TEXAS
REAL ESTATE
FORMS MANUAL

Third Edition

A project of the
Real Estate Forms Committee
of the
State Bar of Texas

Austin 2017
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TEXAS REAL ESTATE FORMS MANUAL

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Preface

The State Bar of Texas is proud to publish the third edition of the *Texas Real Estate Forms Manual*. Written, reviewed, and approved by Texas attorneys who contribute their time to the Real Estate Forms Committee, this manual could not have been completed without their dedication, perseverance, and hard work. Their commitment to the fostering of excellence in the practice of law is one of the hallmarks of our profession.

The members of the Committee, in their commitment to excellence, have given countless hours of their volunteer time over the years toward maintaining the manual as the most up-to-date, comprehensive, and practical publication of its kind. Committee members hail from every part of Texas and from every sort of real estate–related practice, enabling them to bring a broad range of experience and expertise to the manual. While there have been remarkable individual contributions, to attempt to single out any names would be to ignore the value of the collaborative process. Working alone and in pairs, in subcommittees, and in full meetings, the Committee has identified and responded to changes in the law and enhanced the value of the material provided to the members of the State Bar of Texas.

The original manual began as a project of the San Antonio Bar Association in 1949 to draft legal forms and sell them to lawyers. Those forms were collected into a pamphlet, then published as a manual that came to be known as the “brown book” because of the color of its cover. The brown book was both scholarly and practical, and it was widely used and highly regarded. The State Bar assumed responsibility for the project in 1970 and published the “gray book” in 1973 and the “blue book” in 1986. The “black book” carried the tradition forward in 1999, with another gray book in 2011, and now we offer a new “blue book” for the second decade of the twenty-first century.

The manual has expanded to four volumes and contains a digital download version with enhanced word-processing forms and a PDF file of the manual. A custom toolbar for Word allows users to show, hide, print, and delete all instructional material in the forms, while the PDF file includes links to primary research, assisting practitioners in both knowing the law and understanding not just how, but why, to handle a transaction in a certain way.

This expanded and updated edition of the manual stems from the passion for the law and its practice held by each member of the Real Estate Forms Committee. It would be difficult to exaggerate the contributions of this group’s members or their boundless energy, care, diligence, and amazing (sometimes painful) attention to detail. The members maintained good
will and a sense of humor throughout the countless hours during which this manual was
developed. It has been a privilege to work with each of them.

—Denise Vargo Cheney, Chair
Sara Eileen Dysart, Vice-Chair
Summary of Contents

A detailed chapter table of contents immediately precedes the text of each chapter.

**Introduction**
Description of the manual and how to use it

1 **Ethics and Professional Conduct**
Discussion of the regulation of lawyers and law practice and accountability for professional responsibility, with emphasis on real estate practice

2 **Laws Affecting Real Estate**
Digest, arranged alphabetically by topic, of selected statutes and regulations that affect real estate transactions

3 **Preparation, Execution, Proof, and Recording of Documents**
Practice notes relating to the preparation of documents used in conveying real property and their proper execution and recording, with forms for party designations and acknowledgments, as well as a jurat and an interpreter’s affidavit

4 **Sales Contracts and Transaction Guide**
Practice notes and a real estate sales contract form, which serves to outline typical considerations in a closing; the chapter also contains an escrow agent receipt, escrow agreement, and other supporting forms

5 **Deeds, Bills of Sale, and Other Transfers**
Practice notes concerning the conveyancing of real property rights and deeds and other forms, including clauses to be used in completing the forms

6 **Promissory Notes**
Practice notes concerning loan transactions, with a promissory note form and clauses to be used in completing the form

[chapter 7 reserved]

8 **Deeds of Trust**
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16 Water Rights Conveyancing Documents
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17 Risk Allocation: Indemnity, Waiver, and Insurance
Practice notes concerning the allocation of risk in real estate transactions, addressing the use of indemnities and waivers and the transfer of risk to third parties through the purchase of insurance

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23 Restrictive Covenants and Property Owners Associations
Practice notes and forms for the creation of property owners associations

24 Condominium Documents
Practice notes and forms for the creation and conveyance of condominiums

25 Leases
Practice notes and forms for use in leasing transactions and landlord-tenant relationships

26 Miscellaneous Documents
A collection of forms for use ancillary to a real property conveyance and for documenting other transactions, including a boundary line agreement, easement agreements, listing agreements, a restrictive covenant agreement, and a special durable power of attorney

Appendix—Third-Party Legal Opinion Letters
Preparing Word Forms for E-Filing (Windows)

Using Word version 2007 or later, to remove personal information, hidden text, and other metadata before filing or sharing a document electronically, launch the “Inspect Document” tool.


Notes for Other Software

- *Word for Macintosh*: See the section titled “Remove Metadata” in the document named “Macintosh--How to Use the Word Forms” included with the digital download.

- *WordPerfect*: To remove metadata from forms saved as WordPerfect files (version X3 or later), launch the “Save Without Metadata” tool (File > Save Without Metadata, or Alt + F + M).
2. In the “Document Inspector” window that opens, select the categories desired by checking the appropriate boxes (be certain to check the “Hidden Text” box to ensure that any remaining red, hidden instructional text in the document will be also be detected) and click the “Inspect” button.

![Document Inspector Window](image1)

3. In the second “Document Inspector” window that opens, review and remove any metadata found as desired.

![Document Inspector Window](image2)

**CAVEAT:** Although the above steps should remove basic metadata and the form instructions from the Word forms, electronic files contain all manner of metadata. It’s wise to familiarize yourself with the types of data stored by any software you use in the types of files you plan to share and reasonable measures available to remove that data before sharing.
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Introduction

The Texas Real Estate Forms Manual is organized according to steps involved in typical real estate transactions, insofar as possible. Each chapter contains a detailed table of contents; each except chapter 26 contains practice notes concerning the topic of the chapter. With the exception of chapter 2, the forms take up the greater part of each chapter. An appendix at the end of volume 4 of the manual contains information on and a detailed bibliography about third-party opinion letters.

§ 1 Practice Notes

The practice notes are short synopses of the law, designed to serve as a primer to the basic matters involved in a particular chapter. These notes are, at most, black-letter law and do not try to resolve questions in controversial areas. They bring together the Texas Property Code sections and other basic Texas and U.S. law relating to the topic treated in the chapter. For the attorney experienced with real estate law, these notes should serve as a reminder of some of the basics; for the attorney not so experienced with the law, they should provide an orientation to the major matters with which the attorney needs to be concerned when completing a particular transaction.

Although the notes are not intended as a treatise on the subject, they contain much important information that must be understood before the forms may be used responsibly.

§ 2 Forms

The forms (except those promulgated by governmental agencies) were prepared by members of the Real Estate Forms Committee of the State Bar of Texas, and great care has gone into their preparation. The forms represent the best thinking of the practicing attorneys on the committee. Perfection, however, is hard to achieve, and each attorney using these materials must depend on his or her own expertise and knowledge of the law.

The alternative situations that occur most often are covered in the forms. There is, however, no substitute in a particular transaction for the legal mind, and there is no end to the variations of legal problems. Thus, care should be taken to ensure that any form used fits the situation and treats the problems of that transaction.

1. Optional content

Within major sections of the text of forms, optional paragraphs or items are usually identified by boxed instructions. Additional optional clauses are collected under separate form numbers in each chapter where appropriate. Because the manual can cover only relatively common situations confronted in real estate transactions, language needed to address an atypical issue in a particular situation may not appear in the form. The user must take care to ensure both that language appearing in the form that is not appropriate for the particular transaction is eliminated and that any language needed for the particular transaction that does not appear in the form is added.

2. Typeface conventions

Two typefaces are used in the forms. Material in Times Roman (like most of this page) is appropriate for inclusion in a finished form. In contrast, Arial type is used for boxed instructions. When Arial type is used within the form itself (rather than in an instruction box), it appears in boldface for emphasis.

3. Bracketed material

Several types of bracketed material appear in the forms.

Choice of terms. In a bracketed statement such as “[Landlord/Tenant],” the user must choose between the terms or phrases within the brackets. The choices are separated by forward slash marks. Alternative letters or phrases may also be
indicated by the use of brackets. A frequent example that appears in the forms is “[county/ counties],” indicating a choice between the singular and plural forms of the word.

Optional words. In a phrase such as “Description of the Land [and Personal Property],” the user must determine whether to include the words “and Personal Property.”

Substitution of terms. In a bracketed statement such as “[name of buyer],” the user is to substitute the name of the buyer rather than typing the bracketed material verbatim.

Instructions for use. Material such as “[include if applicable: . . . ]” and “[describe property]” provides instructions for completing the finished form and should not be typed verbatim in the document.

Subtitles. The titles of some forms are followed by a bracketed subtitle that is not to be typed as part of the form title. In the title “Closing Instructions [from Borrower],” for example, the bracketed words simply distinguish the form from another similarly titled form in the same chapter for ease of reference.

4. Blank lines

Signature lines appear as blank lines. Spaces for dates and times that would be filled in after the document is prepared also appear as blank lines. (If an actual date or time should be inserted in the form when it is prepared, “[date]” or “[time]” appears instead.) Additional signature lines may be necessary in a given form and should be added by the user.

5. Language in boxes

Language in boxes is not to be typed in the finished document but constitutes instructions, usually either telling the user whether to use the form language following the box, describing what information should be included at that point in the finished document or attached to it, or providing cautionary reminders about use of the form language.

6. Form numbers

Forms are numbered in sequence within each chapter. All forms begin with the number of the chapter, which is followed by a hyphen and the number of the form within the chapter. Some forms consist only of clauses to be inserted in other forms. In these instances the clauses are numbered in sequence using the form number, followed by the number of the clause—for example, clause 5-6-2 in form 5-6. This system is used to permit future expansion of any chapter without requiring the rearrangement of the entire book.

7. Digital download

The digital download version of the Texas Real Estate Forms Manual contains the entire text of the manual as a PDF file that is searchable and hyperlinked to allow for easy, rapid navigation to topics of interest. Also included are electronic versions of all State Bar of Texas—copyrighted forms from the manual as editable Word files, as well as printable or downloadable PDF files of forms available from various agencies, linked from the main PDF file for easy retrieval.

Applicable Texas and federal case and statute citations in the practice notes and forms instructions are linked to case reports and main code sections cited via Casemaker online.

Caveat: Note that the word-processing forms included in the digital download contain instructional language as hidden text. Be aware that this language will be included in your completed forms unless you specifically delete it.

For more information about the digital download including usage notes, see the material following the “How to Download This Manual” tab in volume 1 of this manual.

§ 3 Page numbers

Page numbers are consecutive for both practice notes and forms within each chapter. Practice notes begin with the number of the chapter, followed by the number of the page within the chapter. Forms begin with the number of the form, followed by the number of the page within the
form. This system is used to permit revisions within any chapter or form without renumbering the pages in the remaining chapters.

§ 4 Corrections and updates

In drafting the manual, the members of the committee devoted a great deal of effort to making it error free, but it undoubtedly contains some errors. We would appreciate your pointing out to us any errors you find in the manual, as well as any revisions you believe are advisable. Please mail any corrections or suggestions to the following address:

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books@texasbar.com

Periodic updating of the manual is planned to reflect changes in the law. It is also expected that, over time, additional topics will be covered and the scope of coverage of existing topics will be expanded. We welcome your suggestions about new topics that you would find helpful. Please send your suggestions to the address shown above.
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Chapter 1

Ethics and Professional Conduct

§ 1.1 Introduction


This chapter of the manual follows the attorney-client relationship from the initial client interview to the termination of the relationship, with examples of what a real estate attorney might do to document compliance with the rules. This chapter is very general and is not intended to be a substitute for a complete study of the rules.

The documents at the end of this chapter are examples only and provide general guidance, not “forms” for all transactions.

§ 1.1:1 The Texas Lawyer’s Creed

On November 7, 1989, the Supreme Court of Texas and the Texas Court of Criminal Appeals adopted “The Texas Lawyer’s Creed—A Mandate for Professionalism.” An attorney adhering to the Creed agrees to advise a client of the contents of the Creed when undertaking a representation (article II, paragraph 1).

Recommended paragraphs for the disclosure about the Creed are found in the model engagement letters at forms 1-8, 1-9, and 1-10 in this chapter.

§ 1.1:2 Notice of Grievance Process

Section 81.079 of the Texas Government Code requires attorneys to notify clients of the grievance process. Notice must be provided by making available in the attorney’s office grievance brochures prepared by the State Bar, by prominently posting a sign in the attorney’s office describing the process, by including the information in a written contract for services, or by providing the information in a bill for services. Tex. Gov’t Code § 81.079(b).

Example paragraphs for the disclosure about the Creed are found in the model engagement letters at forms 1-8, 1-9, and 1-10 in this chapter.

§ 1.2 Sources of Interpretation of Rules

Judicial decisions in Texas regarding ethical violations are referenced in the annotations to the Texas Disciplinary Rules of Professional Conduct.

The Committee on Professional Ethics of the Supreme Court of Texas issues opinions on the rules and the Texas Code of Professional Responsibility (the predecessor to the rules). These opinions are published in the Texas Bar Journal.
An attorney may obtain informal explanations of the rules from the State Bar. A consultation with the disciplinary counsel’s office may be not only informative but also probative of good faith should a question later arise. The telephone number of the attorney ethics line is 800-532-3947.

The Texas Center for Legal Ethics also maintains an online library, index, and text of all published opinions of the Committee on Professional Ethics; Texas cases dealing with ethics and professionalism; and a bibliography. The Center’s website is at https://www.legalethicstexas.com/Home, and its phone number is 800-204-2222, ext. 1477.

§ 1.3 Disciplinary Action


§ 1.4 Consulting Potential Client

§ 1.4:1 Attorney-Client Relationship

The relationship of attorney and client is one of agent and principal. Duval County Ranch Co. v. Alamo Lumber Co., 663 S.W.2d 627, 633 (Tex. App.—Amarillo 1983, writ ref’d n.r.e.). It is created by consent and governed by the general rules covering agency. Bar Ass’n of Dallas v. Hexter Title & Abstract Co., 175 S.W.2d 108, 115 (Tex. Civ. App.—Fort Worth 1943), aff’d, 179 S.W.2d 946 (Tex. 1944). The fiduciary obligations and responsibilities imposed on the attorney are predicated on the existence of the attorney-client relationship. See Shropshire v. Freeman, 510 S.W.2d 405 (Tex. Civ. App.—Austin 1974, writ ref’d n.r.e.).

The attorney-client relationship can be implied from the conduct of the parties. Duval County Ranch Co., 663 S.W.2d at 633. A written contract or payment of a retainer is not necessary. For example, gratuitous services can establish an attorney-client relationship. Prigmore v. Hardware Mutual Insurance Co. of Minnesota, 225 S.W.2d 897, 899 (Tex. Civ. App.—Amarillo 1949, no writ). But the fact that an attorney had business dealings with someone does not establish an attorney-client relationship. McGary v. Campbell, 245 S.W. 106, 116 (Tex. Civ. App.—Beaumont 1922, writ dism’d w.o.j.).

§ 1.4:2 Areas of Concern When Consulting Potential Client


During a consultation, an attorney must maintain the requirements of confidentiality and must be wary to avoid current and future conflicts. A consultation and certainly an investigation may impose additional duties such as advising the potential client of the statute of limitations. See Villarreal v. Cooper, 673 S.W.2d 631 (Tex. App.—San Antonio 1984, no writ). At least one state has held attorneys liable for negligently investigating the claim, even though the attorney refused to take the case. See Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980). Further confusion may result if an attorney has a continuing or gratuitous relationship with a client. See Bresette v. Knapp, 159 A.2d 329 (Vt. 1960).

An attorney should consider declining bad or unwanted business as well as the unwanted client. An attorney is not ethically required to represent all who seek the attorney’s advice. See Tex. Disciplinary Rules Prof’l Conduct R. 6.01 & cmts.

§ 1.4:3 Refusing Representation

A potential client may believe that an attorney-client relationship is created by the initial interview. If the attorney decides not to represent a person, this should be made clear. The attorney should consider sending a letter to confirm that the proposed representation will not be undertaken. Form 1-1 in this chapter is an example of a nonrepresentation letter. Tex. Disciplinary Rules Prof’l Conduct R. 1.15(d) requires the potential client’s documents to be returned. They may be withheld only if other law, such as a lien, permits the withholding of documents and if the client will not be prejudiced by the retention. See Tex. Comm. on Prof’l Ethics, Op. 395 (1979). If the documents are particularly valuable, the attorney should consider having their receipt acknowledged.

§ 1.4:4 Advising Potential Client

If the attorney declines the representation, there is a question about whether the attorney should advise the nonclient of any rights or statutes of limitation. Some attorneys, as a matter of policy, will advise the nonclient of such matters if the attorney is aware of them. Other attorneys believe that advice implies some representation of the nonclient and therefore, as a matter of policy, do not offer any advice in the nonrepresentation letter.

§ 1.5 Establishing Attorney-Client Relationship

§ 1.5:1 Disclosure of Conflicts

An attorney must disclose all potential conflicts before accepting employment and those that arise during the course of employment. Nonlitigation conflicts are addressed specifically in rule 1.06, comments 13–16. Unfortunately, these comments merely provide examples and conclude that the question is “often one of proximity and degree.” Tex. Disciplinary Rules Prof’l Conduct R. 1.06 cmt. 13. Relevant factors include the duration of the relationship and intimacy that an attorney has with a client, the duties performed, the likelihood a conflict will arise, and the likelihood of resulting prejudice.

The disclosure requirement includes all personal conflicts, conflicts with current clients, and conflicts with past clients. For examples of disclosures and waivers of specific types of conflicts of interest, see forms 1-2 through 1-7 in this chapter.
Rule 1.12(a) states that an attorney employed by an organization represents the entity. Because investors often ask real estate attorneys to form a partnership or corporation, it is a good practice to clarify that the client is the entity and not the individual investors. See forms 1-5 and 1-6 for examples of letters pertaining to the formation of a partnership and a corporation.

In addition, rule 1.12(e) requires the attorney to inform shareholders and officers that the attorney will not represent them if their interests are adverse to the interests of the entity. See Tex. Disciplinary Rules Prof’l Conduct R. 1.12(e) & cmt. 4.

§ 1.5:2  Consent Required for Representation of Multiple Clients

A typical real estate transaction may involve sellers, purchasers, guarantors, lenders, title insurance companies, trustees, real estate brokers and agents, mortgage brokers, tenants, and lien claimants, as well as the attorneys. In addition, if any of the parties are corporations or partnerships, the individual officers, directors, shareholders, partners, or venturers involved may have interests that diverge from those of the business entity. An attorney who provides legal counsel for more than one of the parties faces a potential conflict of interest that should be carefully examined before the attorney undertakes representation.

In examining the potential attorney-client relationship, the attorney should carefully consider the unique facts of the transaction and the purpose of the engagement. Representation may be analyzed under two theories: the traditional multiple-representation analysis (see Tex. Disciplinary Rules Prof’l Conduct R. 1.06) and the intermediaries analysis (see Tex. Disciplinary Rules Prof’l Conduct R. 1.07).

In many transactions, the multiple clients have adverse positions to each other but, because of economic constraints, want only one attorney to represent them in the transaction. Rule 1.06(a) prohibits an attorney from representing opposing parties in the same litigation. Rule 1.06(b) also prohibits an attorney from representing a client if the representation is substantially related and materially and directly adverse to the interest of another client of the attorney or if the attorney would be limited by other responsibilities. Notwithstanding the prohibition of rule 1.06(b), subsection (c) allows the attorney to represent multiple clients if the attorney believes each client’s representation will not be materially affected and each client consents to the multiple representation after full disclosure.

Rule 1.07 may also affect the consent required for representation of multiple clients. Rule 1.07 can be read to require that an attorney obtain “each client’s written consent” whenever “two or more parties with potentially conflicting interests” are represented by one attorney. One of the primary drafters of the rules has suggested that the literal language of rule 1.07 was in error and should be limited to situations in which an attorney mediates between clients, as illustrated by the comments to rule 1.07. See Robert P. Schuwerk & John F. Sutton, Jr., A Guide to the Texas Disciplinary Rules of Professional Conduct, 27A Hous. L. Rev., Oct. 1990, at 122.

If the attorney concludes that multiple representation is appropriate, obtaining written consent of the clients is advised. Form 1-3 in this chapter is a model letter for such a situation. See also forms 1-5, 1-6, and 1-7 for letters dealing with multiple representation. Separate engagement letters for each client may be appropriate in addition to the multiple-representation consent letter.

An additional problem that may arise is the division of the legal bill between multiple clients. Any representation of multiple clients will require a tailor-made consent agreement that clarifies the billing arrangement. See form 1-7 for an example of a consent agreement.
Further, if multiple parties are to receive cash or some other consideration, the attorney may have a duty to make sure all parties represented concur in the way the consideration is to be divided. See Tex. Disciplinary Rules Prof’l Conduct R. 1.08(f); Quintero v. Jim Walter Homes, Inc., 709 S.W.2d 225, 229 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.) (involves litigation but easily analogized to business settlements).

§ 1.5:3 Legal Fees

An attorney may not enter into an agreement for, charge, or collect an illegal or unconscionable fee. Tex. Disciplinary Rules Prof’l Conduct R. 1.04(a). A fee is unconscionable if a competent attorney could not form a reasonable belief that the fee is reasonable. Tex. Disciplinary Rules Prof’l Conduct R. 1.04(a). In borderline cases the comments specify two indications of unconscionability: the attorney’s overreaching with a client, especially one susceptible to such a practice, and the attorney’s failing to give the client at the outset of the representation a clear explanation of how the fee will be calculated. Tex. Disciplinary Rules Prof’l Conduct R. 1.04 cmt. 8. Rule 1.04(b) lists a number of factors that may be considered in determining the reasonableness of a fee.

An attorney may not divide a fee with another attorney who is not a member or employee of the same firm unless (1) the client consents in writing to the terms of the arrangement ahead of time, (2) the division is in proportion to the services rendered by each attorney or is with an attorney who assumes joint responsibility for the representation, and (3) the aggregate fee is not unconscionable. Tex. Disciplinary Rules Prof’l Conduct R. 1.04(f).

Unless the agreement is confirmed by an arrangement conforming to paragraph (f)(2) of rule 1.04, the attorney may not collect fees or expenses in connection with the agreement except for (1) the reasonable value of legal services provided and (2) the reasonable and necessary expenses actually incurred. Tex. Disciplinary Rules Prof’l Conduct R. 1.04(g).

An attorney may share fees with an “of counsel” attorney (Tex. Comm. on Prof’l Ethics, Op. 450 (1988)) or with a former partner or associate (Tex. Disciplinary Rules Prof’l Conduct R. 1.04(h)).

Fees paid in advance of the performance of work, as well as any of the client’s other property that comes into the attorney’s possession, must be held in trust by the attorney. Tex. Disciplinary Rules Prof’l Conduct R. 1.14. Attorneys must keep complete records of client account funds for at least five years after the conclusion of the representation. Tex. Disciplinary Rules Prof’l Conduct R. 1.14(a). If a client’s funds either are of an amount or are held for a long enough time that the interest generated is likely to exceed the costs of setting up and maintaining an account, an individual account must be set up for the client. For a client’s funds that are of a small amount or are likely to be held only for a short time, attorneys are required to maintain an interest-bearing account in which to pool the funds. Under the Interest on Lawyers’ Trust Accounts (IOLTA) program, interest from these pooled accounts is paid to the Texas Equal Access to Justice Foundation, which awards grants to organizations in Texas that serve the poor in legal matters. Attorneys must submit an annual IOLTA compliance statement to the foundation. State Bar Rules art. XI (1989) (found in the Texas Government Code in title 2, subtitle G, appendix A, following section 84.004 of the Government Code). See also the Rules Governing the Operation of the Texas Equal Access to Justice Program (reproduced in the Texas Rules of Court—State (West 2011)).

§ 1.5:4 Engagement Agreements Detailing Fee Arrangements

Rule 1.04(c) states:
When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

Tex. Disciplinary Rules Prof’l Conduct R. 1.04(c) (emphasis added). Forms 1-8, 1-9, and 1-10 in this chapter are examples of engagement letters for real estate transactions.

§ 1.5:5 Charging for Time and Expenses

As implied in rule 1.04(c), the attorney’s fee basis is established by an agreement between the attorney and the client. The attorney should, however, carefully outline the fee basis to avoid a client’s misunderstanding later. For example, the attorney might advise the client that there will be a fee to recover time previously spent to develop a limited partnership form or to recover unbilled or unpaid time for research incurred on another matter.

§ 1.5:6 Record Retention and Destruction

Neither the rules nor Texas case law specify if, or how long, an attorney must retain client records. To resolve the ambiguity, some attorneys adopt a record retention and destruction policy. If the existence of a policy is disclosed to the client in either the engagement letter or the closing letter, the client has the opportunity to obtain the records and the attorney has some authority to dispose of the documents. See forms 1-8, 1-9, 1-10, and 1-14 in this chapter for an optional paragraph concerning retention and destruction of records.

§ 1.6 Representation of Client

§ 1.6:1 Duty to Keep Client Informed

Rule 1.03(a) requires an attorney to keep the client reasonably informed. In addition, the attorney has the duty to inform the client of relevant considerations and explain their legal significance to permit the client to make informed decisions. Tex. Disciplinary Rules Prof’l Conduct R. 1.03(b).

One way to meet these obligations is to routinely provide the client with copies of all pertinent correspondence, documents, and file memoranda; advise the client in writing of risks involved with the transaction, including the obvious; and document the business decisions made by the client.

§ 1.6:2 Confidentiality

An attorney may not knowingly reveal confidential information of a client or use such confidential information to the attorney’s advantage or for the advantage of a third person. Tex. Disciplinary Rules Prof’l Conduct R. 1.05(b). The ethical duty to preserve a client’s confidence is much broader than the attorney-client evidentiary privilege. This duty applies even if there is not yet an established attorney-client relationship—for instance, when a client comes in for an initial interview. See Tex. Disciplinary Rules Prof’l Conduct preamble ¶ 12. The obligation of confidentiality also continues after the termination of employment. Tex. Disciplinary Rules Prof’l Conduct R. 1.09(a)(2).
§ 1.6:3 Business Interests with Clients

Rule 1.08(a) provides that an attorney may not enter into a business transaction with a client unless (1) the transaction and the terms on which the attorney acquires the interest in the transaction are fair and reasonable to the client and are fully disclosed in a manner that can be reasonably understood by the client, (2) the client is given reasonable opportunity to seek the advice of independent counsel in the transaction, and (3) the client consents in writing. Tex. Disciplinary Rules Prof’l Conduct R. 1.08(a). Comment 2 to rule 1.08 indicates that the rule does not apply to standard commercial transactions between the attorney and the client for products or services the client generally markets to others, because the attorney has no advantage in dealing with the client.

In cases in which the attorney and client are both personally involved in a business transaction, malpractice insurance claims might be denied because the policies may exclude coverage under such circumstances.

See form 1-11 in this chapter for an example of a consent agreement for doing business with a client.

§ 1.6:4 Duty to Clarify Nonrepresentation

An attorney dealing on behalf of a client with a person not represented by an attorney may not state or imply that the attorney has no interest in the outcome of the matter. If the attorney believes an unrepresented person misunderstands the attorney’s role, the attorney must correct this misunderstanding. Tex. Disciplinary Rules Prof’l Conduct R. 4.03. For example, an attorney might make a written nonrepresentation disclosure to a borrower when representing a lender. See form 1-12 in this chapter for an example of a nonrepresentation disclosure letter.

§ 1.6:5 Communication with Someone Represented by Counsel

An attorney may not communicate about the subject of the representation with someone the lawyer knows to be represented by counsel. Tex. Disciplinary Rules Prof’l Conduct R. 4.02. Likewise, the rules prohibit an attorney from encouraging a client to make such a communication. See Tex. Disciplinary Rules Prof’l Conduct R. 4.02 cmt 2.

There are legally required exceptions to this rule, such as the sending of a foreclosure notice. See Tex. Prop. Code § 51.002.

§ 1.7 Issues Raised by Use of Technology

The Texas Disciplinary Rules of Professional Conduct do not specifically address issues raised by the use of technology in the practice of law. The ABA Model Rules of Professional Conduct provide some guidance on such issues, especially when there is no counterpart in the Texas rules.

§ 1.7:1 Confidentiality of Information

Rule 1.6(c) of the ABA Model Rules of Professional Conduct states: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” Comment 18 to this rule states, in part, that—

[the unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to pre-
vent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

§ 1.7:2 Responsibilities Regarding Nonlawyer Assistant

Rule 5.03 of the Texas Disciplinary Rules of Professional Conduct is similar to rule 5.3 of the ABA Model Rules of Professional Conduct. Comment 3 to ABA rule 5.3 recognizes that the use of nonlawyers outside the firm may include—

sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations.


§ 1.7:3 Respect for Rights of Third Parties

Rule 4.4(b) of the ABA Model Rules of Professional Conduct states: “A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.” Comments 2 and 3 to this rule state the following:

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, “document or electronically stored information” includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a
matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 [“Scope of Representation and Allocation of Authority Between Client and Lawyer”] and 1.4 [“Communications”].

Texas Disciplinary Rules of Professional Conduct rules 1.02 (“Scope and Objectives of Representation”) and 1.03 (“Communication”) are the comparable Texas rules referenced in comment 3 above.

§ 1.8 Terminating Attorney-Client Relationship

§ 1.8:1 Termination by Parties

A client may always terminate the attorney-client relationship. An attorney must return any unearned portion of the fee and all pertinent papers and property. Tex. Disciplinary Rules Prof’l Conduct R. 1.15(d) cmt. 4; Tex. Comm. on Prof’l Ethics, Op. 395 (1979). However, rule 1.15(d) specifically provides that an attorney may retain papers relating to the client to the extent permitted by other law, but only if such retention will not prejudice the client in the subject matter of the representation. See Tex. Comm. on Prof’l Ethics Op. 411 (1984).

An attorney also may terminate the relationship; however, the attorney has a duty to minimize any adverse effects to the client. Tex. Disciplinary Rules Prof’l Conduct R. 1.15(b), (d). It is a good practice for an attorney to send a disengagement letter to record the date of the termination of the attorney-client relationship. See form 1-13 in this chapter for an example of a disengagement letter.

Tex. Disciplinary Rules Prof’l Conduct R. 1.15(a) sets out the circumstances under which the attorney must terminate the relationship with the client. An attorney must withdraw if continued representation will result in a violation of one of the Texas Disciplinary Rules of Professional Conduct or another law or if the attorney’s physical, mental, or psychological condition materially impairs the attorney’s fitness to represent the client. The attorney must also withdraw when discharged. When terminating the attorney-client relationship before completing the work for which the client contracted, the attorney should review rule 1.15 to be sure that good cause for withdrawal exists.

Withdrawal is permissible under the circumstances listed in rule 1.15(b). The rule provides that an attorney may withdraw if the client fails substantially to fulfill an obligation to the attorney, including the obligation to pay the attorney’s fee as agreed, and a reasonable warning has been given that the attorney will withdraw unless the obligation is fulfilled. Tex. Disciplinary Rules Prof’l Conduct R. 1.15(b)(5). See form 1-13 for an example of a letter terminating the attorney-client relationship because of nonpayment of fees. At least one court in dicta has stated that by accepting employment an attorney implicitly represents that the attorney will see the task through to conclusion. See Staples v. McKnight, 763 S.W.2d 914 (Tex. App.—Dallas 1988, writ denied). By conditioning the commencement of work and continued performance on the payment of a fee, the attorney may avoid problems later.

§ 1.8:2 Termination Due to Other Considerations

The attorney-client relationship does not continue automatically once the purpose of the employment is completed. However, it is often difficult to determine when a matter is completed. Again, it is a good practice to send a disengagement letter to record the date of the completion of employment. See form 1-14 in this chapter for an example of a completion letter.


**Additional Resources**


Letter Declining Representation

[Date]

[Name and address of potential client]

Re: [state nature of representation]

[Salutation]

First, let me thank you for contacting this firm about representing you in [state nature of representation].

After reviewing the documents I have concluded that we are not the appropriate firm to handle this matter. Please understand that in declining this representation I am not expressing any opinion about your legal remedies in this situation, nor am I suggesting that a solution is or is not available.

See section 1.4:4 in this chapter concerning advising a potential client.

Include the following if applicable.

I strongly recommend that you contact another attorney who is familiar with real estate transactions.

Continue with the following.
Again, I appreciate the confidence you have expressed in our firm, and I hope that you are able to resolve this matter in a satisfactory manner. [Include if applicable: I am returning [describe documents] with this letter.]

Include the following if applicable.

Please sign and return the enclosed copy of this letter to confirm that you have received the enclosures.

Continue with the following.

Sincerely yours,

[Name of attorney]

Enc.

Include lines for potential client to sign and date if copy of letter is to be returned.
Letter Disclosing and Requesting Waiver of Potential Conflict with Current Client

[D]ate

[Name and address of prospective client]

Re: [describe transaction]

[Salutation]

I would like to express my appreciation for the opportunity to represent [name of corporation] in connection with [describe transaction]. However, before I can serve as your counsel, it is important that you have a clear understanding of a potential ethical conflict that could exist in this matter. If you have any questions about any matter in this letter, please give me a call.

[Describe potential conflict, e.g., Our firm has decided not to represent any clients with an adverse position to First Local Bank or a related party because we represent First Local Bank. We do not believe a borrower from First Local Bank is in an adverse position, and I assure you that we will represent your interests to the very best of our abilities. But if you should decide to sue the bank, our firm would not be able to represent you. Of course, we would not represent the bank in any matter adverse to you.]

Please give careful thought to the matter discussed in this letter and respond in the space below.
Sincerely yours,

[Name of attorney]

☐ I consent to the representation subject to the foregoing limitation.

☐ I do not consent to the representation.

[Name of prospective client]
Date:
Letter Disclosing and Requesting Waiver of Potential Conflict for Multiple Representation of Title Company and Third Party

[Date]

[Name and address of prospective client]

Re: [describe transaction]

[Salutation]

I am pleased that you are considering employing our firm in connection with the above-referenced transaction. Although it is not common for a lawyer to represent more than one party in a transaction, dual representation is permitted by professional ethics guidelines as long as two conditions are met.

First, the lawyer must conclude, after a good-faith self-evaluation, that the lawyer can adequately represent the interests of each client. The multiple representation should not adversely affect the attorney’s independent professional judgment on behalf of any client. Second, all clients must consent to the multiple representation after full disclosure is given by the lawyer.

The first condition has been satisfied because I believe that this firm can adequately represent each of you (although I hope you understand that we must reserve the right to withdraw from this dual representation if later events cause me in good faith to reach a different conclusion). This letter is intended to fulfill the second requirement mentioned above, that of
disclosure and consent. Accordingly, I will review some of the possible effects that dual representation may have on you.

**Conflicts of interest.** If I determine that, because of differences between the parties, I can no longer represent each of you impartially, I will inform you of the conflict, and I must then withdraw from representation. If this occurs, I will no longer be able to represent any party to the transaction. Should I determine that this law firm must withdraw from the representation, I will, if you wish, assist the parties in obtaining new counsel. You would, of course, be responsible for payment of all accrued legal fees and any outstanding expenses. Likewise, I would return any unused portion of any advances that had been made. The need to obtain substitute counsel may involve additional legal fees and expenses.

**Scope of employment.** I am being hired solely to advise you on and document this real estate transaction. I am not responsible for and will not advise you on other transactions, nor will I give either of you any kind of tax advice with respect to this transaction. [Include additional disclaimers appropriate to the facts.]

**Judgment calls.** In all real estate closings, a seller or buyer must decide which title matters materially affect title to the property. These decisions are often routine; however, on occasion they require my exercising professional judgment in representing your sometimes competing interests. [Describe examples of possible judgment calls appropriate to the facts.]

Describe any specific conflicts possible in this transaction.

There are of course other potential problems that might develop. Although I assure you that I will try to act as fairly as possible in judgment-call matters, it is certainly possible that one of you may not concur with my judgment.

**Confidential information.** During the course of any representation a lawyer generally becomes aware of confidential information regarding the client. The confidential information
may be a potential cloud on the title that one party does not want revealed to the other party. Another possible confidential matter may be the financial capacity of a party, which bears on the likelihood of that party’s performance of its obligations.

Although I assure you that I will try to act discreetly within the bounds of fair dealing, it is certainly possible that either or both of you would prefer to eliminate any possibility of having your confidential information known by an attorney who is also representing the other party. Furthermore, neither of you will be protected by the attorney-client privilege concerning any information disclosed to me or another lawyer in this firm during our representation. The general rule is that, as between commonly represented clients, the privilege does not attach. Thus, confidential information that would be protected by the attorney-client privilege if we represented only one of you can be disclosed to the other party.

Of course, I would have declined the dual representation before now if I had not already concluded that I can adequately represent both of you in this transaction; however, I also understand that you may feel differently. Therefore, I would appreciate your giving careful thought to the matters discussed in this letter. If you consent to the multiple representation, please sign in the space below and return this letter to me. You should keep a copy of this letter for your records. I will be happy to answer any questions you might have.

Sincerely yours,

__________________________________________________________________________________________________________________________

[Name of attorney]

I understand this disclosure and I consent to the proposed multiple representation.

__________________________________________________________________________________________________________________________

[Name of prospective client]
Date:
Send letter to each prospective client for signature.
Form 1-4

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See section 1.5:1 in this chapter concerning disclosing conflicts.

Letter Disclosing and Requesting Waiver of Potential Conflict with Former Client

[Date]

[Name and address of former client]

Re: [describe transaction]

[Salutation]

As you are aware, this firm previously represented you in connection with [describe transaction]. This firm has recently been asked to represent [name of prospective client] in a claim against you.

Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct prohibits us from representing [name of prospective client] without your written consent. Before asking for your consent, we advise you that the claim against you [describe adverse claim and the specific prohibition of rule 1.09(a)(1)–(3)].

As this is a very serious matter and you may be compromising certain rights that you have under the Texas Disciplinary Rules of Professional Conduct, I suggest that you seek independent counsel in this matter before consenting to our representation of [name of prospective client]. Please give careful thought to the matters discussed in this letter and respond in the space below.
Sincerely yours,

[Name of attorney]

☐ I consent to the representation [include if applicable: subject to the following limitation: [describe any limitation on representation to be imposed]].

☐ I do not consent to the representation.

[Name of former client]
Date:
Letter Disclosing Potential Risks and Requesting Consent of Individual Partners to Representation of Partnership

[Date]

[Names and addresses of all partners]

Re: Proposed representation of [name of partnership] (the partnership)

[Salutation]

In connection with your request that this law firm represent your partnership, I want to make the following disclosures regarding potential ethical conflicts of interest involving our proposed representation.

Our representation of clients is governed by the Texas Disciplinary Rules of Professional Conduct. A lawyer has the duty to exercise independent professional judgment on behalf of each client. If a lawyer is requested to represent multiple clients in the same matter, two requirements must be met: The lawyer must be able to fulfill this duty for each client on an impartial basis, and the lawyer must obtain the consent of each client after explaining the possible risks involved in the multiple representation.

Concerning the representation of an entity, such as a corporation, partnership, joint venture, trust, or association, rule 1.12 of the Texas Disciplinary Rules of Professional Conduct provides, in part, as follows:
A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity’s duly authorized constituents . . . the lawyer shall proceed as reasonably necessary in the best interest of the organization. . . .

Thus, as legal counsel to the entity, we will respond to the instructions of the representative authorized to act on behalf of the entity. For example, the managing partner of the partnership has the authority and power to deal with this law firm. Further, this law firm has no responsibility to verify the representative’s authority and will not bear any responsibility for discovering whether the representative has committed acts of fraud, defalcation, or forgery or other criminal or civil liability actions.

If matters arise that cause any one partner to have a claim against another partner, this law firm could not represent either partner. If matters arise that cause any partner to have a claim against the partnership or that cause the partnership to have a claim against an individual partner, this law firm retains the right to require the partnership to engage other legal counsel to represent it in that claim.

Before consenting to our representation of the partnership, please be aware of the following:

1. This law firm has represented one or more of the partners in matters unrelated to the partnership. These partners, for whom unrelated legal counsel has been furnished, include [name[s] of partner[s]]. Each of these partners is requested to execute a form consenting to this law firm’s serving as counsel to the partnership, because of potential conflicts of interest. At this time, we do not believe that our prior representation of individual partners will impair our independent professional judgment on behalf of the partnership. However, if we determine that, because of differences between the partnership and the partners, we can no longer represent the partnership impartially or if a conflict arises during our representation of the partner-
Letter Disclosing Potential Risks—Partnership

1. If, through our representation of your partnership, we will inform you of such conflict, and we must then withdraw from representation. If this occurs, we will no longer be able to represent any party to the conflict. Should we determine that this law firm must withdraw from the representation, we will, if you wish, assist the partnership in obtaining new counsel. The partnership would, of course, be responsible for payment of all accrued legal fees and any outstanding expenses. Likewise, we would return any unused portion of any advances that had been made. The need to obtain substitute counsel may involve additional legal fees and expenses.

2. Representation of any entity automatically involves potential conflicts, because entities are nothing more than the joining of individuals or other entities with differing needs for what is initially perceived to be a common objective. Each individual should understand that when there is such diversity of interests, the lawyer for the organization cannot provide legal representation for constituent individuals and that discussions between the lawyer for the organization and an individual may not be privileged insofar as that individual is concerned.

3. Before agreeing to the contents of this letter, you are advised to obtain separate legal counsel for these matters. If you consent to this law firm’s representation of the partnership as contemplated by this letter, please sign in the spaces below and return one copy of this letter to me.

Sincerely yours,

[Name of attorney]

We consent to your representation of the partnership under the terms and conditions outlined above.

[Name of partner]
Date:
Repeat signature blocks as necessary.
Form 1-6

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See section 1.5:2 in this chapter concerning representing multiple clients.

Letter Disclosing Potential Risks and Requesting Consent to Representation of Corporate Entity

[Date]

[Names and addresses of all shareholders]

Re: Consent to multiple representation in organizing [name of corporation] (the corporation). You have also requested that this firm serve as general counsel to the corporation following the incorporation.

You have requested that this law firm represent all of you as initial investors in organizing [name of corporation] (the corporation). You have also requested that this firm serve as general counsel to the corporation following the incorporation.

Our representation of clients is governed by the Texas Disciplinary Rules of Professional Conduct. A lawyer has the duty to exercise independent professional judgment on behalf of each client. If a lawyer is requested to represent multiple clients in the same matter, two requirements must be met: The lawyer must be able to fulfill this duty for each client on an impartial basis, and the lawyer must obtain the consent of each client after explaining the possible risks involved in the multiple representation. Further, if at any time during the representation it is determined that because of differences between the joint clients a lawyer can no longer represent each of them impartially, then the lawyer must withdraw from representing all the clients.
At our initial conference, I advised each of you of your right to obtain separate legal
counsel to represent you in all matters relating to the organization of the corporation. I am still
recommending that course of action to you. Each of you indicated that you understood this but
nevertheless wanted this firm to represent all of you. Based on the information you have pro-
vided, we have concluded that we can represent each of you impartially. In determining
whether you should consent to this joint representation, however, you should carefully con-
sider the following matters.

The first matter involves the attorney-client privilege. Although the law is not settled,
we believe that any information disclosed by you to us during this representation will not be
protected by the privilege in a subsequent legal proceeding asserted by or against one of you
involving another of you. Moreover, we believe we cannot effectively represent each of you if
information disclosed to us by one of you must be preserved in confidence. If we are to repre-
sent you, it will only be with the express understanding that each of you has waived the
attorney-client privilege to the extent, but only to the extent, that the privilege might otherwise
require us to withhold from your fellow shareholders information disclosed by one of you.

Second, at this time there does not appear to be any difference of opinion among you
about the major issues involved in organizing the corporation. However, it may turn out that
on further consultation you may have varying opinions about the corporation’s capitalization
or other organizational matters. There are many issues about which investors may disagree
that we must explore with you. Should we determine that there are material differences on one
or more of these issues that you cannot resolve amicably or that we conclude cannot be
resolved on terms compatible with the best interests of each party involved, then we must at
that time withdraw from the representation. If this occurs, we will, if you wish, assist each of
you in obtaining new counsel. You would, of course, be responsible for payment of all
accrued legal fees and any outstanding expenses. Likewise, we would return any unused por-
tion of any advances that had been made. The need to obtain substitute counsel may involve additional legal fees and expenses.

Third, as you know, I have represented [name] in other legal matters. I do not believe that this prior representation will affect in any material manner my ability to represent each of you impartially. Nonetheless, you must understand that this prior representation may unconsciously bias me in favor of [name] in the event of any disagreement among you. Should I at any time determine that such a bias exists, then I must withdraw from the representation.

The fourth matter is that of ultimately allocating our fees and disbursements. Unless we receive joint instructions to the contrary, we will send our entire bill for fees and disbursements for organizing the corporation to [name]. You should enter into a written agreement for reimbursement of [name].

When you have reached an agreement on the subject of fee payment, we will discuss with you whether we can ethically draft the agreement concerning fee payment. If not, we will recommend independent counsel for you. However, we cannot provide advice to any of you for any claim you may have or desire to assert against another for indemnity or reimbursement of fees and disbursements billed by us for this representation.

If you are willing to consent to our joint representation based on the disclosures and conditions listed above, please sign in the spaces below and return one copy of this letter to us.

Sincerely yours,

__________________________________________________________________________________________________________________________ ...
__________________________________________________________________________________________________________________________

[Name of attorney]

We consent to your joint representation of us under the terms and conditions outlined above.
[Name of shareholder]
Date:

Repeat signature blocks as necessary.
Form 1-7

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See section 1.5:2 in this chapter concerning representing multiple clients.

Letter Requesting Consent to Intermediary and Outlining Fee Agreement

[Date]

[Names and addresses]

Re: [describe transaction]

[Salutation]

You have inquired about hiring me to [describe transaction]. As you will recall, we have thoroughly discussed the risks and advantages involved in dual representation. Nevertheless, I believe that we should set out a few matters in more detail. Also, the Texas Disciplinary Rules of Professional Conduct require me to get your consent to this arrangement in writing.

As we discussed, since I will be acting as an intermediary, I will not be an advocate for either side. This role is different from the traditional one of an attorney in American society; I must remain impartial. The risks we discussed were [list risks].

Another matter we discussed involved the attorney-client privilege. Although the law is not settled, we believe that any information disclosed by you to us during this representation will not be protected by the privilege in a subsequent legal proceeding asserted by or against one of you involving the other. Moreover, I believe I cannot effectively represent both of you if information disclosed to me by one of you must be preserved in confidence. If I am to represent you, it will only be with the express understanding that each of you has waived the attorney-client privilege to the extent, but only to the extent, that the privilege might otherwise
require me to withhold from one of you information disclosed by the other.

Because I am and will continue to be neutral, you, as clients, will assume greater responsibility for this transaction than you might ordinarily if you were each represented by counsel. For example, I am being hired solely to document the agreement between you. I am not responsible for and will not advise either of you of the risks or benefits of the transaction, nor am I giving either of you any kind of tax advice with respect to this transaction. I am not giving any other legal advice or opinions such as [include additional disclaimers appropriate to the facts]. Each of you must be sure that the transaction is one in which you want to participate and that it is structured the way you want it.

If I determine that intermediation is no longer appropriate I will so inform you, and I must then withdraw from representation. If this occurs, I will no longer be able to represent any party to the conflict. Should I determine that this law firm must withdraw from the representation, I will, if you wish, assist each of you in obtaining new counsel. You would, of course, be responsible for payment of all accrued legal fees and any outstanding expenses. Likewise, I would return any unused portion of any advances that had been made. The need to obtain substitute counsel may involve additional legal fees and expenses.

As we have discussed, our fees are charged on an hourly basis plus expenses. My fees are $[amount] per hour. The billing rate for my associate, [name], is $[amount] per hour. It is my understanding, and by your signature below you are confirming, that our fees are to be divided equally between you and paid at the closing. I, of course, do not guarantee or promise that any certain result will be obtained. I make no express warranties concerning this transaction, and I disclaim any implied warranties concerning it.

If you are willing to engage me for this joint representation under the terms outlined above, please return a signed copy of this letter for our files.
Sincerely yours,

[Name of attorney]

We consent to your joint representation of us under the terms and conditions outlined above.

[Name of client]
Date:

[Name of client]
Date:
Form 1-8

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See sections 1.5:4 and 1.5:5 in this chapter concerning the basic engagement agreement.

Letter Detailing Basic Engagement Agreement and Fee Agreement

[Date]

[Name and address of client]

Re: [describe transaction]

[Salutation]

Please read this letter carefully. It describes the terms and conditions under which we will represent you concerning the above-referenced matter. Our policy requires that each client sign a copy of this letter agreeing to the terms and conditions described below before we can engage in representation. The terms and conditions of our engagement are as follows:

1. Our fees for legal services are based primarily on the hourly rates for each lawyer and legal assistant at the time the services are rendered. Our current rates are $[amount] per hour for [name], $[amount] per hour for [name], and $[amount] per hour for legal assistants. We review these hourly rates periodically and may adjust them. If such changes are necessary, you will be notified in writing [number] days before the change.

Complete disclosure about the attorney’s billing practices can avoid client misunderstandings later. For example, explain about travel time, multiple attorney conferences, research, billing for "forms" in the firm’s form library, administrative overtime, etc. See sections 1.5:4 and 1.5:5 for additional information.

2. It is our policy to bill clients periodically for fees and out-of-pocket expenses. Each lawyer and legal assistant records the time required to perform services, and these time
records are the basis for the bills. These bills will generally describe services performed and the expenses incurred. For large expenses, we may request the supplier to bill you directly.

3. Because of the detailed nature of our statements, our clients do not usually have any questions about them. However, if any question should arise, please call us promptly so we can discuss the matter. Our hourly rates do not include any interest for slow payment. Because of this and the fact that we do not include a service charge for late payments, we must insist that our clients pay their bills promptly.

4. If during our representation we anticipate a significant increase in the level of our activity on your behalf—for example, trial preparation or trial—we may bill you more frequently. We will expect that such statements also will be paid promptly.

5. We require a deposit before we commence work for you. We have asked that you remit to and maintain with us during our representation a deposit of at least $[amount]. Unless deposits are large enough or will be held long enough to earn interest in excess of the cost of an individual account, we will place these funds in a State Bar of Texas Interest on Lawyers’ Trust Account, the interest on which benefits the Texas Equal Access to Justice Foundation. The deposit will be applied to our final statement for fees and expenses or, at our discretion, to any past-due amounts. On the termination of our services, we will promptly refund the deposit, less any fees and expenses unpaid as of the date of our final bill.

6. Our agreement to provide legal representation in the above-referenced matter is conditioned not only on your execution of this engagement letter but also on payment of the requested deposit.

7. We retain the right to request a supplemental deposit, over and above the original deposit, in the event of an increase in our anticipated fees and expenses during our representation.
8. By your execution of this engagement letter, you agree that we are relieved from the responsibility of performing any further work should you fail to pay any statement for fees and expenses (including bills for expenses received from third parties) or for supplemental deposits within fifteen days of their receipt. In that event, you agree that we may move to withdraw as your counsel and that you will promptly execute any withdrawal motions to accomplish this.

9. By signing this engagement agreement, you are agreeing that this firm may retain papers relating to this matter to secure payment of any amount you owe us, to the extent permitted by law, but only if such retention will not prejudice your interests in the subject matter of the representation.

10. During our discussion about handling this matter, we may have provided you with certain estimates of the fees and expenses that will be required at certain stages of our representation. Such estimates are just that, and the fees and expenses required are ultimately a function of many conditions over which we have little or no control, particularly the extent to which other parties require our involvement on your behalf. The reason we submit our clients’ bills shortly after the services are rendered is so they will have a means of monitoring and controlling their expenses. If you believe the expenses are mounting too rapidly, please contact us immediately so we can assist you in evaluating how they might be curtailed. If we do not hear from you, we assume that you approve of the overall level of activity in this matter.

11. In representing you, we recognize that we may be disqualified from representing any client in any matter related to our representation of you. We also recognize that we may be disqualified from representing any client in any matter in which confidential information concerning you and made available to us during our representation of you becomes material or relevant to another matter or in which use or knowledge of such information could be adverse to your interest.
You agree that, except as stated above, the firm will be entitled to represent the interests of any other client against you in business negotiations or other legal matters.

12. The Supreme Court of Texas has adopted and promulgated the Texas Lawyer’s Creed. Although compliance with the Creed is voluntary, we have decided to adhere to its provisions. Please review the attached Texas Lawyer’s Creed, and if you have any questions, we will be glad to discuss them with you.

13. You may discharge us from this representation at any time. We will be free to withdraw at any time and without cause, subject to reasonable notice under the circumstances and to approval by any court in which your matter may be pending. We will be entitled to receive compensation from you for all services rendered and all disbursements made, under the provisions of this agreement, up to the time of withdrawal. Circumstances may arise that will require us to withdraw from representation under the Texas Disciplinary Rules of Professional Conduct or other applicable professional standards. In such circumstances, as well as in the instances referred to above, we will cooperate in the transfer of the matter to other counsel of your choice.

14. As is true with all legal services, we cannot and do not guarantee the results of our representation. We make no express warranties concerning this transaction, and disclaim any implied warranties concerning it.

15. Attorneys, like other professionals who advise on personal financial matters, are required by a federal law (the Gramm-Leach-Bliley Act) to inform their clients of their policies regarding privacy of client information. Because attorneys have been and continue to be bound by professional standards of confidentiality that are even more stringent than those required by this new law, we have always protected our clients’ right to privacy. In the course
of representing our clients, we receive all manner of significant personal financial information from them. As a client of the firm, you are advised that all information we receive from you will be held in confidence and not released to outside persons, except as agreed to by you or as required under applicable law. We retain records relating to professional services we provide to assist our clients with their professional needs and, in some cases, to comply with professional guidelines. To guard your nonpublic personal information, we maintain physical, electronic, and procedural safeguards that comply with our professional standards.

At the end of our representation, please let us know if you need any documents from our files. We will retain documents for five years and then destroy them in accordance with our record-retention policy then in effect.

We discuss the terms and conditions of our engagement so candidly because you are entitled to know and we believe a candid discussion now should avoid any misunderstandings later. Please sign a copy of this letter in the space below, expressing your agreement to the terms and conditions set forth above. After we receive your signed copy of this letter and the required deposit, we will commence our representation in the matter.

Sincerely yours,

[Name of attorney]

Enc.
ACCEPTED AND AGREED TO ON ________________________.

[Name of client]
Date:

Include the following notice if notice is not otherwise provided as required by Tex. Gov't Code § 81.079. See section 1.1:2.

Notice to Clients

Texas law requires that all attorneys provide their clients with the following notice about the existence of the attorney grievance process: “The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar’s Office of Chief Disciplinary Counsel will provide you with information about how to file a complaint. Please call 1-800-932-1900 toll-free for more information.”

The Texas Lawyer’s Creed

I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this creed for no other reason than it is right.

Our Legal System

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, “My word is my bond.”
2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.

3. I commit myself to an adequate and effective pro bono program.

4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.

5. I will always be conscious of my duty to the judicial system.

Lawyer to Client

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client’s legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.

2. I will endeavor to achieve my client’s lawful objectives in legal transactions and in litigation as quickly and economically as possible.

3. I will be loyal and committed to my client’s lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.

4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.

5. I will advise my client of proper and expected behavior.
6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.

7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.

8. I will advise my client that we will not pursue tactics which are intended primarily for delay.

9. I will advise my client that we will not pursue any course of action which is without merit.

10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client’s lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

**Lawyer to Lawyer**

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer’s conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.

2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.
3. I will identify for other counsel or parties all changes I have made in documents submitted for review.

4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.

5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are canceled.

6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.

7. I will not serve motions or pleadings in any manner that unfairly limits another party’s opportunity to respond.

8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.

9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.

10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.
11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel’s intention to proceed.

12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.

13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

14. I will not arbitrarily schedule a deposition, court appearance, or hearing until a good faith effort has been made to schedule it by agreement.

15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

16. I will refrain from excessive and abusive discovery.

17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.

18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.

19. I will not seek sanctions or disqualification unless it is necessary for protection of my client’s lawful objectives or is fully justified by the circumstances.
Lawyer and Judge

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.

2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.

3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.

4. I will be punctual.

5. I will not engage in any conduct which offends the dignity and decorum of proceedings.

6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.

7. I will respect the rulings of the Court.

8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.

9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.
This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See sections 1.5:4 and 1.5:5 in this chapter concerning the basic engagement agreement.

Letter Detailing Ongoing Engagement Agreement and Fee Agreement

[Date]

[Name and address of client]

Re: [describe attorney engagement]

[Salutation]

Please read this letter carefully. It describes the terms and conditions under which we will represent you on an ongoing basis. Our policy requires that each client sign a copy of this letter agreeing to the terms and conditions described below before we can engage in representation. The terms and conditions of our engagement are as follows:

1. Our fees for legal services are based primarily on the hourly rates for each lawyer and legal assistant at the time the services are rendered. Our current rates are $[amount] per hour for [name], $[amount] per hour for [name], and $[amount] per hour for legal assistants. We review these hourly rates periodically and may adjust them. If such changes are necessary, you will be notified in writing [number] days before the change.

   Complete disclosure about the attorney’s billing practices can avoid client misunderstandings later. For example, explain about travel time, multiple attorney conferences, research, billing for “forms” in the firm’s form library, administrative overtime, etc. See sections 1.5:4 and 1.5:5 for additional information.

2. It is our policy to bill clients periodically for fees and out-of-pocket expenses. Each lawyer and legal assistant records the time required to perform services, and these time
records are the basis for the bills. These bills will generally describe services performed and the expenses incurred. For large expenses, we may request the supplier to bill you directly.

3. Because of the detailed nature of our statements, our clients do not usually have any questions about them. However, if any question should arise, please call us promptly so we can discuss the matter. Our hourly rates do not include any interest for slow payment. Because of this and the fact that we do not include a service charge for late payments, we must insist that our clients pay their bills promptly.

4. If during our representation we anticipate a significant increase in the level of our activity on your behalf—for example, trial preparation or trial—we may bill you more frequently. We will expect that such statements also will be paid promptly.

5. We require a deposit before we commence work for you. We have asked that you remit to and maintain with us during our representation a deposit of at least $[amount]. Unless deposits are large enough or will be held long enough to earn interest in excess of the cost of an individual account, we will place these funds in a State Bar of Texas Interest on Lawyers’ Trust Account, the interest on which benefits the Texas Equal Access to Justice Foundation. The deposit will be applied to our final statement for fees and expenses or, at our discretion, to any past-due amounts. On the termination of our services, we will promptly refund the deposit, less any fees and expenses unpaid as of the date of our final bill.

6. Our agreement to provide legal representation is conditioned not only on your execution of this engagement letter but also on payment of the requested deposit.

7. We retain the right to request a supplemental deposit, over and above the original deposit, during our representation.

8. By your execution of this engagement letter, you agree that we are relieved from the responsibility of performing any further work should you fail to pay any statement for fees
and expenses (including bills for expenses received from third parties) or for supplemental deposits within fifteen days of their receipt. In that event, you agree that we may move to withdraw as your counsel and that you will promptly execute any withdrawal motions to accomplish this.

9. By signing this engagement agreement, you are agreeing that this firm may retain papers relating to this matter to secure payment of any amount you owe us, to the extent permitted by law, but only if such retention will not prejudice your interests in the subject matter of the representation.

10. During our discussion about representing you, we may have provided you with certain estimates of the fees and expenses that will be required at certain stages of our representation. Such estimates are just that, and the fees and expenses required are ultimately a function of many conditions over which we have little or no control, particularly the extent to which other parties require our involvement on your behalf. The reason we submit our clients’ bills shortly after the services are rendered is so they will have a means of monitoring and controlling their expenses. If you believe the expenses are mounting too rapidly, please contact us immediately so we can assist you in evaluating how they might be curtailed. If we do not hear from you, we assume that you approve of the overall level of activity in this matter.

11. In representing you, we recognize that we may be disqualified from representing any client in any matter related to our representation of you. We also recognize that we may be disqualified from representing any client in any matter in which confidential information concerning you and made available to us during our representation of you becomes material or relevant to another matter or in which use or knowledge of such information could be adverse to your interest.
You agree that, except as stated above, after our representation of you has terminated, the firm will be entitled to represent the interests of any other client against you in business negotiations or other legal matters.

12. The Supreme Court of Texas has adopted and promulgated the Texas Lawyer’s Creed. Although compliance with the Creed is voluntary, we have decided to adhere to its provisions. Please review the attached Texas Lawyer’s Creed, and if you have any questions, we will be glad to discuss them with you.

13. You may discharge us from this representation at any time. We will be free to withdraw at any time and without cause, subject to reasonable notice under the circumstances and to approval by any court in which we are your attorney of record. We will be entitled to receive compensation from you for all services rendered and all disbursements made, under the provisions of this agreement, up to the time of withdrawal. Circumstances may arise that will require us to withdraw from representation under the Texas Disciplinary Rules of Professional Conduct or other applicable professional standards. In such circumstances, as well as in the instances referred to above, we will cooperate in the transfer of the matter to other counsel of your choice.

14. As is true with all legal services, we cannot and do not guarantee the results of our representation. We make no express warranties concerning any matter in which we represent you, and disclaim any implied warranties.

15. Attorneys, like other professionals who advise on personal financial matters, are required by a federal law (the Gramm-Leach-Bliley Act) to inform their clients of their policies regarding privacy of client information. Because attorneys have been and continue to be bound by professional standards of confidentiality that are even more stringent than those required by this new law, we have always protected our clients’ right to privacy. In the course
of representing our clients, we receive all manner of significant personal financial information from them. As a client of the firm, you are advised that all information we receive from you will be held in confidence and not released to outside persons, except as agreed to by you or as required under applicable law. We retain records relating to professional services we provide to assist our clients with their professional needs and, in some cases, to comply with professional guidelines. To guard your nonpublic personal information, we maintain physical, electronic, and procedural safeguards that comply with our professional standards.

At the end of our representation, please let us know if you need any documents from our files. We will retain documents for five years and then destroy them in accordance with our record-retention policy then in effect.

We discuss the terms and conditions of our engagement so candidly because you are entitled to know and we believe a candid discussion now should avoid any misunderstandings later. Please sign a copy of this letter in the space below, expressing your agreement to the terms and conditions set forth above. After we receive your signed copy of this letter and the required deposit, we will commence our representation of you.

Sincerely yours,

__________________________________________________________________________________________________________________________ ...

[Name of attorney]

Enc.
Form 1-9  Letter Detailing Ongoing Engagement Agreement and Fee Agreement

ACCEPTED AND AGREED TO ON __________________________.

________________________________________________________________________________________

[Name of client]
Date:

Include the following notice if notice is not otherwise provided as required by Tex. Gov’t Code § 81.079. See section 1.1:2.

Notice to Clients

Texas law requires that all attorneys provide their clients with the following notice about the existence of the attorney grievance process: “The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar’s Office of Chief Disciplinary Counsel will provide you with information about how to file a complaint. Please call 1-800-932-1900 toll-free for more information.”

The Texas Lawyer’s Creed

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Our Legal System

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, “My word is my bond.”
2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.

3. I commit myself to an adequate and effective pro bono program.

4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.

5. I will always be conscious of my duty to the judicial system.

**Lawyer to Client**

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client’s legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

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2. I will endeavor to achieve my client’s lawful objectives in legal transactions and in litigation as quickly and economically as possible.

3. I will be loyal and committed to my client’s lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.

4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.

5. I will advise my client of proper and expected behavior.
6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.

7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.

8. I will advise my client that we will not pursue tactics which are intended primarily for delay.

9. I will advise my client that we will not pursue any course of action which is without merit.

10. I will advise my client that I reserved the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client’s lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

Lawyer to Lawyer

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer’s conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.

2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.
3. I will identify for other counsel or parties all changes I have made in documents submitted for review.

4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.

5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are canceled.

6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.

7. I will not serve motions or pleadings in any manner that unfairly limits another party’s opportunity to respond.

8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.

9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.

10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.
11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel’s intention to proceed.

12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.

13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

14. I will not arbitrarily schedule a deposition, court appearance, or hearing until a good faith effort has been made to schedule it by agreement.

15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

16. I will refrain from excessive and abusive discovery.

17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.

18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.

19. I will not seek sanctions or disqualification unless it is necessary for protection of my client’s lawful objectives or is fully justified by the circumstances.
Lawyer and Judge

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.

2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.

3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.

4. I will be punctual.

5. I will not engage in any conduct which offends the dignity and decorum of proceedings.

6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.

7. I will respect the rulings of the Court.

8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.

9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.
Form 1-10

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See sections 1.5:4 and 1.5:5 in this chapter concerning the basic engagement agreement.

Letter Detailing Basic Engagement Agreement and Fee Agreement for Simple Matters

[Date]

[Name and address of client]

Re: [describe transaction]

[Salutation]

Thank you for asking me to represent you in the above-referenced matter. I consider it a privilege to do so. Please excuse the overly formal and detailed nature of this letter—it is intended to ensure that you know and understand the terms and conditions under which this firm will represent you.

1. Our fees for legal services are based primarily on the hourly rates for each lawyer and legal assistant at the time the services are rendered. Our current rates are $[amount] per hour for [name], $[amount] per hour for associates or contract lawyers, and $[amount] per hour for legal assistants.

2. It is our policy to bill clients periodically for fees and out-of-pocket expenses. These bills will generally describe services performed and the expenses incurred. If we are

Complete disclosure about the attorney's billing practices can avoid client misunderstandings later. For example, explain about travel time, multiple attorney conferences, research, billing for "forms" in the firm's form library, administrative overtime, etc. See sections 1.5:4 and 1.5:5 for additional information.
confronted with unanticipated expenses, we may request the supplier to bill you directly for any third-party expenses.

3. Our statements are reasonably detailed, and consequently our clients do not usually have any questions about them. However, if you should ever have any question or comment, please do not hesitate to call us so that we can discuss the matter. Our hourly rates do not include any interest for slow payment. Because of this and the fact that we do not include a service charge for late payments, we must insist that our clients pay their bills promptly.

4. We require a [nonrefundable] retainer [when accepting work from new clients/before beginning work on a new matter]. Accordingly, we ask that you remit to [us/and maintain with us during our representation] a retainer of $[amount]. [Include as applicable: We will place these funds in our trust account./The retainer will be applied to our final statement for fees and expenses or, at our discretion, to any past-due amounts./On the termination of our services, we will promptly refund the retainer, less any fees and expenses unpaid as of the date of our final bill.]

5. You agree that we are relieved from the responsibility of performing any further work should you fail to pay any statement for fees and expenses (including bills for expenses received from third parties) or for supplemental retainers within fifteen days of their receipt. In that event, you agree that we may move to withdraw as your counsel and that you will promptly execute any withdrawal motions to accomplish this.

6. You agree that this firm may retain papers relating to this matter to secure payment of any amount you owe us, to the extent permitted by law, but only if such retention will not prejudice your interests in the subject matter of the representation.

7. During our discussions about handling this matter, we may have provided you with certain estimates of the fees and expenses that will be required at certain stages of our representation. Such estimates are just that, and the fees and expenses required are ultimately
a function of many conditions over which we have little or no control, particularly the difficulties we encounter during negotiations with other parties. The reason we submit our clients’ bills shortly after the services are rendered is so they will have a means of monitoring and controlling their expenses. If you believe the expenses are mounting too rapidly, please contact us immediately so we can assist you in evaluating how they might be curtailed. If we do not hear from you, we assume that you approve of the overall level of activity in this matter.

8. The Supreme Court of Texas has adopted and promulgated the Texas Lawyer’s Creed. Although compliance with the Creed is voluntary, we have decided to adhere to its provisions. Please review the attached Texas Lawyer’s Creed, and if you have any questions, we will be glad to discuss them with you.

9. You may discharge us from this representation at any time. We will be free to withdraw at any time, with or without cause, subject to reasonable notice under the circumstances and to approval by any court that may become involved in your matter. We will be entitled to receive compensation from you for all services rendered and all disbursements made, under the provisions of this agreement, up to the time of withdrawal. Circumstances may arise that will require us to withdraw from representation under the Texas Disciplinary Rules of Professional Conduct or other applicable professional standards. In such circumstances, as well as in the instances referred to above, we will cooperate in the transfer of the matter to other counsel of your choice.

10. As is true with all legal services, we cannot and do not guarantee the results of our representation. We make no express warranties concerning this transaction, and disclaim any implied warranties concerning it.
11. Attorneys, like other professionals who advise on personal financial matters, are required by a federal law (the Gramm-Leach-Bliley Act) to inform their clients of their policies regarding privacy of client information. Because attorneys have been and continue to be bound by professional standards of confidentiality that are even more stringent than those required by this new law, we have always protected our clients’ right to privacy. In the course of representing our clients, we receive all manner of significant personal financial information from them. As a client of the firm, you are advised that all information we receive from you will be held in confidence and not released to outside persons, except as agreed to by you or as required under applicable law. We retain records relating to professional services we provide to assist our clients with their professional needs and, in some cases, to comply with professional guidelines. To guard your nonpublic personal information, we maintain physical, electronic, and procedural safeguards that comply with our professional standards.

At the end of our representation, please let us know if you need any documents from our files. We will retain documents for [five years/a limited time] and then destroy them in accordance with our record-retention policy then in effect.

We believe this candid discussion should prevent any misunderstandings later. Please sign a copy of this letter in the space below, expressing your agreement to the terms and conditions set forth above.

Sincerely yours,

[Name of attorney]
ACCEPTED AND AGREED TO ON _______________________.

__________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of client]
Date:

Include the following notice if notice is not otherwise provided as required by Tex. Gov’t Code § 81.079. See section 1.1:2.

Notice to Clients

Texas law requires that all attorneys provide their clients with the following notice about the existence of the attorney grievance process: “The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar’s Office of Chief Disciplinary Counsel will provide you with information about how to file a complaint. Please call 1-800-932-1900 toll-free for more information.”

Include the following if applicable.

The Texas Lawyer’s Creed

I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this creed for no other reason than it is right.

Our Legal System

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, “My word is my bond.”
2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.

3. I commit myself to an adequate and effective pro bono program.

4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.

5. I will always be conscious of my duty to the judicial system.

**Lawyer to Client**

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client’s legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.

2. I will endeavor to achieve my client’s lawful objectives in legal transactions and in litigation as quickly and economically as possible.

3. I will be loyal and committed to my client’s lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.

4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.

5. I will advise my client of proper and expected behavior.
6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.

7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.

8. I will advise my client that we will not pursue tactics which are intended primarily for delay.

9. I will advise my client that we will not pursue any course of action which is without merit.

10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client’s lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

**Lawyer to Lawyer**

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer’s conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.

2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.
3. I will identify for other counsel or parties all changes I have made in documents submitted for review.

4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.

5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are canceled.

6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.

7. I will not serve motions or pleadings in any manner that unfairly limits another party’s opportunity to respond.

8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.

9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.

10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.
11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel’s intention to proceed.

12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.

13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

14. I will not arbitrarily schedule a deposition, court appearance, or hearing until a good faith effort has been made to schedule it by agreement.

15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

16. I will refrain from excessive and abusive discovery.

17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.

18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.

19. I will not seek sanctions or disqualification unless it is necessary for protection of my client’s lawful objectives or is fully justified by the circumstances.
Lawyer and Judge

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.

2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.

3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.

4. I will be punctual.

5. I will not engage in any conduct which offends the dignity and decorum of proceedings.

6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.

7. I will respect the rulings of the Court.

8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.

9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.
Letter Requesting Client’s Consent to Business Relationship with Attorney

[Date]

[Name and address of client]

Re: [describe transaction]

[Salutation]

You have inquired about my interest in investing in the above-referenced venture in addition to my performing the legal work for you on this project. I have given this matter considerable thought and will continue to do so. I will let you know my decision by [date].

Nevertheless, I think it is important that you consider the advisability of having me, your lawyer, as a business partner. Under rule 1.08(a) of the Texas Disciplinary Rules of Professional Conduct, a lawyer cannot enter into a business venture with a client unless (1) the transaction and terms on which the lawyer acquires an interest are fair and reasonable to the client, (2) these terms are fully disclosed to the client, (3) the client is given a reasonable opportunity to seek independent counsel, and (4) the client agrees in writing to the relationship. This rule protects the client from possible conflicts of interest that may occur if counsel is involved in the venture.

In this case the terms and conditions of the venture are well known to you because you were the one who suggested them. However, for purposes of clarity I will repeat them here. The terms are [list terms].
Although not required by our State Bar’s rules of ethics, I must insist that you seek independent counsel before our entry into this venture.

Once you consult with an attorney, please put his or her name in the space I have provided and then sign and return the copy of this letter to signify your consent for me to have an interest in the venture.

Sincerely yours,

__________________________________________________________________________________________________________________________ ...
__________________________________________________________________________________________________________________________ ...

[Name of attorney]

I have consulted with ______________________________ and have availed myself of that attorney’s advice. I knowingly agree to your participation in the venture described on the terms outlined in this letter, which I believe are fair and reasonable. I am also requesting you to act as legal counsel in this transaction, with the terms of the engagement to be outlined in a separate letter agreement.

ACCEPTED:

__________________________________________________________________________________________________________________________ ...
__________________________________________________________________________________________________________________________ ...

[Name of client]
Date:
Nonrepresentation Letter When Representing Lender or Title Company

Form 1-12

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See section 1.6:4 in this chapter concerning clarifying nonrepresentation.

Nonrepresentation Letter When Representing Lender or Title Company

[Date]

[Names and addresses of buyer and seller]

Re: [describe transaction]

[Salutation]

I have represented [name of lender or title company] in the preparation of legal documents for use in closing the above-referenced transaction.

While I have acted solely on behalf of [name of lender or title company], [name], the buyer, and [name], the seller, acknowledge that the legal fees incurred in preparing the legal documents will be paid by the buyer or the seller even though I have not in any manner undertaken to assist or render legal advice to the buyer or the seller, except in the preparation of the legal documents. The buyer and the seller further acknowledge and understand that they may retain independent legal counsel to represent their individual interests in the referenced transaction.

The buyer and the seller specifically recognize that I do not have the responsibility to provide any truth-in-lending disclosures, any other truth-in-lending documents, or any other documents required by any regulations that apply to this transaction. The lender is responsible for providing those documents, and no charge may be made for providing them.
Please sign below to acknowledge that you have been advised of my representation of the [lender/title company] and that you understand that I am not your attorney.

Sincerely yours,

________________________________________________________
[Name of attorney]

Buyer:

________________________________________________________
[Name of buyer]
Date:

Seller:

________________________________________________________
[Name of seller]
Date:
Form 1-13

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See section 1.8:1 in this chapter concerning terminating the attorney-client relationship.

Letter Terminating Attorney-Client Relationship

[Date]

[Name and address of client]

Re: [describe transaction]

[Salutation]

During the past [time period], it has been our pleasure to serve you as counsel in [describe transaction]. During that representation, you have paid substantial legal fees and related expenses. Unfortunately, contrary to our engagement agreement, you have not paid our statements in a timely manner for the past few months.

At this time, the outstanding and overdue fees and expenses total approximately $[amount]. Our firm desires to continue our relationship but does not have the ability to finance your legal representation. Moreover, you expressly agreed that payment of the hourly fees and expenses in this matter would be kept current.

We now provide you the opportunity to retain other counsel without jeopardizing your position. However, if we wait several more months, it is possible that circumstances will change and this opportunity will be lost. Consequently, as of [date], we will cease to represent you.

Your new counsel may wish to discuss this file with us. That would be to your advantage both substantively and economically. We are willing to do so as long as satisfactory
arrangements are made to compensate us for the additional time and expense incurred. Also, it will be necessary to agree on a plan to pay the outstanding fees and expenses.

During our representation we have generated work that we are willing to share with your new counsel to the extent our legal obligations require us to do so in the absence of full payment of our fees and expenses.

If you wish us to continue representing you, satisfactory arrangements must be made to take care of the overdue fees and expenses, as well as the future fees and expenses.

I look forward to hearing from you and remain hopeful our representation can continue.

Sincerely yours,

[Name of attorney]
Form 1-14

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. Client files must be maintained and preserved for a period of five years after termination of representation. Tex. Disciplinary Rules Prof’l Conduct R. 1.14.

Letter for Completion of Attorney-Client Relationship

[Date]

[Name and address of client]

Re: [describe transaction]

[Salutation]

It has been our pleasure to serve you as counsel in [describe transaction]. According to our records, we have completed this matter, and we are closing this file.

You should already have a complete set of the relevant closing documents in your possession. If not, please let us know and we will be glad to send them to you.

Describe any actions that the client may need to follow up on, such as UCC1 renewals, note extensions at maturity, etc.

Include the following if applicable.

Please let us know if you need any other documents from our files. We will retain documents for five years and then destroy them in accordance with our record-retention policy then in effect.

Continue with the following.

I look forward to the opportunity to represent you on other matters in the future.
Sincerely yours,

[Name of attorney]
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Chapter 2  

Laws Affecting Real Estate

The following statutes and regulations affecting real estate are organized alphabetically by topic, with cross-references to other relevant sections where appropriate.

§ 2.1 Abandonment

The landlord’s rights and obligations regarding personal property after a tenant abandons commercial leased premises are addressed in Tex. Prop. Code § 93.002(e). A landlord has a duty to mitigate damages if a tenant abandons leased premises. Tex. Prop. Code § 91.006. The general subject of unclaimed personal property and escheat is addressed in Tex. Prop. Code chs. 72–76. See also the section titled “Escheat” below.

§ 2.2 Abstracts of Judgment

The Texas Property Code sets out the procedure for obtaining an abstract of judgment from the judge or justice of the peace who rendered the judgment or from the clerk of the court. Abstracts of judgment are recorded in the county’s real property records. Tex. Prop. Code §§ 52.002–.003. See also the sections titled “Judgment Liens” and “Release of Lien by Attorney or Others” below.

For special restrictions on the filing of abstracts of judgment by inmates or their representatives, refer to Tex. Civ. Prac. & Rem. Code §§ 12.001–.007.

§ 2.3 Acceleration of Note

Tex. Civ. Prac. & Rem. Code § 16.038 provides that if the maturity date of a note is accelerated and subsequently rescinded or waived in accordance with the requirements of section 16.038 before the limitations period expires, then the acceleration is deemed rescinded and waived, and the note is governed by Tex. Civ. Prac. & Rem. Code § 16.035 as if no acceleration had occurred. A notice served under section 16.038 does not affect a lienholder’s right to accelerate the maturity date of the debt in the future or waive past defaults. Section 16.038 does not create an exclusive method for waiver and rescission of acceleration or affect the accrual of a cause of action and the running of the related limitations period under Tex. Civ. Prac. & Rem. Code § 16.035(e) on any subsequent maturity date, accelerated or otherwise, of the note.

§ 2.4 Acknowledgments

§ 2.5 Ad Valorem Taxes

Both real and personal property are subject to ad valorem taxes in Texas. Tex. Tax Code § 11.01. Provisions for special assessments or exemptions that may apply to real property include those for a residence homestead (Tex. Tax Code §§ 11.13, 11.131, 11.135); charitable organizations improving property for low-income housing (Tex. Tax Code §§ 11.181–.1826); agricultural use (Tex. Const. art. VIII, §§ 1–d, 1–d–1; Tex. Tax Code §§ 23.41–.60); timber production (Tex. Const. art. VIII, § 1–d–1; Tex. Tax Code §§ 23.59, 23.71–.79); restricted timber use land (Tex. Tax Code §§ 23.9801–.9807); open-space scenic, recreational, or park use (Tex. Const. art. VIII, § 1–d–1; Tex. Tax Code §§ 23.59, 23.81–.87); mandatory school-tax home exemption (Tex. Const. art. VIII); and partially disabled and disabled veterans or their surviving spouses, surviving spouses of members of the armed services killed in action, and surviving spouses of first responders killed or fatally injured in the line of duty (Tex. Const. art. VIII, § 1–b). There is also a provision dealing with the separate taxation of tax parcels in condominium projects (Tex. Prop. Code § 82.005). The word *grant* or *convey* in a deed implies a covenant that the estate is free of encumbrances at the time of execution of the conveyance. Tex. Prop. Code § 5.023. “Encumbrance” includes a tax, an assessment, and a lien on real property. Tex. Prop. Code § 5.024.

Owners taxed at a reduced rate under the agricultural-use amendment (Tex. Const. art. VIII, § 1–d), the open-space amendment (Tex. Const. art. VIII, § 1–d–1), or the special appraisal provisions of subchapters B–H of chapter 23 of the Tax Code should be alert to the potential tax liability that accrues if the land use changes or title is transferred and must disclose the reduced rate to a potential buyer using the statutorily prescribed form. Tex. Prop. Code § 5.010. The county appraisal district office is required to maintain a list of properties potentially subject to this type of rollback of taxes. See Tex. Tax Code §§ 23.51–.79. Lenders should be aware of the prohibitions against certain waivers and indemnities relating to the agricultural or open-space use exemption, described in more detail in the section titled “Loan Documents” below. In certain circumstances, taxing authorities may have the ability to waive penalties and interest on property erroneously omitted from taxation or granted improper tax exemptions. See Tex. Tax Code § 33.011.

Ad valorem tax liens take priority over most prior recorded liens. Tex. Tax Code §§ 32.01–.07. Certain redemption and possessory rights also apply to properties sold at tax foreclosures. See generally Tex. Tax Code ch. 34 and the section titled “Redemption Rights” below. A tax lien may also be transferred to a third party on payment of taxes authorized by the owner in accordance with Tex. Tax Code § 32.06. In some cases, property tax lenders will need to be licensed, are prohibited from lending to those eligible for the tax exemption for people over age sixty-five, will need to be cognizant of the regulations concerning advertising, and may be limited in selling a property tax loan in the secondary market. See Tex. Fin. Code ch. 351.

In counties having a population in excess of 250,000 and counties of less than 250,000 whose county commissioners opt to participate, an officer conducting a tax foreclosure sale of real property may not execute or deliver a deed to a purchaser who owes ad valorem taxes, whether on real or personal property. Tex. Tax Code § 34.015.

A tenant may contest a landlord’s ad valorem tax assessment under certain circumstances. Tex. Tax Code §§ 41.413, 42.015.

When a governmental entity acquires the right to possession of taxable property by condemnation or acquires title to taxable property, taxes for the year of conveyance are prorated to the date of the order granting possession or the date of conveyance. If taxes for the year have not yet been determined, the assessor for each taxing unit may base the proration on taxes for the
prior year. The collector must accept the tax payment, and the transferor is relieved of further payment for that year. Tex. Tax Code § 26.11.

§ 2.6 Adverse Possession


§ 2.7 Affidavits of Heirship

If an ownership interest in real property is in the estate of a decedent who dies intestate, inheritance of the property may be established by an affidavit recorded in the real property records of the county in which the property is located that details the family history and heirship of the decedent and identifies the heirs-at-law under sections 201.001–.003 of the Texas Estates Code. Tex. Est. Code ch. 205. The Estates Code includes a form of affidavit of heirship. Tex. Est. Code § 203.002. See also the section titled “Wills and Estates” below. A form of affidavit is furnished at form 26-1 in this manual. The practitioner may want to verify with a title insurance company that the affidavit will be sufficient evidence of inheritance for issuance of a title policy in the event of a future sale of the property interest.

§ 2.8 Affordable Housing Investments

The Internal Revenue Code provides for credits against federal income tax for owners of qualified low-income rental housing projects. See 26 U.S.C. § 42. In Texas that program is administered by the Texas Department of Housing and Community Affairs under Tex. Gov’t Code ch. 2306 and the rules found in 10 Tex. Admin. Code ch. 49. Under the National Affordable Housing Act of 1990, 42 U.S.C. §§ 12701–12898a, certain HUD funds are available for nonprofit and community development organizations to build or preserve low-income housing. Those projects must also satisfy the HUD program requirements found in 24 C.F.R. pts. 91, 92. Affordable housing constructed with federal or state funds must meet specified handicapped-accessible standards. Tex. Gov’t Code § 2306.514. Tex. Gov’t Code § 6711(g) provides for the allocation of housing tax credits in Fort Worth, Houston, Dallas, and San Antonio. A community land trust may be created to acquire and hold land for the benefit of developing and preserving long-term affordable housing in a municipality or county. Tex. Loc. Gov’t Code ch. 373B.

§ 2.9 Agricultural Development Districts

The creation of agricultural development districts is authorized by chapter 60 of the Agriculture Code. Tex. Agric. Code ch. 60. Districts have the power of eminent domain and may issue bonds (Tex. Agric. Code § 60.058) and levy taxes (Tex. Agric. Code ch. 60, subcs. E, F). See also the section titled “Disclosures and Notices” below.

§ 2.10 Agricultural Liens

Persons securing loans with agricultural products should be aware that the perfection and priority of agricultural liens may be subject to rules outside of chapter 9 of the Texas Uniform Commercial Code. For example, an agricultural lien granted under subchapter E of Texas Property Code chapter 70 has priority over certain prior liens if certain conditions are met. See Tex. Prop. Code § 70.4045. Similarly, the statutory trust created upon acceptance of commodities to which the Perishable Agricul-
The Seller of Commodities to which PACA Applies May Also Have Priority Over Certain PreviouslyFiled UCC Liens. See 7 U.S.C. §§ 499a–499s. The Seller of Commodities to Which PACA Applies May Be in a Position Superior to All Other Creditors.

§ 2.11 Agricultural Use Exemption

See the sections titled “Ad Valorem Taxes” above and “Loan Documents” below.

§ 2.12 Aircraft Liens


§ 2.13 Alcoholic Beverages


§ 2.14 Alternative Dispute Resolution (ADR)


§ 2.15 Americans with Disabilities Act and Related Statutes

Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12181–12189, creates minimum standards for accessibility in commercial and some types of residential buildings, including requirements relating to new construction; parking alterations; removing barriers from existing structures; installing telephone devices and other assistive listening devices for the deaf; providing auxiliary aids for conferences, seminars, and written materials offered to the public; and ensuring equivalent services and opportunities to disabled persons. Regulations under title III of the ADA pertaining to public accommodations, commercial facilities, and private entities are promulgated under 28 C.F.R. pt. 36. Architectural guidelines can be found in 36 C.F.R. pt. 1191.

Texas also has a state architectural-barriers statute that applies to certain commercial and residential facilities. Tex. Gov’t Code ch. 469. Regulations promulgated under the statute are found at 16 Tex. Admin. Code ch. 68. The Human Resources Code permits guide trainers reasonable access to public facilities to train assistance animals and prohibits the denial of access to public facilities, commercial properties, or housing for disabled persons, including those who use assistance animals. Tex. Hum. Res. Code § 121.003. Affordable housing constructed with federal or state funds must meet specified handicapped-accessible standards. Tex. Gov’t Code § 2306.514.
For current information on contractors and municipalities that are authorized to perform inspection functions, contact the Texas Department of Licensing and Regulation.

See also the section titled “Fair Housing” below for additional statutes relating to disability access for residential properties.

§ 2.16 Annexation

Annexation and disannexation of real property by municipalities are governed generally by Tex. Loc. Gov’t Code chs. 42, 43. A municipality may contract with an owner of land that is located in the municipality’s extraterritorial jurisdiction to guarantee the land’s immunity from annexation for a period not to exceed forty-five years, including renewals or extensions. Tex. Loc. Gov’t Code § 212.172.

§ 2.17 Antiquities


§ 2.18 Appraisers

Appraisers are governed by Tex. Occ. Code ch. 1103, the Texas Appraiser Licensing and Certification Act. The Broker’s and Appraiser’s Lien on Commercial Real Estate Act provides for a lien and procedures to foreclose the lien for commissions and fees due and payable on the sale or lease of commercial real estate (as defined in the Act). See Tex. Prop. Code ch. 62. An appraiser or other person who intentionally or knowingly makes a materially false or misleading written statement in providing an appraisal of real property for compensation commits a criminal offense punishable under Tex. Penal Code § 32.32(b–1).

Creditors approved as sellers and servicers to government-sponsored enterprises Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac) must represent and warrant that appraisals for all covered loans for which application is made on or after October 15, 2010, comply with certain appraiser independence requirements as defined in their respective seller and servicing guides. See Fannie Mae, Announcement SEL-2010-14 (Oct. 15, 2010), and Freddie Mac, Bulletin 2010-23 (Oct. 15, 2010).

Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, 124 Stat. 1376), enacted July 21, 2010, which may be cited by its short title as the “Mortgage Reform and Anti-Predatory Lending Act,” codified extensive appraisal reform measures that supersede the Home Valuation Code of Conduct (HVCC) and the appraiser independence requirements in favor of new, uniform appraisal independence standards. Regulation Z (Truth in Lending) was amended to implement these new standards effective April 1, 2011, by adding 12 C.F.R. § 226.42 (and removing old section 226.36(b)) to establish new requirements for appraisal independence for consumer credit transactions secured by a consumer’s principal residence. See 75 Fed. Reg. 66,554 (Oct. 28, 2010). The regulations are intended to ensure that real estate appraisals used to support creditors’ underwriting decisions are based on the appraisers’ independent professional judgment, free of any influence or pressure exerted by parties to the transactions.
§ 2.19 Arbitration

Arbitration is a dispute resolution process whereby one or more arbitrators make a decision, called an award, which is binding only if the parties so agree. In Texas, arbitrations can be governed by common law, the Texas Arbitration Act (TAA), and the Federal Arbitration Act (FAA). See *L.H. Lacy v. City of Lubbock*, 559 S.W.2d 348, 351 (Tex. 1977); *Tex. Civ. Prac. & Rem. Code* chs. 171–172; 9 U.S.C. §§ 1–16. Some Texas statutes prohibit arbitration under certain circumstances. For example, in a contract for the construction or repair of improvements to real property in Texas, a provision requiring arbitration of disputes in another state is voidable. *Tex. Bus. & Com. Code* ch. 272. Also, in a contract for the sale or lease of goods worth $50,000 or less, a provision requiring arbitration in another state is voidable unless the provision is in bold-faced, capitalized, underlined, or otherwise conspicuous type. *Tex. Bus. & Com. Code* ch. 273. When an arbitration agreement is not governed by or enforceable under the TAA, it may be governed by relevant Texas common-law arbitration rules. *L.H. Lacy*, 559 S.W.2d at 352. The FAA applies when the dispute concerns a contract evidencing a transaction involving interstate commerce. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269–70 (Tex. 1992). The FAA and TAA are not mutually exclusive and can both apply to an arbitration provision. *In re D. Wilson Construction Co.*, 196 S.W.3d 774, 779–80 (Tex. 2006). If the FAA applies, however, restrictions under Texas statutes, like the ones described above, can be preempted if the TAA would not allow enforcement of an arbitration agreement that the FAA would enforce. *In re D. Wilson Construction Co.*, 196 S.W.3d at 780.

§ 2.20 Architects


An architect’s lien against real estate is addressed in *Tex. Prop. Code* § 53.021(c).

§ 2.21 Asbestos

See the section titled “Environmental Laws” below.

§ 2.22 Assumed Names

The circumstances under which assumed names should be filed are addressed in the Assumed Business or Professional Name Act, *Tex. Bus. & Com. Code* ch. 71. The circumstances under which an entity is considered to have fraudulently filed an assumed name and the penalties for doing so are addressed in *Tex. Bus. & Com. Code* § 71.203. See also the section titled “Fraudulent Filings” below.

A financing statement that identifies a debtor by an assumed name or trade name may not be effective to perfect a security interest against the debtor unless the name used in the financing statement is so similar to the debtor’s name that a search of the records of the filing office under the debtor’s name, using the filing office’s standard search logic, would disclose the financing statement that used a different assumed name or trade name. *Tex. Bus. & Com. Code* § 9.506(c). The Texas Business and Commerce Code provides rules for the name to be used in a financing statement for different types of debtors—for example, a debtor that is a decedent’s estate, a trust or a trustee, an individual, or an organization. *Tex. Bus. & Com. Code* § 9.503.
§ 2.23 Astronomical Observatories

See the section titled “Outdoor Lighting” below.

§ 2.24 Automatic Teller Machines (ATMs)

Public safety requirements for the design of and layout surrounding an unmanned teller machine are found at Tex. Fin. Code ch. 59, subch. D.

§ 2.25 Bankruptcy

In addition to the federal Bankruptcy Code, title 11 of the United States Code, property subject to bankruptcy protection will also be affected by the homestead and personal property exemptions of the Texas Constitution and Property Code. Tex. Const. art. XVI, § 50; Tex. Prop. Code chs. 41, 42. Assignment for the benefit of creditors is addressed in Tex. Bus. & Com. Code §§ 23.01–.33. Texas has also adopted the Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code ch. 24. The circumstances under which a judgment lien is canceled after a bankruptcy discharge are addressed in Tex. Prop. Code §§ 52.041–.043.

§ 2.26 Beaches

See the section titled “Coastal Properties” below.

§ 2.27 Beauty Shop Leases

Lessors of premises used for beauty salons and parlors should be aware of the Texas Department of Licensing and Regulation regulations found in 16 Tex. Admin. Code § 83.114.

§ 2.28 Billboards

See the section titled “Outdoor Signs” below.

§ 2.29 Blind Trusts and Undisclosed Beneficiaries

A conveyance by a person designated as trustee is valid, even if the identity of the beneficiary has not been disclosed; the beneficiary may not set aside the conveyance of the property. Tex. Prop. Code § 101.001. A governmental entity may not purchase real property held in trust or sell real property to a trustee until the trustee submits a copy of the trust agreement and identifies the true owner of the property to the governmental entity. Tex. Gov’t Code ch. 2252, subch. D.

§ 2.30 Brokers

Real estate brokers and salespersons are regulated by the Texas Real Estate Commission under the provisions of the Real Estate License Act, Tex. Occ. Code ch. 1101. The Broker’s and Appraiser’s Lien on Commercial Real Estate Act provides for a lien and procedures to foreclose the lien for commissions and fees due and payable on the sale or lease of commercial real estate (as defined in the Act). See Tex. Prop. Code ch. 62. See also the section titled “Disclosures and Notices” below.
§ 2.31 Brownfields Statute

See the section titled “Voluntary Cleanup Program” below.

§ 2.32 Building Codes


The National Electrical Code as it existed on May 1, 2001, was adopted by the Texas legislature as the municipal electrical construction code in Texas and applies to (1) all residential electrical construction applications and (2) commercial buildings in a municipality for which construction began after January 1, 2006. A municipality may establish procedures to adopt local amendments and to administer and enforce the code. Tex. Loc. Gov’t Code § 214.214.

The International Building Code as it existed on May 1, 2003, was adopted by the Texas legislature as the municipal commercial building code in Texas for commercial buildings in a municipality for which construction began after January 1, 2006. A municipality may establish procedures to adopt local amendments and to administer and enforce the code. Tex. Loc. Gov’t Code § 214.216.

The International Residential Code as it existed on May 1, 2001, was adopted by the Texas legislature as the municipal residential building code in Texas. A municipality may establish procedures to adopt local amendments and to administer and enforce the code. Tex. Loc. Gov’t Code § 214.212.

§ 2.33 Business Organizations Code

Corporations, partnerships, limited partnerships, limited liability companies, registered limited liability partnerships, non-profit corporations, and cooperative associations organized or qualified to do business in Texas on or after January 1, 2006, must comply with the Texas Business Organizations Code. Entities organized or qualified to do business before January 1, 2006, had the option to be governed by the Code on or after January 1, 2006. Effective January 1, 2010, all entities organized or qualified to do business in Texas must comply with the Code. See generally Tex. Bus. Orgs. Code ch. 402.

§ 2.34 Camping Resorts

The Texas Membership Camping Resort Act is found at Tex. Prop. Code ch. 222. See also the section titled “Landowner Liability” below.

§ 2.35 Cash Proceeds

Those who receive in connection with their trade or business more than $10,000 in cash in a transaction or in several related transactions must report to the Internal Revenue Service the amount of currency received; the payor’s name, address, and tax identification number; the date and nature of the transaction; and other information as the United States Secretary of the Treasury may prescribe. 26 U.S.C. § 6050I(a), (b); 26 C.F.R. § 1.6050I–1.
§ 2.36 Cemeteries


§ 2.37 Certificates of Convenience and Necessity

See the sections titled “Sewer Service,” “Telecommunications,” and “Water Service” below.

§ 2.38 Certification of Trust

A person other than a beneficiary is not required to inquire into the extent of the trustee’s powers or the propriety of the exercise of those powers if the person deals with the trustee in good faith and obtains a certification of trust. Tex. Prop. Code §114.081(b). Tex. Prop. Code § 114.086 describes the contents of such a certification and describes the instances in which a party may rely on the representations about the power of the trustee to take actions on behalf of the trust described in the certification. See section 10.15 in this manual.

§ 2.39 Certified Mail

See the section titled “Registered Mail” below.

§ 2.40 Child Support Liens


§ 2.41 Choice of Law


§ 2.42 Coastal Properties

Two types of notices relating to coastal properties are required for real property transactions in the vicinity of coastal waters. First, persons entering into an executory contract to convey an interest in property located seaward of the Gulf Intracoastal Waterway must make the disclosure required by Tex. Nat. Res. Code § 61.025, either in the contract itself or in a notice deliv-
ered not less than ten days before the closing of the sale. With some exceptions, the notice must be provided to the purchaser or transferee in all conveyancing transactions, including nonjudicial foreclosure sales. See Tex. Att’y Gen. Op. No. JM-834 (1987). Second, if real property adjoins and abuts the tidally influenced waters of the state, the notice prescribed in Tex. Nat. Res. Code § 33.135 must be given in all written executory contracts. The statutory disclosure form prescribed by section 5.008(b) of the Texas Property Code also includes language regarding such coastal properties.

Chapter 61 of the Natural Resources Code (Texas Open Beaches Act) declares the public policy of the state is that the public has free and unrestricted right of ingress and egress to and from state-owned beaches bordering on the seaward shore of the Gulf of Mexico and the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico, to which the public has acquired a right of use or easement to or over by prescription or dedication or has established and retained a right by virtue of continuous right in the public under Texas common law. Chapter 61 contains provisions under which the commissioner of the General Land Office can (1) impose administrative penalties on persons constructing, maintaining, controlling, owning, or possessing improvements on public beaches; (2) order those improvements removed at the expense of the person constructing, maintaining, controlling, owning, or possessing them; (3) notify the State Board of Insurance that the improvements are not insurable; and (4) make determinations concerning the line of vegetation, including the ability to suspend a determination on the line of vegetation for up to three years. There are several provisions regarding public access to beaches, coastal erosion duties, erosion responses, and posting of private access in Tex. Nat. Res. Code chs. 33, 61.

See also the section titled “Windstorm Inspection” below.

The Texas Constitution was amended in 2009 to further protect the right of the public to access and use public beaches. Tex. Const. art. I, § 33, defines “public beach” and grants to the public a permanent easement and the unrestricted right to use, and a right of ingress to and egress from, a public beach. Section 33 further authorizes the legislature to enact laws to protect the public’s right to access and use a public beach and to protect the public beach easement from interference and encroachments, but it does not create a private right of enforcement. However, Texas law does not recognize the concept of a “rolling” public easement onto privately owned beachfront property, which would have the effect of allowing the public use easement to migrate onto previously unencumbered private property.

Easements for public use of private dry beach property change size and shape along with the gradual and imperceptible erosion or accretion in the coastal landscape. But, avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property.


§ 2.43 Colonias

Colonias are housing developments in low-income regions, typically near the border between Texas and Mexico. The Texas Local Government Code contains subdivision platting requirements in counties located (1) within fifty miles of the international border regardless of the population of any city within the county or (2) within one hundred miles of the international border if a city located within the county has a population of more than 250,000. Tex. Loc. Gov’t Code §§ 232.021–.043. See also Tex. Loc. Gov’t Code §§ 232.071–.080 for alternate subdivision platting requirements applicable to certain other economically distressed areas. The Property Code contains restrictions on executory contracts (contracts for deed), a form of real estate transaction widely used in colonias. See Tex. Prop. Code §§ 5.061–.080. Colonia self-help centers are authorized in certain counties under Tex. Gov’t Code §§ 2306.581–.590. See also the section titled “Contracts for Deed” below.
§ 2.44 Community Homes; Group Homes

The Community Homes for Disabled Persons Location Act, Tex. Hum. Res. Code §§ 123.001–.010, restricts in some circumstances the enforceability of restrictive covenants and zoning excluding such homes and provides for registration, licensing, and other regulation of such facilities.

§ 2.45 Community Property with Right of Survivorship

Spouses may create a right of survivorship in community property by executing a written agreement. Tex. Est. Code §§ 111.001–.002. The Estates Code also addresses the rights of personal representatives, purchasers, and creditors in this type of property.

§ 2.46 Condemnation and Eminent Domain

Condemnation is the right to take private property for public use; property may not be taken, damaged, or destroyed for or applied to public use without just and adequate compensation and due process. See U.S. Const. amends. V, XIV, § 1; Tex. Const. art. I, §§ 17, 19. Condemnation actions are governed by chapter 21 of the Texas Property Code. Before a governmental entity with eminent domain authority begins negotiating with a property owner to acquire real property, the entity must provide a landowner’s bill of rights statement provided by Tex. Gov’t Code § 402.031. The landowner’s bill of rights provides that the property owner has a right to (1) notice of the proposed acquisition of the owner’s property; (2) a bona fide good-faith effort to negotiate by the entity proposing to acquire the property; (3) an assessment of damages to the owner that will result from the taking of the property; (4) a hearing under chapter 21 of the Texas Property Code, including a hearing on the assessment of damages; and (5) an appeal of a judgment in a condemnation proceeding, including an appeal of an assessment of damages. The attorney general will prepare a written statement that includes a bill of rights for a property owner whose real property may be acquired by a governmental or private entity through the use of the entity’s eminent domain authority under chapter 21 of the Texas Property Code. A copy of the Texas Landowner’s Bill of Rights can be found at https://www.texasattorneygeneral.gov/files/agency/landowners_billofrights.pdf.

Some of the statutes authorizing condemnation are Tex. Transp. Code § 22.011 (airports and airspace), §§ 224.001–.008, 280.001, 314.001–.013 (highways and streets); Tex. Loc. Gov’t Code §§ 251.001–.002 (public works or public use), §§ 331.001, 331.003 (parks and playgrounds), §§ 552.011, 552.013 (waterworks), § 571.004 (seawalls, levees, floodways, and the like); Tex. Nat. Res. Code § 111.019 (pipelines); Tex. Health & Safety Code § 711.033 (cemetery organizations); Tex. Educ. Code § 11.155 (school districts); Tex. Util. Code § 181.004 (utilities); Tex. Water Code § 49.222 (drainage districts); Tex. Gov’t Code § 411.004 (providing eminent domain authority to counties for drainage); and Tex. Water Code ch. 54 (municipal utility districts (“MUDs”)).

See also the sections titled “Landowner’s Bill of Rights” and “Private Property Rights” below.

The comptroller is required to create an eminent domain database including the name, address, and representative of each entity authorized by the state to exercise the power of eminent domain. Tex. Gov’t Code ch. 2206, subch. D (eff. September 1, 2015). The database must identify the scope of eminent domain granted to the entity, the entity’s website address, and whether the entity exercised its eminent domain authority in the past year. Entities with the power of eminent domain are required to submit an annual report to the comptroller to update the database, including whether or not the entity exercised its eminent domain authority in the past year. Failure to file a report may result in a civil penalty.
§ 2.47 Condominiums

A condominium is a form of real property ownership in which portions of the real property are designated for separate ownership and the remainder is designated for common ownership solely by the separate owners. A condominium exists only if one or more of the common elements are directly owned in undivided interests by the unit owners. If an entity separate from the unit owners (e.g., an incorporated property owners association) owns all the common elements, the real property is not a condominium, even if the separate entity is owned by all the unit owners. Tex. Prop. Code § 82.003(a)(8).

The Texas Uniform Condominium Act (TUCA), Tex. Prop. Code ch. 82, governs the creation, operation, alteration, termination, and management of TUCA condominium projects created on or after January 1, 1994, but certain provisions of TUCA apply to those created before that date. Condominium projects created before January 1, 1994, are governed by portions of Tex. Prop. Code ch. 81 (the prior Condominium Act) and portions of TUCA, unless the owners of the project amend their declaration and submit it exclusively to the provisions of TUCA. See Tex. Prop. Code § 82.002. Tax certificates, receipts, or other statements evidencing payment of taxes or that taxes have not yet been calculated must be attached to a plat, replat, or amended plat or replat of a condominium before recording in accordance with Tex. Prop. Code § 82.051(g). The separate taxation of individual units of a condominium is addressed in Tex. Prop. Code § 82.005 and Tex. Tax Code § 25.09. Certain disclosures are required in a contract for sale of a condominium. Tex. Prop. Code §§ 82.156–.157. See chapter 24 in this manual.

§ 2.48 Confessions of Judgment


§ 2.49 Confidentiality Notice

See the section titled “Disclosures and Notices” below.

§ 2.50 Conspicuous Text

Several statutes require that certain notices and contractual provisions be set apart from and made more conspicuous than the surrounding text, either by using bold-faced type or some other method. A partial list of these provisions includes—

1. choice-of-law provisions designating another state and agreements to litigate or arbitrate in another state in contracts concerning goods valued at $50,000 or less (Tex. Bus. & Com. Code ch. 273);
3. the statutory statute-of-frauds notice for loans greater than $50,000 (Tex. Bus. & Com. Code § 26.02);
4. notices of cancellation for certain types of credit services agreements (Tex. Fin. Code § 393.202);
5. disclosures required in rental-purchase agreements (Tex. Bus. & Com. Code § 92.051(d));
6. certain language in homestead improvement contracts (Tex. Prop. Code § 41.007);
7. certain language in homestead lien affidavits (Tex. Prop. Code § 53.254);
8. certain notices relating to contracts for deed (Tex. Prop. Code §§ 5.062, 5.066, 5.074);
9. certain agreements between landlords and residential tenants concerning repairs (Tex. Prop. Code § 92.006);
10. certain notices in residential leases concerning the landlord’s obligations to install safety devices (Tex. Prop. Code § 92.164);
11. certain notices in residential leases concerning the disabling of smoke alarms by tenants (Tex. Prop. Code § 92.2611);
12. various provisions in retail installment contracts (Tex. Fin. Code §§ 345.052, 345.081, 345.304);
13. home solicitation transaction cancellation notices (Tex. Bus. & Com. Code §§ 601.052–.053);
15. certain provisions of residential service contracts (Tex. Occ. Code § 1303.254);
16. liability for rollback taxes (Tex. Prop. Code § 5.010(a)); and

§ 2.51 Construction Accounts

Construction accounts are governed by Tex. Prop. Code ch. 162.

§ 2.52 Construction Contracts


§ 2.53 Construction Payment Bond Claims

A surety company that has issued a construction payment bond is subject to requirements governing the claims process. See Tex. Ins. Code §§ 3503.051–.057.

§ 2.54 Consumer Laws

Many of the laws designed to protect consumers apply to real estate transactions, including—

1. the Deceptive Trade Practices–Consumer Protection Act (DTPA), Tex. Bus. & Com. Code §§ 17.41–.63 (including special provisions in section 17.42 limiting waivers of DTPA rights);
2. the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–2312 (applies to consumer products used for personal, family, or household purposes, including property intended to be attached to or installed in real property);
3. the Home Solicitation Transactions Act, Tex. Bus. & Com. Code ch. 601 (gives consumers the right to cancel a transaction involving real property);

4. the Real Estate License Act, Tex. Occ. Code ch. 1102 (requires the licensing of persons who inspect real property);

5. the Residential Service Company Act, Tex. Occ. Code ch. 1303 (regulates persons who sell residential service or maintenance contracts);

6. the Manufactured Housing Standards Act, Tex. Occ. Code ch. 1201 (requires the licensing of persons who install manufactured housing), Tex. Occ. Code ch. 1202 (regulates “industrialized housing” or modular homes);

7. the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, and its accompanying Regulation Z, 12 C.F.R. pt. 226 (requires certain consumer disclosures by creditors of the costs and terms of consumer credit and provides certain remedies for consumers, including the right of rescission of certain credit transactions secured by a lien on the consumer’s principal dwelling); see also the section titled “Truth in Lending” below; and

8. the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601–2617, and its accompanying Regulation X, 24 C.F.R. pt. 3500 (requires certain consumer disclosures for mortgage loan transactions secured by a lien on one-to-four family residential real property that otherwise meet the definition of a “federally related mortgage loan” set out in 24 C.F.R. § 3500.2 and also prohibits unlawful kickbacks, referral fees, and unearned fees in connection with federally related mortgage loans). See also the section titled “Real Estate Settlement Procedures Act (RESPA)” below.

§ 2.55 Contracts for Deed

The requirements for creating an enforceable residential contract for deed, the notice requirements to enforce a default, and numerous requirements imposed on sellers under such a contract are found in subchapter D of chapter 5 of the Texas Property Code. Tex. Prop. Code §§ 5.061–.086. See the section titled “Deceptive Trade Practices–Consumer Protection Act (DTPA)” below regarding DTPA actions for failure to deliver required disclosures.

Subchapter D applies to all contracts for deed statewide if the property is used or to be used as the buyer’s residence or as the residence of a person related to the buyer within the second degree by consanguinity or affinity. A residential lease with option to purchase the leased property is deemed a contract for deed with respect to certain of the provisions of subchapter D, although lease/purchase options of less than three years are subject to fewer provisions of subchapter D. Tex. Prop. Code § 5.062(a), (f).


The attorney who prepares the contract for deed, if deemed the person responsible for closing, may be required to satisfy Internal Revenue Service Form 1099-S reporting requirements. 26 U.S.C. § 6045(e). See chapter 4 in this manual for additional considerations in reviewing a contract for deed transaction. The practitioner should also carefully consider the applicability to the contract for deed transaction of the many disclosures required elsewhere in chapter 5 of the Property Code. See exhibit D to form 4-1 in this manual.

If chapter 601 of the Texas Business and Commerce Code (relating to the right of consumers to cancel certain transactions) applies to the contract for deed transaction, the seller must provide the buyer with the notice of right of rescission prescribed in
section 601.052(a) and (b) and the form of cancellation notice prescribed in section 601.053(c), and the buyer may cancel the contract not later than midnight of the third business day after the buyer signs the contract for deed. Tex. Bus. & Com. Code §§ 601.051, 601.052(a), (b), 601.053. See forms 4-4 and 4-15. The attorney who prepares the contract for deed should also determine whether the contract for deed transaction is subject to the federal Truth in Lending Act and its accompanying Regulation Z. See chapter 12 in this manual.

Contracts for deed transferring an interest in real property to or from an individual are required to include the confidentiality notice set out in Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 2.56 Copyrights

The U.S. copyright laws extend to visual arts and architectural works and prohibit modification or destruction of visual arts in certain circumstances. See 17 U.S.C. §§ 102, 106A. Owners of buildings may alter or destroy a building embodying an architectural work. 17 U.S.C. § 120(b).

§ 2.57 Corporations


Unless otherwise provided in the governing documents, the governing entity may authorize by resolution a disposition of property without the approval of the members or owners of the entity. Tex. Bus. Orgs. Code § 10.252. If a corporation conveys land under authority of its governing documents, the deed must be signed by an officer or attorney-in-fact. Tex. Bus. Orgs. Code § 10.253. A corporation may convey or mortgage its property for any lawful purpose, except if prohibited by law or by the corporation’s charter or bylaws. No corporate seal is required for a valid deed. Tex. Bus. Orgs. Code § 10.251.

Condominium owners associations for condominium regimes formed after December 31, 1993—and those formed before January 1, 1994, that opt to be governed exclusively by Texas Property Code chapter 82 under section 82.002(a)(1)—must be formed as for-profit or nonprofit corporations. Tex. Prop. Code § 82.101.

See also the sections titled “Business Organizations Code” above and “Foreign Entities,” “Limited Liability Companies,” “Nonprofit Corporations,” and “Partnerships” below.

§ 2.58 Covenants Not to Compete

Covenants not to compete are governed by the provisions of Tex. Bus. & Com. Code § 15.50.

§ 2.59 Criminal Record Checks of Employees

Criminal record checks of employees of residential dwelling projects are permitted under the provisions of Tex. Health & Safety Code ch. 765.
§ 2.60 Deceptive Trade Practices–Consumer Protection Act (DTPA)


§ 2.61 Deeds

The legal requirements for deeds are addressed in Tex. Prop. Code §§ 5.021–.023. See also chapter 5 in this manual.

Deeds transferring an interest in real property to or from an individual are required to include the confidentiality notice set out in Tex. Prop. Code § 11.008. See section 3.16 in this manual.

Instruments that correct a conveyance of real property should comply with Tex. Prop. Code §§ 5.027–.030. Whether the change to the instrument is material or nonmaterial will dictate the process needed to make the correction. See section 5.8 in this manual.

The Texas Real Property Transfer on Death Act authorizes an individual to execute and record a transfer on death deed to make a revocable transfer of the transferor’s interest in real property to one or more designated beneficiaries, including alternate beneficiaries, effective at the transferor’s death. See Tex. Est. Code ch. 114. See section 5.12 in this manual.

§ 2.62 Deeds of Trust

Foreclosure of liens is addressed in Tex. Prop. Code ch. 51. See also the separate discussion under “Foreclosure” below.

Deeds of trust transferring an interest in real property to or from an individual are required to include the confidentiality notice set out in Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 2.63 Deficiency Litigation after Foreclosure

A suit for a deficiency following a foreclosure sale conducted under Tex. Prop. Code § 51.002 must be brought within two years and is governed by Tex. Prop. Code §§ 51.003–.005. See also the section titled “Foreclosure” below.

§ 2.64 Disclaimer of Interest in Decedent’s Estate

§ 2.65 Disclosure of Interested Parties When Contracting with Governmental Entities

A governmental entity or state agency may not enter into a contract with a business entity if the contract requires a vote by the governing body of the governmental entity or state agency or the contract has a value of at least $1 million unless the business entity submits a disclosure of interested parties to the governmental entity or state agency at the time the business entity submits the signed contract to the governmental entity or state agency. Tex. Gov. Code § 2252.908. The disclosure of interested parties must be submitted on an electronic form prescribed by the Texas Ethics Commission. See 1 Tex. Admin. Code ch. 46. The required Form 1295 and filing instructions can be found on the Texas Ethics Commission website at https://www.ethics.state.tx.us/whatsnew/FAQ_Form1295.html. See also the section titled “Sale of Trust Property to Governmental Entities” below.

§ 2.66 Disclosures and Notices

Numerous statutory disclosure and notice requirements affect real estate transactions.

1. A seller of residential real property comprising not more than one dwelling unit must give the purchaser of the property a signed, written notice, substantially in statutory form, concerning the condition of the property, including known defects or malfunctions of building structural components and building materials; working condition of various systems, appliances, smoke detectors, and other enumerated items; and the existence of various undesirable conditions such as termite damage, lead-based paint, radon gas, and a single blockable main drain in a swimming pool or hot tub. The notice must be delivered on or before the effective date of any executory sales contract binding the purchaser and, if the seller fails to provide the notice by the effective date, the purchaser may rescind the contract for any reason within seven days after receiving the notice. Tex. Prop. Code § 5.008. See form 4-21 in this manual.

2. Real estate brokers have a number of disclosure obligations, including the nature of their principal-agent relationship, as well as any applicable intermediary status, to prospective buyers, sellers, landlords, and tenants; knowledge of latent defects; the advisability of obtaining a title policy; as well as nondisclosure requirements. Tex. Occ. Code §§ 1101.555–.559, 1101.651–.652; 22 Tex. Admin. Code chs. 535, 537.

3. A seller is obligated to make certain disclosures if the property is located in a water or utility district. Tex. Water Code §§ 49.452, 54.016(h)(4)(A). See form 4-18.


5. The presence of underground storage tanks must be disclosed to purchasers in accordance with 30 Tex. Admin. Code § 334.9. See form 4-10.

6. There are disclosure requirements in the Texas Timeshare Act, Tex. Prop. Code §§ 221.031–.036.


9. Disclosures concerning home insulation are required by 16 C.F.R. § 460.16. See form 4-6.
10. Disclosures concerning asbestos are required by 29 C.F.R. §§ 1910.1001 and 1926.1101. See the appropriate forms in chapters 25 and 26. See also form 4-8.

11. A seller of vacant land must include in the contract a certain bold-faced notice about potential rollback taxes. A number of exemptions apply, including an exemption if a separate paragraph in the contract addresses rollback tax liability. Tex. Prop. Code § 5.010. See form 4-14.

12. A seller of unimproved residential property must provide the buyer with a written disclosure of certain subsurface conditions, such as pipelines, in certain circumstances. This notice is not required if the seller is obligated under the contract to furnish a title insurance commitment and if the buyer is entitled to terminate if objections to the commitment are not cured before closing. Tex. Prop. Code § 5.013.

13. A seller of a single-family residence must give notice to a prospective buyer if the residence is subject to membership in a property owners association, restrictive covenants have been recorded, and an assessment lien may be foreclosed for failure to pay assessments. Tex. Prop. Code § 5.012. See form 23-9.

14. A seller must disclose that the land may be included in the extraterritorial jurisdiction of a municipality and thereby subject to annexation. Tex. Prop. Code § 5.011. See form 4-15.

15. Contractors are required to give the owner a disclosure statement before the owner executes a residential construction contract. Tex. Prop. Code § 53.255. See form 18-1.

16. Residential mortgage loan originators have certain disclosure obligations to residential mortgage loan applicants, including the nature of the relationship between the residential mortgage loan originator and the applicant, the duties the residential mortgage loan originator has to the applicant, and how the residential mortgage loan originator will be compensated, as well as the terms under which an interest rate lock-in fee will be refundable. Tex. Fin. Code §§ 156.004, 156.304. The Savings and Mortgage Lending Commissioner by rule has promulgated a standard form entitled “Residential Mortgage Loan Originator Discloser.” 7 Tex. Admin. Code § 80.9.

17. A seller of unimproved real property located outside a municipality’s jurisdiction must provide a statutory notice to a purchaser that the extension of water or sewer services may require additional expense and delay to obtain. Tex. Water Code § 13.257. See form 4-16.

18. Sellers of real property within an agricultural development district must give the purchaser written notice to that effect. Tex. Agric. Code § 60.063. The district must file a copy of the form for notice required by section 60.063 with the county clerk in each county in which all or part of the district is located. Tex. Agric. Code § 60.0631. The statute charges each agricultural district with the responsibility to prepare its own form.

19. Disclosures concerning home loans and high-cost home loans (loans with an interest rate of 12 percent or greater per year), including disclosures regarding individual or group credit life or disability insurance, are required by chapter 343 of the Finance Code. Tex. Fin. Code ch. 343. See also section 10.14 in this manual.

20. Texas Property Code section 11.008 provides that an instrument executed after September 1, 2005, transferring an interest in real property to or from an individual must include a statutorily described notice that appears on the top of the first page of the instrument in twelve-point bold-faced type or twelve-point uppercase letters. Tex. Prop. Code § 11.008. The notice advises natural persons that Social Security numbers or driver’s license numbers may be removed from the document before recording. The statute defines an “instrument” for purposes of this section as “a deed or deed of trust.” See Tex. Prop. Code § 11.008(a). These terms are not defined.
The validity of an instrument as between the parties to the instrument and the notice provided by the instrument is not affected by a party’s failure to include the notice required under section 11.008.

The county clerk may not under any circumstance reject an instrument presented for recording solely because the instrument fails to comply with this section. Tex. Prop. Code § 11.008(e).

21. A seller of residential property that is located in a public improvement district established under chapter 372 of the Local Government Code and that consists of not more than one dwelling unit must give notice to the purchaser that it will be obligated to pay assessments for an improvement project. The notice must be given before the effective date of the executory contract and must be substantially similar to the prescribed notice. If an executory contract is entered into without the notice having been given, the purchaser may, as its exclusive remedy, terminate the contract for any reason no later than the earlier of (1) the seventh day after the date the purchaser receives the notice or (2) the date the transfer occurs as provided by the executory contract. Tex. Prop. Code § 5.014. See form 4-5.

22. If all or part of a subdivision for which a plat is required under chapter 232 of the Local Government Code is located within a future transportation corridor identified in an agreement between the Texas Department of Transportation and a county under section 201.619 of the Transportation Code, each purchase contract or lease between the subdivider and a purchaser or lessee of land in the subdivision must contain a conspicuous statement that the land is located within the area of the alignment of a transportation project as shown in the final environmental decision document that is applicable to the future transportation corridor. Tex. Loc. Gov’t Code § 232.0033. See form 4-19.

23. With a number of exceptions, a seller of property that will be conveyed subject to a lien must make required disclosures to the prospective purchaser at least seven days before the earlier of the effective date of the conveyance or the execution of the contract for the conveyance. The failure to give the notice does not invalidate a conveyance, but the purchaser may pursue other remedies available unless the person required to give notice reasonably believes and takes any necessary action to ensure that each lien for which notice was not provided will be released on or before the thirtieth day after the date on which title to the property is transferred. Among the excepted transactions for which disclosure is not required are those in which the purchaser obtains a title policy and those in which the seller has sold, or the purchaser has purchased, interests in real property four or more times during the preceding twelve months. Tex. Prop. Code § 5.016.

24. A person registered under the Residential Mortgage Loan Servicer Registration Act (Tex. Fin. Code ch. 158) and acting as a servicer of loans secured by a lien on residential real estate located in Texas must provide a statutory notice informing the borrower of each such residential mortgage loan that complaints about servicing of the loan should be sent to the Department of Savings and Mortgage Lending. Tex. Fin. Code § 158.101.

25. A person who sells property for which a certificate of mold remediation has been issued pursuant to section 1958.154 of the Texas Occupations Code must deliver to the purchaser copies of each certificate of mold remediation issued for the property with the preceding five years. Tex. Occ. Code § 1958.154.

26. A seller of commercial or residential property adjoining an impoundment of water, including a reservoir or lake constructed and maintained under chapter 11 of the Texas Water Code that has storage capacity of at least 5,000 acre-feet at the impoundment’s normal operating level, must give to the purchaser notice of fluctuations for various reasons, including an entity lawfully exercising its right to the water stored in the impoundment or drought or flood conditions. Tex. Prop. Code § 5.019. See form 4-27.

Other situations may require disclosures. See the sections titled “Ad Valorem Taxes,” “Choice of Law,” “Coastal Properties,” “Condominiums,” “Conspicuous Text,” and “Contracts for Deed” above and “Flood Insurance,” “Foreign Ownership of
Real Property,” “FTC Anti-Holder-in-Due-Course Rule,” “Home Equity Lending,” “Home Improvement Contracts,” “Inter-
state Land Sales Full Disclosure Act,” “Landfills,” “Lead-Based Paint Disclosures,” “Mortgage Loan Originators,” “Securi-
ties Acts,” “Truth in Lending,” and “Utility District Disclosures” below.

§ 2.67 Discrimination

A restriction in a deed or other instrument affecting real property that prohibits the use, sale, lease, or transfer on account of
race, color, religion, or national origin is void and unenforceable. Tex. Prop. Code § 5.026. Municipalities may also adopt fair
housing ordinances, which may have enforcement procedures and remedies that vary from state and federal law. Tex. Loc.
Gov’t Code § 214.903. The Texas Workforce Commission civil rights division has the authority to hear certain types of dis-
crimination complaints. Tex. Lab. Code ch. 301. See also the sections titled “Americans with Disabilities Act and Related
Statutes” above and “Equal Credit Opportunity” and “Fair Housing” below.

Cities and counties may not prohibit housing discrimination against a person “because the person’s lawful source of income to
pay rent includes funding from a federal housing assistance program,” but ordinances or regulations protecting veterans from
discrimination may not be invalidated by cities or counties. Tex. Loc. Gov’t Code § 250.007.

§ 2.68 Divorce

See the section titled “Family Law” below.

§ 2.69 Dodd-Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, 124 Stat. 1376) is sweeping finan-
cial reform legislation intended in pertinent part to “protect consumers from abusive financial services practices” thought by
Congress to have significantly contributed to the 2007-2009 national financial crisis. The Act, comprising some sixteen titles,
was signed into law on July 21, 2010.

The full text of the Act may be accessed at https://legcounsel.house.gov/Comps/Dodd-Frank%20Wall%20Street%20
Reform%20and%20Consumer%20Protection%20Act.pdf. Titles IX, X, and XIV of the Act are particularly pertinent to
residential real estate finance transactions.

Title IX, subtitle D, requires any “securitizer” of an asset-backed security, such as a mortgage-backed security or a collateral-
ized mortgage obligation, to retain an economic interest in a portion of the credit risk that the securitizer sells or transfers to a
third party through the issuance of an asset-backed security, unless all the assets that collateralize the asset-backed security are
“qualified residential mortgages” that meet certain definitional standards. Title IX becomes effective with respect to securitiz-
ers and originators of asset-backed securities backed by residential mortgages one year after the date on which final regula-
tions under the title are adopted and published in the Federal Register.

Title X, which may be cited by its short title as the Consumer Financial Protection Act of 2010, establishes within the Federal
Reserve System an independent bureau to be known as the Bureau of Consumer Financial Protection (the “Bureau”), which
shall regulate the offering and provision of all consumer financial products and services under federal consumer financial
laws. The Bureau is empowered and has the exclusive authority to implement, interpret, and enforce the Real Estate Settle-
ment Procedures Act, Truth in Lending Act, Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Debt Collection
Practices Act, Home Mortgage Disclosure Act, S.A.F.E. Mortgage Licensing Act, and other enumerated federal statutes that currently regulate some aspect of consumer loan origination and servicing activities. The director of the Bureau, appointed by the President with the advice and consent of the Senate, has the authority to prescribe rules and issue orders and guidance as may be “necessary or appropriate” to enable the Bureau to administer and “carry out the purposes and objectives” of the federal consumer financial laws and to “prevent evasions” of such laws. The Bureau has unprecedented enforcement powers to grant relief for any violation of consumer financial law, including imposing civil money penalties for any violation of a law, rule, or final order imposed on a covered person in amounts ranging from $5,000 to $1 million for each day in which such a violation continues. The Bureau assumed all “consumer financial protection functions” formerly delegated to other federal agencies on the designated transfer date of July 21, 2011.

Title XIV, which may be cited as the Mortgage Reform and Anti-Predatory Lending Act, contains extensive amendments to the Truth in Lending Act, Real Estate Settlement Procedures Act, and the Equal Credit Opportunity Act reforming residential mortgage origination, underwriting, appraisal, and servicing practices. See the discussion in chapter 12 in this manual.

§ 2.70  
Dry Cleaners


§ 2.71  
Due-on-Sale Clauses


§ 2.72  
Durable Powers of Attorney

Durable powers of attorney are governed by Tex. Est. Code chs. 751–752. Unless a time limitation is specifically stated in the instrument creating it, the passage of time does not cause a durable power of attorney to lapse. Tex. Est. Code § 751.004. The durable power of attorney between spouses terminates on divorce or annulment except in certain situations. Tex. Est. Code § 751.053. A court’s appointment of a permanent guardian for the principal’s estate terminates the durable power of attorney on the guardian’s qualification. A court may suspend the powers of an agent under a durable power of attorney during the term of a temporary guardianship. Tex. Est. Code § 751.052.

A durable power of attorney must be in writing, be signed by a principal who is an adult, be acknowledged, and contain the following phrase or words of similar import: “This power of attorney is not affected by subsequent disability or incapacity of the principal.” Tex. Est. Code § 751.002. The attorney-in-fact or agent has a fiduciary duty to the principal to timely inform the principal of all actions taken, account for his actions, maintain appropriate records, and provide an accounting on demand by the principal. Tex. Est. Code § 751.101.

Durable powers of attorney used in real estate transactions must be recorded in the county or counties in which the real property is located not later than thirty days after the instrument signed by the agent is recorded. See Tex. Est. Code § 751.151. Several other important requirements for such powers of attorney are addressed in the statute. Tex. Est. Code § 751.051 sets forth a statutory form of durable power of attorney. When using the statutory form, the principal will need to initial each spe-
cific power to be granted or initial the line to grant all powers. A form of durable power of attorney for use in real estate trans-
actions incorporating the statutory requirements is included in chapter 26 in this manual.

§ 2.73  Easements, Pipeline

Unless expressly provided otherwise, pipeline easements created by grant or power of eminent domain for the benefit of a sin-
gle common carrier pipeline for which the power of eminent domain is available are presumed to create an easement in favor
of the common carrier pipeline that extends a width of fifty feet as to each pipeline laid under the easement before January 1,
way for others must be registered, licensed, or exempt from licensing by the Real Estate License Act. A notice promulgated by
the Texas Real Estate Commission must be delivered to the grantor of the easement before the easement is granted. Tex. Occ.
Code § 1101.653.

§ 2.74  Economically Distressed Counties

See the section titled “Colonias” above.

§ 2.75  Economic Development

The Texas Economic Development Act provides certain ad valorem tax benefits to encourage economic development. Tex.
Tax Code ch. 313.

§ 2.76  Elderly Housing

See the section titled “Fair Housing” below.

§ 2.77  Electronic Commerce

Texas has adopted the Uniform Electronic Transactions Act, which is intended to facilitate electronic commerce. Tex. Bus. &
Com. Code ch. 322. The Uniform Electronic Transactions Act does not apply to transactions that are otherwise covered by the
laws governing the execution of wills and testamentary trusts or by the Uniform Commercial Code. Tex. Bus. & Com. Code
Code ch. 4A.

§ 2.78  Electronic Filing of Documents

Statutes authorizing and otherwise relating to the electronic filing of documents in the public records include Tex. Loc. Gov’t
Code § 191.009 and ch. 195. Chapter 9 of the Texas Business and Commerce Code, while no longer explicitly authorizing
electronic filing, is clearly written to accommodate it. For example, in most places the revision refers to “authenticating”
rather than “signing” a record. The revised Code also provides that “communication of a record to a filing office . . . consti-
Texas has also adopted the Uniform Real Property Electronic Recording Act. Tex. Prop. Code §§ 15.001–.008. Under the Act, a “document” includes information stored in an electronic or other medium that is retrievable in perceivable form. Tex. Prop. Code § 15.002(1). A document received by a county clerk in electronic form is eligible to be recorded in the real property records. If another law requires as a condition of recording that a document be on paper or other tangible medium, the requirement is satisfied by an electronic document that complies with the Act. Tex. Prop. Code § 15.004. An electronic signature is an electronic sound, symbol, or process attached to or logically associated with a document executed or adopted by a person with the intent to sign the document. Tex. Prop. Code § 15.002(4). An acknowledgment may be similarly satisfied by an electronic signature. Tex. Prop. Code § 15.004. Licensed attorneys, lending institutions, title insurance companies, and state agencies may record electronically. County clerks are authorized (but not required) to implement the Act. Tex. Prop. Code § 15.005. The Act also amends provisions of the Local Government Code pertaining to electronic recording and directs the Texas State Library and Archives Commission to adopt rules to promote uniformity within the state and among other states that adopt similar laws. Tex. Prop. Code § 15.006.

The Electronic Government Task Force has launched an Internet portal to provide access to electronic government services in Texas. It is found at https://www.texas.gov; it provides forms and applications from various agencies and access to filing and payment of sales tax. Authority for oversight by the TexasOnline Authority is provided in Tex. Gov’t Code ch. 2054.

§ 2.79 Eminent Domain

See the section titled “Condemnation and Eminent Domain” above.

§ 2.80 Endangered Species Act

The Endangered Species Act can be found at 16 U.S.C. §§ 1531–1544. The provisions of the statute may limit the development of real property in areas that include the habitats of endangered species.

§ 2.81 Engineer’s Liens against Real Estate

An engineer’s lien against real estate is addressed in Tex. Prop. Code § 53.021(c).

§ 2.82 Environmental Laws

Numerous federal and state environmental statutes affect real estate transactions. Among the most important federal laws are—

1. the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601–9675, relating primarily to liability for cleanup of inactive hazardous waste sites (see also the sections titled “Hazardous Waste Liens” and “Landowner Liability” below);

2. the Resource Conservation and Recovery Act, as amended by the Hazardous and Solid Waste Amendments of 1984 and the Land Disposal Program Flexibility Act of 1996, 42 U.S.C. §§ 6901–6992k, relating primarily to active waste treatment, storage, or disposal facilities, including underground storage tanks (see also the section titled “Underground and Aboveground Storage Tanks” below);
3. the Federal Water Pollution Control Act, also known as the Clean Water Act, 33 U.S.C. §§ 1251–1387, governing, among other things, the regulation of wetlands, stormwater, and point-source water pollution (see also the sections titled “Stormwater Permits” and “Wetlands” below);

4. the federal Clean Air Act, 42 U.S.C. §§ 7401–7671q, requiring permits for many types of operations, regulating certain asbestos materials and emissions, and prohibiting certain types of chemicals, such as chlorofluorocarbons (CFCs), that deplete the ozone layer. The regulations dealing with CFCs are in 40 C.F.R. pt. 82. Related regulations include the asbestos-based National Emission Standards for Hazardous Air Pollutants at 40 C.F.R. pt. 61;

5. the Endangered Species Act, 16 U.S.C. §§ 1531–1544;


7. asbestos regulations under the Occupational Safety and Health Act, 29 C.F.R. § 1910.1001 (general industry standard), and 29 C.F.R. § 1926.1101 (construction standard);

8. the Residential Lead-Based Paint Hazard Reduction Act of 1992, also known as Title X of the Housing and Community Development Act (42 U.S.C. §§ 4851–4856) (see the section titled “Lead-Based Paint Disclosures” below);

9. the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j–26; and


Important state environmental statutes and regulations include—

1. the Solid Waste Disposal Act, Tex. Health & Safety Code ch. 361 (concerns the disposal of hazardous and certain nonhazardous wastes), including the statute regulating developments over abandoned landfills, Tex. Health & Safety Code §§ 361.531–.539 (see the separate discussion of this statute under the section titled “Landfills” below), and the voluntary cleanup program (also known as a Brownfields statute), Tex. Health & Safety Code §§ 361.601–.613 (see the section titled “Voluntary Cleanup Program” below);

2. the Texas Clean Air Act, Tex. Health & Safety Code ch. 382, requiring air permits for many types of industrial and construction operations and regulating air emissions and various other hazardous substances and activities;


4. the Texas Underground and Above-ground Storage Act, as amended, Tex. Water Code §§ 26.341–.367 (see also the section titled “Underground and Aboveground Storage Tanks” below);


7. the Texas Asbestos Health Protection Act, Tex. Occ. Code ch. 1954;

8. the Texas Railroad Commission’s Operator Cleanup Program and regulations at 16 Tex. Admin. Code § 3.91; and

9. Tex. Agric. Code ch. 63, providing enhanced safety oversight and inspections of ammonium nitrate storage facilities by permitting entry by local or state fire authorities and providing enhanced storage requirements.
In addition, there are numerous environmental provisions that bear on the ownership, operation, and development of real estate properties in the Texas Health and Safety Code, the Texas Natural Resources Code, the Texas Parks and Wildlife Code, and the Texas Water Code.

§ 2.83 Equal Credit Opportunity

The Equal Credit Opportunity Act, implemented by Regulation B, 12 C.F.R. § 202.16, provides a cause of action against a creditor who discriminates against an applicant for credit (1) on the basis of the applicant’s race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to enter into a binding contract), (2) because all or part of the applicant’s income derives from any public assistance program, or (3) because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. See 15 U.S.C. §§ 1691–1691f. Regulation B also establishes rules for a creditor’s collection, evaluation, and use of information in connection with a credit application and requires a creditor to notify applicants of action taken on their applications concerning the creditor’s approval of, counter-offer to, or denial of credit generally within thirty days after receiving a completed application. Proper use of sample notification forms set out in Appendix C of Regulation B constitutes full compliance with various requirements of the Act. Effective July 21, 2011, model forms C1 through C5 were revised to include a notice that a credit score was used to make an adverse credit decision and to include certain information about credit scores to comply with amended content requirements of the Fair Credit Reporting Act. Notifications must be in writing and contain a statement of specific reasons for any adverse action taken on the credit application and a statutory notice set forth in section 701(a) of the Act. Creditors furthermore must provide consumers with a copy of any property appraisal report used to evaluate an application for credit that is to be secured by a lien on a dwelling. See 12 C.F.R. § 202.14.

§ 2.84 Equal Housing Opportunity

See the sections titled “Affordable Housing Investments” above and “Fair Housing” below.

§ 2.85 Escheat

Escheat of real and personal property to the state is governed by Tex. Prop. Code ch. 71. See also the section titled “Abandonment” above.

§ 2.86 Estate Tax Liens

An unpaid federal estate tax becomes a lien on the gross estate of the decedent. 26 U.S.C. § 6324(a)(1).

§ 2.87 Eviction

Eviction actions (also known as forcible-entry-and-detainer actions) are governed by Tex. Prop. Code ch. 24 and Tex. R. Civ. P. 500–507, 510.1–.13. Substantial changes were made to the Texas Rules of Civil Procedure in 2013, including changing references in the rules from forcible entry and detainer to eviction.

§ 2.88 Excavators

See the section titled “Underground Facility Damage Prevention and Safety Act” below.
§ 2.89 Exempt Property and Liens

See the section titled “Bankruptcy” above.

§ 2.90 Extraterritorial Jurisdiction

The extraterritorial jurisdiction of municipalities is governed by Tex. Loc. Gov’t Code ch. 42. See also the section titled “Disclosures and Notices” above.

§ 2.91 Failed Depository Institutions

If a bank, savings and loan association, or other depository institution is placed in receivership or conservatorship, one may record at any time an affidavit or memorandum of a sale, transfer, purchase, or acquisition agreement between the receiver or conservator and another depository institution. If the transfer involves an interest in land or in a mortgage vested according to the real property records in the failed depository institution, a recorded affidavit or memorandum is constructive notice of the transfer. Tex. Prop. Code § 12.018.

§ 2.92 Fair Credit Reporting Act

The federal Fair Credit Reporting Act has been amended to require any financial institution that (1) extends credit to an individual and (2) regularly and in the ordinary course of business reports negative information to a credit bureau to give a clear and conspicuous written notice to its individual customers about reporting negative information.

The term financial institution is broadly defined to include “any institution the business of which is engaging in financial activities as described in section 4(k)” of the Bank Holding Company Act of 1956, whether affiliated with a bank or not. 15 U.S.C. § 6809(3)(a). Thus the term financial institution includes not only institutions regulated by federal banking agencies but also other entities, such as merchant creditors and debt collectors, that extend credit to individuals and report negative information. See 16 C.F.R. § 313.3(k).

A financial institution must give the required notice to an individual customer before, or no later than thirty days after, reporting the negative information to a credit bureau. After giving the notice, the institution may report additional negative information to a credit bureau for the same transaction, extension of credit, account, or customer without giving additional notice. If a financial institution gives a customer a notice before reporting negative information, the institution is not required to actually report negative information about the customer to a credit bureau. A financial institution generally may give the notice about reporting negative information on or with any notice of default, billing statement, or other material provided to an individual customer as long as the notice is clear and conspicuous. The notice may not be included in the initial disclosures required to be given by section 127(a) of the federal Truth in Lending Act (15 U.S.C. § 1637(a)).

A financial institution complies with the notice requirement if the institution uses a model notice promulgated by the Board of Governors of the Federal Reserve System. The format of a model notice may be rearranged. For model notices, see clauses 14-7-2 and 14-7-3 in this manual.

Creditors also are required to give a “risk-based pricing” notice when, based on the consumer’s credit report, the creditor provides credit to the consumer on materially less favorable terms than terms available to a substantial proportion of consumers through that creditor. Creditors who conduct periodic reviews of existing accounts and increase the annual percentage rate of
interest charged consumers based on findings of a deteriorated consumer credit report must also provide the consumer with an account review risk-based pricing notice. Effective July 21, 2011, the notices must contain the credit score of the consumer and certain information about credit scores if a credit score of the consumer is used in setting the material terms of the credit. Model forms in appendix H to 12 C.F.R. pt. 222 may be used for compliance with risk-based pricing and credit score disclosure requirements. Consumers who receive a risk-based pricing notice must be informed that they are entitled to a free consumer credit report to confirm the report’s accuracy or to dispute the accuracy or completeness of any information in the report. As an alternative to providing a risk-based pricing notice, creditors instead may provide all credit applicants with a free credit score and certain required information about credit scores.

§ 2.93 Fair Debt Collection Practices

The federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692–1692p) and the Texas Debt Collection Practices Act (Tex. Fin. Code §§ 392.001–.404) regulate efforts to collect debts from consumers. Each act requires collection notices to contain information about the debt and how to dispute it. Attorneys are subject to most provisions of each act. However, an attorney collecting a debt on behalf of a client is not considered a “third-party debt collector” under the Texas Debt Collection Practices Act unless the attorney employs nonattorneys who regularly solicit debts for collection or make frequent contact with debtors to collect or adjust debts. Tex. Fin. Code § 392.001(7). Each act also prohibits types of communications that might be considered harassment. Creditors and debt collectors usually have the right to collect on a debt from the assets of a decedent’s estate but, effective August 29, 2011, are prohibited from contacting relatives of a deceased debtor, other than a spouse or legal representative of the estate, who may lack either the authority to pay the debt from the decedent’s estate or the legal obligation to pay the debt. See 76 Fed. Reg. 44,915 (July 27, 2011). Trustees and substitute trustees are not considered debt collectors. Tex. Prop. Code § 51.0075(b).

§ 2.94 Fair Housing

The federal Fair Housing Act (42 U.S.C. §§ 3601–3631) and the Texas Fair Housing Act (Tex. Prop. Code §§ 301.001–.171) forbid (1) discrimination in the sale, rental, or financing of housing on the basis of race, color, religion, national origin, sex, handicap, or familial status; (2) the refusal to permit modifications of existing premises at the expense of the handicapped person or reasonable accommodations in rules, policies, practices, or services, if necessary to afford handicapped persons equal opportunity for, or full enjoyment of, the use of the premises; and (3) the failure to make special accommodations for handicapped persons in certain multifamily dwellings designed and constructed for first occupancy after March 13, 1991. Regulations setting out the particular handicapped access requirements for new multifamily housing structures can be found at 24 C.F.R. § 100.205. Municipalities may also adopt fair housing ordinances, which may have enforcement procedures and remedies that vary from state and federal law. Tex. Loc. Gov’t Code § 214.903.

The Texas Fair Housing Act and the federal Fair Housing Act both prohibit housing that is limited specifically to the elderly and that excludes families and young children, unless certain minimum design and eligibility requirements are met. The state requirements can be found in 40 Tex. Admin. Code §§ 819.121–.135. The federal requirements can be found at 24 C.F.R. §§ 100.300–.308 and 42 U.S.C. § 3607(b)(2).

§ 2.95 Family Law

The Texas Family Code has several provisions that relate to real property transfers, including enforcement of a division of property (Tex. Fam. Code §§ 9.006–.014); right to future property (Tex. Fam. Code § 9.011); division of property following a
decree of divorce (Tex. Fam. Code §§ 9.201–.205); the Uniform Premarital Agreement Act (Tex. Fam. Code §§ 4.001–.010); partition or exchange of community property (Tex. Fam. Code §§ 4.101–.106); rules of marital property liability (Tex. Fam. Code §§ 3.201–.203); homestead rights (Tex. Fam. Code §§ 5.001–.108); child support liens (Tex. Fam. Code §§ 157.311–.331); and prohibition by a temporary restraining order of the transfer, assignment, mortgage, encumbrance, or alienation of any real property of the parties to a dissolution of marriage without the prior authorization of the court (Tex. Fam. Code § 6.501(a)). The Texas Constitution also addresses the issue of separate and community property between spouses. Tex. Const. art. XVI, § 15.

§ 2.96 Federal Lien Registration Act

Texas has adopted the Uniform Federal Lien Registration Act, Tex. Prop. Code §§ 14.001–.007, which governs the procedures for filing notices of federal liens, including tax liens, against real property. See also the section titled “Federal Tax Liens” below.

§ 2.97 Federal Tax Liens

If notice of a junior federal tax lien has been filed at least thirty days before a scheduled foreclosure sale, written notice of the sale under a deed of trust, forfeiture under a contract for deed, or receipt of a deed in lieu of foreclosure must be given, by registered or certified mail or by personal service, to the Internal Revenue Service at least twenty-five days before the transfer. Without this notice, the transfer will be made subject to the federal tax lien. If proper notice is given, the United States is limited to a right to redeem the property within 120 days after the date of sale. See 26 U.S.C. § 7425(d)(1); 26 C.F.R. §§ 301.7425–1 to –4. See the form of notice to the IRS of nonjudicial sale in chapter 14 in this manual.

§ 2.98 Fences and Gates

The Texas Agriculture Code sets out certain requirements for cleared and cultivated lands, including the maintenance of fences of adequate substance and size, the minimum interspersing and sizes of gates located in such fence lines, and the removal of boundary line fences or damages to them. Tex. Agric. Code ch. 143.

The Texas Transportation Code regulates fence setback, height, and visibility requirements for fences located on land adjacent to a road or highway in the state highway system and in certain municipalities. Tex. Transp. Code § 250.001.

The Texas Local Government Code requires emergency gate access in multiunit housing complexes located outside municipal boundaries. Tex. Loc. Gov’t Code §§ 352.1145–.115. A county may also require a multiunit housing project within its jurisdiction to have easily identifiable addresses on each building. Tex. Loc. Gov’t Code § 352.116.

§ 2.99 Financing Statement, Fraudulent Filing

The circumstances under which a party is considered to have fraudulently filed a financing statement and the penalties for doing so are addressed in Tex. Bus. & Com. Code § 9.5185. See also the section titled “Fraudulent Filings” below.

Certain financing statements filed by an inmate or inmate’s representative are presumptively fraudulent. For restrictions on filing financing statements by such parties, refer to Tex. Civ. Prac. & Rem. Code §§ 12.001–.007 and Tex. Gov’t Code §§ 51.901, 405.021.
§ 2.100 Fixtures

A record of a mortgage or other interest in real property is effective as a financing statement against fixtures if the requirements of Tex. Bus. & Com. Code § 9.502(c) are met. The priority of fixture filings is addressed in Tex. Bus. & Com. Code § 9.334. There is also an interaction between personal property leases and fixtures that should be noted. See Tex. Bus. & Com. Code § 2A.309. Mechanic’s and materialman’s liens on removable improvements, including fixtures, take priority over a deed-of-trust lien even if the deed of trust was recorded before the inception of such liens. See Tex. Prop. Code § 53.123; see also First National Bank v. Whirlpool Corp., 517 S.W.2d 262, 269 (Tex. 1974).

§ 2.101 Flood Insurance

The National Flood Insurance Act of 1968, the Flood Disaster Protection Act of 1973, and the National Flood Insurance Reform Act of 1994, 42 U.S.C. §§ 4001–4129, provide flood, mudslide, and flood-related erosion insurance protection to property owners. In specified flood-prone areas, local governments are required to enforce special land use and building restrictions to minimize flood damage. If a loan secured by improved real estate in such an area is made, increased, extended, or renewed by a federally insured or federally regulated lender, the buyer must be notified in writing of the flood hazards a reasonable time before closing. 42 U.S.C. § 4104a. Regulations implementing the flood insurance program are found at 44 C.F.R. pts. 59–78. See also Tex. Loc. Gov’t Code § 561.001 (county’s power affecting flood control); Tex. Loc. Gov’t Code § 240.901 (participation in federal flood insurance policy); Tex. Water Code ch. 16, subch. I (Flood Control and Insurance Act).

§ 2.102 Forced Sale of Co-Owner’s Interest

The forced sale of a co-owner’s interest in real property for reimbursement of property taxes is subject to the provisions of Tex. Prop. Code ch. 29.

§ 2.103 Forcible Entry and Detainer

See the section titled “Eviction” above.

§ 2.104 Foreclosure

Nonjudicial foreclosure sales of real property are governed by Tex. Prop. Code §§ 51.001-.002, 51.0021, 51.0025, 51.0075, 51.009. If a security agreement covers both real and personal property, the personal property may be foreclosed under the Uniform Commercial Code, or both the real and personal property may be foreclosed in accordance with the procedures applicable to the real property. Tex. Bus. & Com. Code § 9.604(a). Certain redemption rights apply to the foreclosure of a condominium unit for failure to pay assessments (see Tex. Prop. Code § 82.113(g)), to foreclosures by a property owners association (Tex. Prop. Code ch. 209), to tax foreclosures (Tex. Tax Code §§ 32.06, 34.21), and to foreclosures of property subject to a federal tax lien (26 U.S.C. § 7425(d)). See the section titled “Federal Tax Liens” above.

Deficiency litigation brought after a nonjudicial foreclosure sale must be filed within two years and is governed by the provisions of Tex. Prop. Code § 51.003. Deficiency litigation brought after a judicial foreclosure sale must be filed within ninety days and is governed by the provisions of Tex. Prop. Code § 51.004. A guarantor may institute litigation to contest the deficiency amount remaining after a judicial or nonjudicial foreclosure sale within ninety days after the later of the date of the

A deed-of-trust foreclosure may also be permitted under limited circumstances after a deed in lieu of foreclosure has been accepted by the lienholder. Tex. Prop. Code § 51.006.

Litigation against the trustee named in a deed of trust, contract lien, or security instrument is subject to the procedures and defenses in Tex. Prop. Code § 51.007.


A foreclosure may be subject to the preference provisions of federal bankruptcy law. See 11 U.S.C. § 547(b).

See also the sections titled “Child Support Liens,” “Coastal Properties,” “Deficiency Litigation after Foreclosure,” “Federal Lien Registration Act,” and “Federal Tax Liens” above and “Hazardous Waste Liens” and “IRS Information Return (Foreclosures)” below.

§ 2.105 Foreclosure Limitations Concerning FDIC Interests

If the Federal Deposit Insurance Corporation (FDIC) has a property interest, including a security interest, lien, or mortgage interest, in property that would be extinguished through foreclosure, condemnation, partition, or suit to quiet title, foreclosure must be by judicial sale if the United States is to be a named party or, if the sale is under a junior lien, the government’s consent is required to eliminate that interest, with the government having a one-year right of redemption for certain liens eliminated by foreclosure of a superior lien. See 12 U.S.C. § 1825(b)(2); 28 U.S.C. § 2410(c). The holder of a superior lien may make a written request to have a junior lien, other than a tax lien, in favor of the United States extinguished if it appears that the sale proceeds will be insufficient to satisfy the government’s lien or that the lien has been satisfied by lapse of time or has otherwise become unenforceable. 28 U.S.C. § 2410(e).

§ 2.106 Foreign Entities

Foreign entities are governed by the Texas Business Organizations Code.

§ 2.107 Foreign Ownership of Real Property

Numerous federal and state laws affect real estate conveyances involving foreigners. Tex. Prop. Code § 5.005 provides that aliens have the same real and personal property rights as United States citizens. Land owned by nonresident aliens or foreign governments may not be eligible under some circumstances for appraisal as open-space land or qualified timberland. Tex. Tax Code §§ 23.56, 23.77. The International Investment and Trade in Services Survey Act (22 U.S.C. §§ 3101–3108) and the Agricultural Foreign Investment Disclosure Act of 1978 (7 U.S.C. §§ 3501–3508) also affect these types of transactions. Statutes requiring financial institutions to keep records and reports on monetary transactions are at 31 U.S.C. §§ 5311–5332. Internal Revenue Service requirements for submitting returns, as applied to foreigners with “direct investments” in real property interests in the United States, are at 26 U.S.C. § 6039C. Anyone purchasing realty in the United States from a foreign
individual or entity must, with few exceptions, withhold 10 percent of the sales price and report and pay it over to the IRS within twenty days of the date of transfer. See 26 U.S.C. § 1445; 26 C.F.R. §§ 1.1445–1 to –11T. A form of nonforeign affidavit addressing the requirements of section 1445 is included in chapter 26 of this manual. See also the section titled “North American Free Trade Agreement (NAFTA)” below.

§ 2.108 Forfeiture Laws

Real property may be subject to forfeiture if associated with criminal activities under the Controlled Substances Act. See 21 U.S.C. § 881(7). The Texas Controlled Substances Act (Tex. Health & Safety Code §§ 481.001–.205) and the Code of Criminal Procedure provisions relating to forfeiture of contraband (Tex. Code Crim. Proc. arts. 59.01–.14) may also apply to such cases. Real property is also subject to forfeiture under the Racketeer Influenced and Corrupt Organizations Act. See 18 U.S.C. § 1963(b)(1).

§ 2.109 Franchising


§ 2.110 Fraudulent Filings

A person commits a criminal offense if, with intent to harm or defraud, he holds a purported lien against real or personal property that is fraudulent and fails to release the lien. Tex. Penal Code § 32.49. Knowingly presenting for filing a financing statement that is forged, contains a material false statement, or is groundless is also a criminal offense. Tex. Penal Code § 37.101. Actions on fraudulent liens can be found in Tex. Gov’t Code §§ 51.902, 51.903. Liability and causes of action for fraudulent liens can be found in Tex. Civ. Prac. & Rem. Code ch. 12. Tex. Civ. Prac. & Rem. Code § 12.002(c) provides that mechanic’s lien claimants under chapter 53 of the Texas Property Code are not liable under this section unless they act with intent to defraud.

A person commits a criminal offense if he knowingly or intentionally signs and presents for filing or causes to be presented for filing an assumed name certificate if the document indicates that the person signing the document has the authority to act on behalf of the entity for which the document is presented and the person does not have that authority, if the document contains a materially false statement, or if the document is forged. Tex. Bus. & Com. Code § 71.203. See also the section titled “Assumed Names” above.

Certain filings by inmates and their representatives are presumptively fraudulent. For restrictions on filings by such parties, refer to Tex. Civ. Prac. & Rem. Code §§ 12.001–.007 and Tex. Gov’t Code §§ 51.901, 405.022.

§ 2.111 Fraudulent Representations and Promises

A person who makes a material false representation or false promise in a transaction involving real property is liable to the person defrauded for actual (and perhaps punitive) damages, attorney’s fees, and court and other costs. Tex. Bus. & Com. Code § 27.01. A violation of section 27.01 that relates to the transfer of title to real estate is a false, misleading, or deceptive act or practice as defined by Tex. Bus. & Com. Code § 17.46(b), and any public remedy under Tex. Bus. & Com. Code ch. 17, subch. E, is available for a violation of that section.
§ 2.112 Fraudulent Transfers


§ 2.113 FTC Anti-Holder-in-Due-Course Rule

Certain consumer credit contracts must comply with the notice requirements of 16 C.F.R. pt. 433. A copy of the relevant notice is included in chapter 20 in this manual.

§ 2.114 Future Estates

Future estates are governed by Tex. Prop. Code §§ 5.041–.043.

§ 2.115 Gifts to Minors Act

See the section titled “Uniform Transfers to Minors Act” below.

§ 2.116 Good Faith and Fair Dealing

No statute or common law imposes a duty of good faith and fair dealing in contracts in Texas, English v. Fischer, 660 S.W.2d 521 (Tex. 1983), but contracts governed by the Uniform Commercial Code (UCC) must comply with the good-faith obligation of Tex. Bus. & Com. Code § 1.304. In addition, the obligation of good faith under the UCC cannot be disclaimed by agreement, but contracting parties can define the standards by which the performance of good faith is to be measured, as long as the standards are not manifestly unreasonable. Tex. Bus. & Com. Code § 1.302(b).

§ 2.117 Grantee’s Address

No instrument may be recorded unless it contains the mailing address of each grantee or a penalty is paid. Tex. Prop. Code § 11.003(a). However, the failure to comply with this provision will not invalidate the instrument as between the parties, and acceptance by the clerk creates a presumption that the law was satisfied. Tex. Prop. Code § 11.003(b), (c). See the section titled “Recording” below.

§ 2.118 Group Homes

See the section titled “Community Homes; Group Homes” above.

§ 2.119 Guarantors

A guarantor of a debt has certain rights if a deficiency judgment is obtained after a foreclosure under Tex. Prop. Code § 51.005. Subrogation rights of a surety, including a guarantor, are addressed in Tex. Civ. Prac. & Rem. Code § 43.004.

§ 2.120 Handicapped Parking

See the section titled “Americans with Disabilities Act and Related Statutes” above.
§ 2.121  Hart-Scott-Rodino Antitrust Improvements Act


§ 2.122  Hazardous Waste Liens

A lien is created in favor of the state under Tex. Health & Safety Code § 361.194 on real property that is the subject of hazardous waste cleanup actions by the state. A federal lien also arises under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. See 42 U.S.C. § 9607(l).

§ 2.123  Historic Structures

The Texas Historical Commission regulates the listing and preservation of historic structures in the state under the provisions of Tex. Gov’t Code ch. 442. Counties also have certain rights and responsibilities regarding historic structures, sites, and resources. Tex. Loc. Gov’t Code ch. 318. Liability for adversely affecting historic structures is addressed in Tex. Gov’t Code § 442.016. Many counties and local municipalities also have historic or landmark commissions that regulate historic structures in their jurisdiction.

§ 2.124  Home Equity Lending

The homestead may be used to secure “equity” loans, including equity loans with line of credit terms, reverse mortgages, and the conversion and refinancing of a personal property lien on a manufactured home. Tex. Const. art. XVI, § 50. Section 50(f) permits the refinancing of a home equity loan only with another equity loan or a reverse mortgage. Section 50(a)(6)(F) allows for a home equity line of credit with certain limitations. Equity loans may be made for any purpose and must meet a number of constitutional and statutory requirements. Reverse mortgages must also satisfy the constitutional definition. A lien that does not satisfy a definition under section 50 is not valid against the homestead. Home equity documents for secondary mortgage loans are regulated by the Office of Consumer Credit Commissioner and must be in plain language. Tex. Fin. Code § 341.502. See also the section titled “Loan Documents” below.

For a more extensive discussion of the issues in home equity lending, see chapter 11 in this manual.

§ 2.125  Home Improvement Contracts

There are notice requirements for home improvement contracts on homestead property (Tex. Prop. Code §§ 53.255, 53.256) and for liens claimed under these contracts (Tex. Prop. Code § 53.254). See the sections titled “Mechanic’s Liens” and “Residential Construction Liability” below.

§ 2.126  Home Mortgage Disclosure Act of 1975

Financial institutions that make federally related home mortgage loans must compile and make available information to enable citizens and government agencies to determine whether the institutions are fulfilling their obligations to serve the housing needs of the communities and neighborhoods in which they are located. See 12 U.S.C. §§ 2801–2810; 12 C.F.R. pt. 203.
§ 2.127 Home Solicitations

The Texas Home Solicitations Transaction Act may apply if the consumer’s obligation is entered into at a location other than the contractor’s place of business. If the Act applies, certain notices are required. Tex. Bus. & Com. Code ch. 601. See form 4-4 in this manual.

§ 2.128 Homesteads

Homestead rights are generally addressed in Tex. Prop. Code ch. 41, § 53.254, and Tex. Const. art. XVI, §§ 50, 51. A homestead can be encumbered only by a purchase-money lien, a lien for improvements (mechanic’s lien contracts), equity loans, reverse mortgages, property taxes, owelty rights, the conversion and refinancing of a personal property lien on a manufactured home, and the refinance of a homestead lien, including a federal tax lien. The amount of land that may be claimed as homestead depends on whether it is urban or rural and, if rural, whether it is claimed by a family or a single person. See Tex. Prop. Code § 41.002. Absent unusual circumstances or a judicial declaration that one spouse is incapacitated, the consent of both spouses is required if a homestead is sold or encumbered, regardless of whether it is characterized as community or separate property. Tex. Fam. Code §§ 5.001–.102.

Tex. Prop. Code § 41.005 provides for the voluntary designation of a homestead. This section and Tex. Tax Code §§ 11.13, 11.131, 11.135, 11.41, 11.43(j) set forth the requirements for making such a designation.

Under certain circumstances a lien to recover remediation costs may attach to a homestead. Tex. Health & Safety Code §§ 361.194, 361.197.

The state may be able to recover the costs of nursing home care paid by Medicaid from the homestead of the patient unless certain criteria are met. Tex. Gov’t Code § 531.077.

Federal laws may preempt these statutes.

See also the section titled “Home Equity Lending” above, chapter 11 in this manual, and section 20.1:2.

§ 2.129 Hotel Occupancy Taxes

The requirements and parameters of hotel occupancy taxes in the state are described in Tex. Tax Code chs. 156, 351, 352 and Tex. Loc. Gov’t Code chs. 334, 335.

§ 2.130 House Trailers

See the section titled “Manufactured Housing” below.

§ 2.131 Impact Fees

The imposition of impact fees is governed by Tex. Loc. Gov’t Code ch. 395.
§ 2.132 Implied Title Covenants

Use of the word *grant* or *convey* in a deed creates certain implied warranties unless the deed expressly provides otherwise. *Tex. Prop. Code § 5.023.*

§ 2.133 Indemnity Agreements

Texas law limits the validity of indemnity agreements in certain situations, including in construction contracts and certain indemnities by a contractor with respect to an architect’s negligence and by an architect with respect to an owner’s negligence. See section 17.2:4 in this manual.

§ 2.134 Innocent-Purchaser Defense

The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 establishes an innocent-landowner defense to environmental liability under certain circumstances, provided a purchaser has exercised “all appropriate inquiry” in its investigation of the property. See 42 U.S.C. §§ 9601(35), 9607(b).

§ 2.135 Insurance Claims

A lender must either endorse an insurance claim payment concerning personal property or provide a written statement of the reason it refuses to endorse within fourteen business days after receiving a request for the endorsement. *Tex. Ins. Code ch. 557.*

§ 2.136 Interstate Land Sales Full Disclosure Act

The Interstate Land Sales Full Disclosure Act requires filings and disclosures in some circumstances if there are sales or leases of twenty-five or more lots as part of a common promotional plan in interstate commerce or by use of the mail. See 15 U.S.C. §§ 1701–1720. Regulations promulgated under the Act can be found at 24 C.F.R. pts. 1710–1720.

§ 2.137 IRS Information Return (Foreclosures)

Under certain circumstances persons who lend money secured by property and who later acquire an interest in the property in satisfaction of the debt or have reason to know that the property has been abandoned must file an information return with the Internal Revenue Service and send a statement to the debtor. The information return must be filed by February 28, and the statement to the debtor provided by January 31, of the year following the calendar year in which the lender acquires the property or knows or has reason to know of the abandonment. See 26 U.S.C. § 6050J; 26 C.F.R. § 1.6050J–1T.

§ 2.138 Joint Tenancy with Right of Survivorship

A joint tenancy with the right of survivorship may be created by written agreement of property owners. *Tex. Est. Code § 111.001.* However, a joint tenancy between spouses concerning community property is governed by different statutory requirements. See the section titled “Community Property with Right of Survivorship” above. For both types of property on the death of any cotenant, the practitioner should determine if title companies will accept the result of the joint tenancy agree-
ment or if court adjudication and confirmation of the result is necessary. Adjudication or confirmation of joint tenancy with right of survivorship in community property is discussed at Tex. Est. Code §§ 112.101–106.

§ 2.139 Judgment Liens

A recorded and properly indexed abstract of judgment constitutes a lien on the defendant’s real property (including after-acquired property) located in the county in which the abstract is recorded and indexed. Tex. Prop. Code § 52.001. The lien continues for ten years after the abstract is recorded and indexed, but if the judgment becomes dormant during that period for lack of a writ of execution, the lien ceases to exist. Tex. Prop. Code § 52.006. Dormancy and revival of judgments are controlled by Tex. Civ. Prac. & Rem. Code § 34.001. But see the special provisions for the duration and revival of judgment liens in favor of the state or a state agency at Tex. Prop. Code § 52.006.


An abstract of judgment generally does not constitute a lien against a homestead at the time the abstract is recorded and indexed. Tex. Const. art. XVI, § 50. For special procedures for effecting a release of a judgment lien against the homestead by statutory affidavit by the judgment debtor, refer to Tex. Prop. Code § 52.0012.


§ 2.140 Landfills

An owner or lessee must obtain a permit before development of a tract located over a closed municipal solid waste landfill, file a notice of the former use in the real property records, and give notice to prospective buyers or lessees. Tex. Health & Safety Code §§ 361.531–.539. The statute also requires that certain soil testing be conducted of any tract of one acre or more to determine whether it is located over a closed landfill. Tex. Health & Safety Code § 361.538.

§ 2.141 Landlord-Tenant Liens

There are two types of commercial landlord’s liens. One is statutory, arising by operation of law. The other is contractual, created by agreement of the parties as a provision of the lease. The contractual landlord’s lien constitutes a security agreement under article 9 of the Uniform Commercial Code. Tex. Bus. & Com. Code § 9.109(a)(1). The statutory landlord’s lien gives the landlord a preference lien on the property of the tenant or subtenant in the building for rent that is due and for rent that is to become due during the current twelve-month period succeeding the date of the beginning of the rental agreement or an anniversary of that date. Tex. Prop. Code § 54.021. The lien is unenforceable for rent on a commercial building that is more than six months past due unless a lien statement is filed with the county clerk. Tex. Prop. Code § 54.022. The statutory lien can be foreclosed only through judicial proceedings; the contractual lien, depending on its terms, may be foreclosed through either judicial or nonjudicial proceedings.
A residential landlord’s lien against a tenant’s nonexempt personal property is provided in Tex. Prop. Code §§ 54.041–.048. An agricultural landlord’s lien is available in Tex. Prop. Code §§ 54.001–.007.

§ 2.142 Landlord-Tenant Relationship

The landlord-tenant relationship is subject to the Texas Property Code. Chapter 91 contains provisions generally applicable to landlords and tenants. Chapter 92 covers residential tenancies. Chapter 93 covers commercial tenancies. Chapter 94 covers manufactured home community tenancies. If a tenant holds over after termination of a lease, the landlord’s remedies include, among others, filing a forcible detainer action (Tex. Prop. Code ch. 24) and enforcing a lien against the tenant’s property (Tex. Prop. Code chs. 54, 59). Other landlord-tenant related provisions to note are the prohibition against subleasing and assignment (Tex. Prop. Code §§ 91.005, 94.057); landlord’s duty to mitigate damages (Tex. Prop. Code §§ 91.006, 94.202); repair provisions (Tex. Prop. Code §§ 92.051–.061, 94.153–.154); landlord’s duty to provide a complete copy of the lease (Tex. Prop. Code §§ 92.024, 94.053(b)); security deposits (Tex. Prop. Code §§ 92.101–.110, 93.004–.009, 94.101–.107); late fees (Tex. Prop. Code §§ 92.019, 94.054); rental applications (Tex. Prop. Code §§ 92.351–.355); lockout (Tex. Prop. Code §§ 92.0081, 92.009, 93.002–.003); and utility interruptions (Tex. Prop. Code §§ 92.008, 92.0091, 93.002).


See the sections titled “Abandonment,” “Ad Valorem Taxes,” “Criminal Record Checks of Employees,” and “Landlord-Tenant Liens” above and “Lockouts” and “State of Texas Leases” below. See also chapter 25 in this manual.

§ 2.143 Landowner Liability


§ 2.144 Landowner’s Bill of Rights

The Landowner’s Bill of Rights, prepared by the Office of the Attorney General of Texas, is a statement of the rights a real property owner has if condemnation of his real property is sought. The statement may be viewed at the Attorney General’s website at https://www.texasattorneygeneral.gov/files/agency/landowners_billofrights.pdf. The Texas Property Code requires a governmental or private entity with eminent domain authority to provide the Landowner’s Bill of Rights statement to the property owner as part of the condemnation process. Tex. Prop. Code § 21.0112. See also the section titled “Condemnation and Eminent Domain” above.

§ 2.145 Landscape Architecture

§ 2.146 Lead-Based Paint Disclosures

In 1992, Congress adopted the Residential Lead-Based Paint Hazard Reduction Act, also known as Title X of the Housing and Community Development Act. The lead-based paint provisions are codified at 42 U.S.C. §§ 4851–4856 (the regulations are published in 40 C.F.R. pt. 745). Sellers and landlords must provide purchasers and tenants of residential properties constructed before 1978 with a “Lead Warning Statement,” in the form provided in 42 U.S.C. § 4852d, in large type and on a separate sheet of paper from the contract. The required warning statements, prescribed in 40 C.F.R. § 745.113, are included in chapters 4 (for sales) and 25 (for leases) in this manual. The related state statute is found at Tex. Occ. Code ch. 1955. This law applies to all “child-occupied facilities,” including day-care centers and preschool and kindergarten classrooms, occupied by the same child, six years of age or younger, for three hours or more, twice a week.

§ 2.147 Legal Incapacity

A person may lack legal capacity to contract for and deal with real property without the supervision of a guardian appointed under the Texas guardianship statutes, Texas Estates Code title 3, sections 1001.001 to 1356.056. In dealing with a guardian in a real estate transaction, the attorney should carefully review the guardianship order. “An incapacitated person for whom a guardian is appointed retains all legal and civil rights and powers except those designated by court order as legal disabilities by virtue of having been specifically granted to the guardian.” Tex. Est. Code § 1151.001. Additionally, there must be an annual determination whether the guardianship should be continued, modified, or terminated. Tex. Est. Code §§ 1201.051–.054. Tex. Prop. Code ch. 142 addresses the management of property recovered on behalf of a minor or incapacitated person through a suit by a next friend. See also the section titled “Minors” below.

§ 2.148 Letters of Credit

Letters of credit are governed by the provisions of Tex. Bus. & Com. Code ch. 5.

§ 2.149 Libraries

Public libraries are exempt from attachment, execution, or forced sale. Tex. Prop. Code § 43.001.

§ 2.150 License to Carry Handguns

Individuals may obtain a license to carry a handgun. Tex. Gov’t Code ch. 411, subch. H. Signs indicating that handguns are prohibited on site are required for certain alcoholic beverage establishments, hospitals, and nursing homes. Tex. Gov’t Code § 411.204. Handguns are prohibited as a matter of law for certain other types of private and public properties, including schools, polling places, government offices, racetracks, and secured areas of airports. Tex. Penal Code § 46.03. The statute does not affect the right of an employer to prohibit handguns on the premises of the business (Tex. Gov’t Code § 411.203).

§ 2.151 Life Tenants

The duties of a life tenant of real property are set out in Tex. Prop. Code § 5.009.
§ 2.152 Limitations

An action to recover real property conveyed by an instrument containing certain technical defects must be brought within two years of the recordation of the instrument. Tex. Civ. Prac. & Rem. Code § 16.033(a). An action to foreclose a real property vendor’s lien or deed-of-trust lien must be brought and a nonjudicial sale must be completed within four years after the cause of action accrues. Tex. Civ. Prac. & Rem. Code § 16.035. A suit to foreclose a mechanic’s lien must be commenced within two years after the last day for filing the affidavit or one year after completion, termination, or abandonment of the work under the original contract, whichever is later. Tex. Prop. Code § 53.158. A suit on a deficiency judgment after a real property foreclosure must be brought within two years of the foreclosure sale. Tex. Prop. Code § 51.003.


See also the section titled “Adverse Possession” above.

§ 2.153 Limited Liability Companies

Limited liability companies are governed by the Texas Business Organizations Code generally and by title 3 more specifically. Tex. Bus. Orgs. Code §§ 101.001–622. See also the sections titled “Business Organizations Code,” “Corporations,” and “Foreign Entities” above and “Nonprofit Corporations” and “Partnerships” below.

§ 2.154 Limited Liability Partnerships

Limited liability partnerships are governed by the Texas Business Organizations Code generally and by title 4 more specifically. See Tex. Bus. Orgs. Code §§ 152.801, 153.351. In Texas, a limited liability partnership is either a preexisting general partnership or a preexisting limited partnership that registers with the secretary of state as a limited liability partnership and complies with other statutory requirements.


§ 2.155 Liquidated Damages Clauses

Liquidated damages provisions regarding the sale of goods must comply with the requirements of Tex. Bus. & Com. Code § 2.718.
§ 2.156 Lis Pendens

A party seeking affirmative relief in an action involving title to real property, the establishment of an interest in real property, or the enforcement of an encumbrance against real property may file notice of the pending action with the clerk of the county in which the land is located.

A form of lis pendens is available as form 26-35 in this manual. The person filing such a notice must serve a copy of the notice on each party to the action who has an interest in the real property affected by the notice no later than three days after the notice is filed. Tex. Prop. Code § 12.007(d). Under certain conditions and on motion of a party, the court may cancel the lis pendens anytime during the proceeding. Tex. Prop. Code § 12.008. Under certain other conditions for lis pendens filed after September 1, 2009, and on motion of a party, the court must expunge the notice of lis pendens. Tex. Prop. Code § 12.0071. A recorded lis pendens for which no certified copy of an order expunging the notice of lis pendens has been recorded constitutes notice of the litigation. Tex. Prop. Code § 13.004.

For a certified copy of an order expunging a notice of lis pendens that is recorded on or after September 1, 2017, after such certified copy of the order has been recorded, an interest in the real property covered by the notice of lis pendens may be transferred or encumbered free of all matters asserted or disclosed in the notice and all claims or other matters asserted or disclosed in the action in connection with which the notice was filed. Tex. Prop. Code § 12.0071(f).

§ 2.157 Loan Documents

Tex. Bus. & Com. Code § 26.02 requires a financial institution to give a statute-of-frauds type of notice for loans exceeding $50,000 and to post notices informing borrowers of the provisions of section 26.02. Construction mortgages should clearly identify that they are securing a construction loan to take advantage of the priority provisions of Tex. Bus. & Com. Code § 9.334(h). See also Tex. Gov’t Code ch. 83, which prohibits the preparation of deeds, deeds of trust, notes, mortgages, and other documents affecting title to real property for compensation unless the preparer is an attorney licensed in Texas or is qualified under one of the other listed exemptions. See also the section titled “Unauthorized Preparation of Real Estate Documents” below.

The Texas Finance Code provides rules relating to loan documents used in home equity loans, which are administered by the Office of Consumer Credit Commissioner. Tex. Fin. Code § 341.502. For a more extensive discussion of the issues in home equity lending, see chapter 11 in this manual.

The Texas Tax Code prohibits a lender from requiring a borrower to waive its right to an agricultural or open-space tax exemption as a condition to a loan or to agree to pay the lender for any losses suffered by the lender due to change of use and loss of this exemption. Tex. Tax Code §§ 23.47, 23.58.

Certain loan documents transferring an interest in real property to or from an individual are required to include the confidentiality notice set out in Tex. Prop. Code § 11.008. See section 3.16 in this manual.

Several other sections also address the preparation of loan documents, including “Deeds of Trust” and “Foreclosure” above and “Master Form Mortgage,” “Mechanic’s Liens,” “Truth in Lending,” and “Usury” below.
§ 2.158 Lockouts


§ 2.159 Lost or Found Property

See the sections titled “Abandonment” and “Escheat” above.

§ 2.160 Low-Income Affordable Housing Tax Credits

See the section titled “Affordable Housing Investments” above.

§ 2.161 Manufactured Housing

The Texas Manufactured Housing Standards Act (TMHSA) regulates manufactured housing through the Texas Department of Housing and Community Affairs. Tex. Occ. Code ch. 1201. Title to manufactured homes, the perfection and release of manufactured housing liens, and the cancellation of manufactured housing titles are governed by the TMHSA. Both the TMHSA and the Texas Property Code address the question of when a manufactured home is personal property and when it is real property. Tex. Prop. Code § 2.001; Tex. Occ. Code §§ 1201.2055, 1201.2075, 1201.222. For a more extensive discussion of manufactured housing, see section 5.15:6 in this manual.


§ 2.162 Master Form Mortgage


§ 2.163 Mechanic’s Liens

Mechanic’s liens, which may arise in favor of a variety of contractors, workers, and those providing material for construction or for improvements to property, may be either constitutional or statutory. The constitutional lien derives from Tex. Const. art. XVI, § 37. Statutory liens derive from Tex. Prop. Code ch. 53. See chapters 20 and 21 in this manual.

The mechanic’s lien procedures and rights may also apply to persons who perform labor or materials for the demolition of a structure under a written contract. Tex. Prop. Code § 53.021(e).

On public construction projects, a mechanic’s lien cannot be established against public buildings, structures, or grounds, but subcontractors may have a lien on money, bonds, or warrants due the contractor for the improvements if the prime contract does not exceed $25,000 if with a governmental entity other than a municipality or joint board created under the Transportation Code or $50,000 if with a municipality or joint board. Tex. Prop. Code § 53.231. The McGregor Act, Tex. Gov’t Code ch. 2253, establishes procedures for the protection of performance- and payment-bond beneficiaries who have a direct contractual
relationship with the prime contractor or a subcontractor on a public construction project. The Miller Act, as amended by the Construction Industry Payment Act of 1999, pertains to bonding requirements for construction, alteration, or repair of federal works. 40 U.S.C. §§ 3131–3134.

Certain mechanic’s lien documents transferring an interest in real property to or from an individual may be required to include the confidentiality notice set out in Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 2.164 Military Installations

See the section titled “Outdoor Lighting” below.

§ 2.165 Military Personnel

The Servicemembers Civil Relief Act (formerly the Soldiers’ and Sailors’ Civil Relief Act) requires that, under some circumstances, enforcement of certain civil liabilities and legal proceedings, including foreclosures, be suspended while armed forces personnel are on active duty. 50 U.S.C. §§ 3901–4043. Delinquency dates for property taxes may also be extended. Tex. Tax Code § 31.02.

Texas Property Code section 51.015 also affords certain protections to military servicemembers—during active duty military service and during the nine months thereafter—against collection actions for enforcement of real estate loans secured by the servicemember’s dwelling and made to that servicemember before his or her active duty military service commenced. Tex. Prop. Code § 51.015.

 Notices of special rights afforded servicemembers are required in suits to evict (Tex. Prop. Code § 24.0051(d)), in the sale of real property under a power of sale or other contractual lien (Tex. Prop. Code § 51.002(i)), and in the notice that must be provided before certain enforcement actions by property owners associations (Tex. Prop. Code § 209.006(b)). Leases that do not contain notice of a servicemember’s right to terminate may lead to the release of liability for unpaid rent. Tex. Prop. Code § 92.017(g).

§ 2.166 Mineral Rights

Chapter 92 of the Texas Natural Resources Code provides procedures to designate drill sites on land proposed to be subdivided. Tex. Nat. Res. Code §§ 92.001–.007. Tex. Nat. Res. Code § 81.0523 preempts the regulation of oil and gas operations by municipalities and other political subdivisions. A municipality or other political subdivision may not enact or enforce an ordinance that bans, limits, or otherwise regulates oil and gas operations within the boundaries or extraterritorial jurisdiction of the municipality or other political subdivision, except for an ordinance that (1) regulates only aboveground activities, (2) is commercially reasonable, (3) does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator, and (4) is not otherwise preempted by state or federal law. Tex. Nat. Res. Code § 81.0523(b), (c). An ordinance is considered prima facie to be commercially reasonable if the ordinance has been in effect for at least five years and has allowed oil and gas operations to continue during that time period. Tex. Nat. Res. Code § 81.0523(d).

§ 2.167 Mini-Storage Warehouses

See the section titled “Self-Service Storage Facilities” below.
§ 2.168  Minors

Minors do not have the legal capacity to enter into contracts. The age of majority is eighteen years. Tex. Civ. Prac. & Rem. Code §§ 129.001, 129.002. Marriage removes the disabilities of minority. Tex. Fam. Code § 1.104. Under certain circumstances, the disabilities can be judicially removed. Tex. Fam. Code ch. 31. Unless the disability is removed by marriage or by court decree, a guardian must be appointed under terms of the Texas Estates Code to administer real property owned by the minor. Tex. Est. Code §§ 1001.001–.056. Under certain conditions, a parent may petition the court for an order to sell the minor’s property instead of having a guardian appointed. Tex. Est. Code § 1351.001. A next friend may also manage property of a minor recovered in a lawsuit if the minor has no guardian. Tex. Prop. Code § 142.001. See also the sections titled “Legal Incapacity” above and “Uniform Transfers to Minors Act” below.

§ 2.169  Mobile Homes

See the section titled “Manufactured Housing” above.

§ 2.170  Mold Assessors and Remediators

Mold remediation and other activities that affect indoor air quality, such as mold assessments, are governed by chapter 1958 of the Texas Occupations Code. Tex. Occ. Code ch. 1958.

Sections 544.301–.305 of the Insurance Code prohibit certain underwriting decisions based on previous mold claims or damages and applies to any insurer that writes residential property insurance in Texas. Tex. Ins. Code §§ 544.301–.305. An insurer may not make an underwriting decision based on previous mold claims or damages if mold remediation was performed on the property and either a certificate of mold remediation was issued or a subsequent inspection by an independent assessor or adjustor revealed no evidence of mold damage. Tex. Ins. Code § 544.303.

§ 2.171  Money Laundering

See the section titled “Cash Proceeds” above.

§ 2.172  Mortgage Electronic Registration Systems (MERS)

For all practical purposes, Mortgage Electronic Registration Systems, Inc. (MERS) is nothing more than a “book entry system” or “utility” for the real estate finance industry that is intended to eliminate the need for executing and recording assignments when mortgage loans and related servicing rights are sold in the secondary market. MERS is an electronic registration system that tracks the bundle of rights that are transferred when the various beneficial interests associated with real estate loans are bought and sold on the secondary market like stocks and bonds and commodities like coffee, gold, and oil futures.

To invoke the protections of the real property recording statutes in the official land title records, MERS acts as the mortgagee of record for each security instrument that secures a loan registered on the MERS System. Security instruments must contain particular language naming MERS as original mortgagee. MERS maintains a web-based, electronic book entry registration system that tracks the beneficial ownership and servicing rights associated with any registered real estate loan. The mortgage servicer, who is responsible for all the daily administrative details required to service a borrower’s loan, inputs all loan level data and changes into MERS.
MERS does not buy, sell, transfer, or assign real estate loans and is not the owner, holder, or servicer of the beneficial ownership and servicing rights associated with loans registered on MERS. As long as a loan is registered on the MERS System, MERS is the mortgagee of record in the real property records, and no assignment or transfer of lien is necessary, regardless of the number of times a registered loan is bought or sold.

MERSCORP, Inc., is a private corporation owned and sponsored by the Mortgage Bankers Association of America; the American Land Title Association; the Federal National Mortgage Association; the Federal Home Loan Mortgage Corporation; the Department of Veterans Affairs; the U.S. Department of Housing and Urban Development; nearly every Tier-1 lender; the major title insurance underwriters; and the three major rating agencies for mortgage-backed securities, Standard & Poor’s, Moody’s Investors Service, and Fitch Ratings.

§ 2.173 Mortgage Fraud

Intentionally or knowingly making a materially false or misleading written statement to obtain a mortgage loan is a violation of section 32.32 of the Texas Penal Code. Punishment ranges from a class C misdemeanor to a first-degree felony. Intentionally or knowingly making a materially false or misleading written statement in providing an appraisal of real property for compensation also violates section 32.32 of the Texas Penal Code and is subject to the same range of punishment. Tex. Penal Code § 32.32(b–1). Venue for prosecution for mortgage fraud is governed by Tex. Code Crim. Proc. art. 13.271.

Lenders, mortgage bankers, and licensed mortgage brokers must provide all applicants for a home loan a written notice of penalties for making false or misleading written statements containing the promulgated language set out in section 343.105 of the Texas Finance Code, or substantially similar language, at the time of loan closing. See form 10-19 in this manual. The notice must be a separate document in at least a fourteen-point typeface. Borrowers must sign the notice and verify that all statements and representations contained in their written loan applications regarding their identity, employment, annual income, and intent to occupy the residential real property securing the home loan are true and correct as of the date of loan closing. The failure to provide the notice in compliance with the statute expressly does not affect the validity of the home loan or its enforceability by any holder.

§ 2.174 Mortgage Loan Originators

Use of the term mortgage broker has been discontinued for purposes of state licensing and registration of mortgage loan originators to conform to terminology established by the Texas Secure and Fair Enforcement for Mortgage Licensing Act of 2009. Tex. Fin. Code ch. 180. Companies engaged in or conducting the business of originating residential mortgage loans (mortgage companies) must be licensed under and comply with the Residential Mortgage Loan Company Licensing and Registration Act while individuals must be licensed under and comply with the Mortgage Banker Registration and Residential Mortgage Loan Originator License Act, administered by the Department of Savings and Mortgage Lending. Tex. Fin. Code chs. 156, 157. An applicant must designate an individual licensed as a residential mortgage loan originator under chapter 157 of the Texas Finance Code as the company’s qualifying individual as required by sections 156.2041 through 156.2044 of the Texas Finance Code.

An individual licensed under chapter 157 may not be licensed or act as a residential loan originator unless the individual enrolls in the Nationwide Mortgage Licensing System and Registry (or is sponsored by an appropriate entity), obtains a valid unique identifier under that system, and otherwise complies with the applicable requirements of chapter 180 of the Texas

A licensed residential mortgage loan originator is not required to obtain a regulated loan license under chapter 342 of the Texas Finance Code to make, negotiate, or transact a secondary mortgage loan subject to that chapter. Tex. Fin. Code § 342.051. Mortgage bankers, as defined in section 156.002(8) of the Texas Finance Code, are exempt from chapter 156 if registered under chapter 157. Depository institutions, their regulated subsidiaries, and entities regulated by the Farm Credit Administration are exempt from chapter 156. Tex. Fin. Code § 156.202.

Residential mortgage loan originator compensation, including the practice by creditors of paying mortgage loan originators a yield-spread premium based on the interest rate of a residential mortgage loan or paying compensation based on loan terms other than the principal loan amount, is restricted under amendments to Regulation Z, 12 C.F.R. § 226.36 (Truth in Lending).

Entities and individuals exempt from the licensing requirement are listed in Tex. Fin. Code §§ 156.202(a–1), 157.0121, 180.003(a).

Residential mortgage companies and loan originators must comply with rules and regulations adopted by the Finance Commission. 7 Tex. Admin. Code ch. 80. The commissioner is authorized to enforce compliance with the subject licensing regulations through powers granted under chapters 156 and 157 of the Texas Finance Code. Unlicensed activity is punishable as a class B misdemeanor.

§ 2.175 Municipal Utility Districts (MUDs)

Municipal utility districts are governed by the provisions of Tex. Water Code chs. 49, 54, 59. See also the section titled “Utility District Disclosures” below.

§ 2.176 Naturally Occurring Radioactive Materials (NORM)


§ 2.177 Navigable Streams

Survey lines may not cross navigable streams, which are defined as those retaining “an average width of 30 feet from the mouth up.” Tex. Nat. Res. Code §§ 21.001(3), 21.012(b). See also Tex. Rev. Civ. Stat. art. 5414a, which controls the validity of patents to and awards of land lying across or partly across watercourses, navigable streams, beds, and abandoned beds of watercourses. See also the section titled “Watercourse Forming County Boundary” below.

§ 2.178 Nonprofit Corporations

Nonprofit corporations are governed by the Texas Business Organizations Code generally and by chapter 22 more specifically. Tex. Bus. Orgs. Code §§ 22.001–.409. The sale, lease, exchange, or mortgage of property belonging to a domestic entity is controlled by Tex. Bus. Orgs. Code § 10.251. Most property owners associations that are incorporated are organized as nonprofit organizations. See Tex. Prop. Code chs. 81, 82. See also the sections titled “Business Organizations Code,” “Corpora-
§ 2.179 Non–Real Estate Taxes Affecting Real Estate

The purchaser of a business or stock of goods must withhold from the purchase price adequate funds to pay taxes that may be owed by the seller (for example, unpaid hotel, parking revenue, sales, and corporate franchise taxes of the seller) until the seller provides a receipt of payment from the comptroller. Tex. Tax Code § 111.020. See also the section titled “Hotel Occupancy Taxes” above.

§ 2.180 North American Free Trade Agreement (NAFTA)


§ 2.181 Notarial Seals, Out-of-State

The failure of a non-Texas notary public to attach an official seal to a document will not render the document invalid if a seal is not required in the jurisdiction in which the document is acknowledged. Tex. Prop. Code § 12.001; Tex. Civ. Prac. & Rem. Code § 121.004. The secretary of state annually compiles a list of states that require notarial seals to validate the certificate of acknowledgment and will make the list available to all county clerks by January 1 of each year. Tex. Gov’t Code § 405.019. See also the section titled “Acknowledgments” above.

§ 2.182 Notaries Public

Notary qualifications and requirements are found in Tex. Gov’t Code ch. 406. Notaries may not represent or imply that they are attorneys. Tex. Gov’t Code § 406.017. The notary’s book is public information and must be available for inspection at reasonable times. Tex. Gov’t Code § 406.014(b). By administrative rule, however, notaries public may not record in the public record the identification number on the signer’s identification card used. 1 Tex. Admin. Code § 87.40. Notaries may certify copies of documents not recordable in the public records and may take depositions. Tex. Gov’t Code § 406.016. Application of a printed seal by a notary public is not required on an electronically transmitted certificate of acknowledgment if the same information as contained in the seal is set forth. Tex. Civ. Prac. & Rem. Code § 121.004(d); Tex. Gov’t Code § 406.013(d). See the section titled “Acknowledgments” above.

§ 2.183 Nuisance

§ 2.184 Open-Space Exemption

The law governing the appraisal of “qualified open-space land” for ad valorem taxes is found in Tex. Tax Code §§ 23.51–.59. The Texas Tax Code prohibits a lender from requiring a borrower to waive its right to an agricultural or open-space tax exemption as a condition to a loan or to agree to pay the lender for any losses suffered by the lender due to change of use and loss of this exemption. Tex. Tax Code §§ 23.47, 23.58. See also the section titled “Ad Valorem Taxes” above.

§ 2.185 Outdoor Lighting

**Astronomical Observatories:** The commissioners court of a county within fifty-seven miles of the McDonald Observatory must adopt orders regulating the installation and use of outdoor lighting in any unincorporated territory and adopt orders establishing standards relating to outdoor lighting in proposed subdivisions to minimize the interference with observatory activities. The commissioners court of a county within five miles of the George Observatory or the Stephen F. Austin Observatory may restrict artificial outdoor lighting in any unincorporated territory of the county and establish standards relating to artificial outdoor lighting in proposed subdivisions to minimize the interference with observatory activities. Tex. Loc. Gov’t Code §§ 240.031–.035. A municipality must regulate by ordinance the installation and use of outdoor lighting to protect against its use in a way that interferes with scientific astronomical research of an observatory. Tex. Loc. Gov’t Code §§ 229.051–.053. A municipality must by ordinance establish standards relating to proposed subdivisions to minimize interference with observatory activities. Tex. Loc. Gov’t Code §§ 229.054–.055.

**Military Installations:** Sections 240.032 and 240.0325 of the Texas Local Government Code authorize the commissioners court of a county with a population of more than one million that has at least five United States military bases and any county adjacent to that county that is within five miles of a United States Army installation, base, or camp, on request of the commanding officer, to adopt orders regulating the installation and use of outdoor lighting within five miles of the installation, base, or camp in unincorporated territory of the county. There are exceptions for installations in place before the effective date of the order for electric utilities, electric cooperatives, gas utilities, surface coal mining, telecommunications providers, and manufacturing facilities required by the Texas Commission on Environmental Quality to hold a permit and for tracts of land used as a single residence outside the boundaries of a private subdivision, tracts of land maintained for agricultural use, activity that takes place on a tract of land maintained for agricultural use, structures or related improvements located on a tract of land maintained for agricultural use, or a correctional facility operated by or under a contract with the Texas Department of Criminal Justice. Tex. Loc. Gov’t Code §§ 240.032, 240.0325.

§ 2.186 Outdoor Signs

The Civil Practice and Remedies Code addresses the subject of trespass by outdoor signs in Tex. Civ. Prac. & Rem. Code §§ 80.001–.003. Municipalities are authorized to relocate, reconstruct, and remove signs under Tex. Loc. Gov’t Code ch. 216. The owner of a sign may be entitled to be compensated for the costs associated with the relocation, reconstruction, or removal. Tex. Loc. Gov’t Code § 216.003. However, a municipality cannot regulate a private landowner’s right to put political signage on the landowner’s property. Tex. Loc. Gov’t Code § 216.903. The Texas Highway Commission regulates highway signs under Tex. Transp. Code chs. 391–395, while recognizing the authority of cities and counties to regulate highway signs in certain circumstances.
§ 2.187  Parking

A neighborhood may petition a county or municipality to post signs prohibiting the overnight parking of commercial vehicles by complying with Tex. Transp. Code § 545.307. See the section titled “Towing of Motor Vehicles” below.

§ 2.188  Parks and Recreational Projects

Cities and towns are restricted in certain instances from selling or encumbering parks and other recreational projects without authorization by a majority vote of qualified voters. Tex. Gov’t Code §§ 1508.001–.010.

§ 2.189  Partition


§ 2.190  Partnerships

Partnerships are governed generally by title 4 of the Texas Business Organizations Code. Chapters 151 and 154 apply to both general and limited partnerships. Chapter 152 applies to general partnerships, and chapter 153 applies to limited partnerships.


If a partner conveys partnership real property without authority and the transaction is not in the usual course of business, the partnership may recover the property from the grantee but not from a bona fide purchaser from the grantee for value without knowledge of the lack of authority. Tex. Bus. Orgs. Code § 152.302(c).

Title to partnership property for general partnerships is governed by Tex. Bus. Orgs. Code § 152.102.

See also the sections titled “Business Organizations Code,” “Corporations,” “Foreign Entities,” “Limited Liability Companies,” and “Nonprofit Corporations” above.

§ 2.191  Personal Property Leases


§ 2.192  Pest Control


§ 2.193  Pipeline Easements

See the section titled “Easements, Pipeline” above.
§ 2.194 Plats

See the section titled “Subdivisions” below.

§ 2.195 Pool-Yard Enclosures


§ 2.196 Powers of Attorney

See the section titled “Durable Powers of Attorney” above.

§ 2.197 Private Mortgage Insurance Notice

Lenders that require borrowers to purchase mortgage guaranty insurance must provide annually a prescribed statutory notice about the right to cancel. Tex. Ins. Code § 3502.201.

§ 2.198 Private Property Rights

Private real property owners have certain rights under state law to challenge state and local regulations and governmental actions that result in a taking of their property. Tex. Gov’t Code ch. 2007. Governmental entities are required to prepare a written takings impact assessment of proposed governmental action that may result in a taking. Failure to do so may render the action void. Tex. Gov’t Code ch. 2007. Private real property owners have certain rights to reacquire property taken through eminent domain. Tex. Prop. Code § 21.023. Before a governmental entity with eminent domain authority begins negotiating with a property owner to acquire real property, the entity must provide a landowner’s bill of rights statement provided by Tex. Gov’t Code § 402.031. Tex. Prop. Code § 21.0112.

See also the sections titled “Condemnation and Eminent Domain” and “Landowner’s Bill of Rights” above and “Vested Land Use Rights” below.

§ 2.199 Property Inspection

The licensing of property inspectors is addressed in the Real Estate License Act. Tex. Occ. Code ch. 1102. Property inspections may be conducted, in part, by electricians, plumbers, carpenters, and others, such as engineers, in their respective fields.

§ 2.200 Property Owners Associations

The Texas Residential Property Owners Protection Act applies to residential subdivisions that are subject to restrictions that authorize a property owners association to collect regular or special assessments and that require mandatory membership in the association. Tex. Prop. Code ch. 209. The Act also regulates the foreclosure of an assessment lien and provides a right of redemption after foreclosure. Tex. Prop. Code §§ 209.009–.011. In addition, the Property Code affords certain rights to property owners associations in cities or counties that meet various specified minimum population requirements to amend, extend, or supplement deed restrictions and to establish assessment lien mechanisms. Tex. Prop. Code chs. 201, 204–206. The statute also sets out certain other statutory powers of property owners associations. Property owners associations are subject to the
state open meetings and open records laws in very limited circumstances. Tex. Gov’t Code §§ 551.0015, 552.0036. Property owners associations are required to deliver a resale certificate to owners, purchasers of a property in a subdivision, or title companies on demand. The resale certificate must include information relevant to the specific property as well as to the subdivision as a whole. Tex. Prop. Code ch. 207.

Condominium property owners associations are not governed by chapters 207 and 209; rather, condominiums formed after December 31, 1993, are governed by Texas Property Code chapter 82. Condominiums formed before January 1, 1994, are generally governed by Texas Property Code chapter 81 and selected provisions of chapter 82 set forth in section 82.002(c), unless they amend the condominium declaration and elect to be governed solely by all of chapter 82.

§ 2.201 Property Tax Consultants

Chapter 1152 of the Texas Occupations Code provides for the registration of property tax consultants. A property tax consultant is a person who performs or supervises the performance of property tax consulting services for compensation. Property tax consulting services means preparing for another person a rendition statement or property record, representing another person in a property tax protest, consulting or advising another person concerning the preparation of a rendition statement or property report or acting on behalf of another person in a protest under the Tax Code, negotiating or entering into an agreement with an appraisal district on behalf of another person, or acting as the agent of a property owner in connection with certain property tax matters. Tex. Occ. Code §§ 1152.001–.251.

§ 2.202 Property Tax Loans

With certain exceptions, a person engaging in the business of making, transacting, or negotiating property tax loans, or a person making property tax loans who contracts for, charges, or receives, directly or indirectly, a charge, including interest, compensation, consideration, or any other amount authorized under the statute, must be licensed by the Texas Consumer Credit Commissioner. Tex. Fin. Code ch. 351. The lender must provide the commission records to investigate compliance with the laws, an audit of net assets, and access to the lender’s place of business for inspection. The commission is also authorized to prescribe filing documents necessary when a property tax lender pays property taxes for another person. Tex. Tax Code § 32.06.

§ 2.203 Racial Discrimination

See the sections titled “Discrimination” and “Fair Housing” above.

§ 2.204 Real Estate Appraisers

See the section titled “Appraisers” above.

§ 2.205 Real Estate Investment Trusts (REITs)

§ 2.206 Real Estate License Act

The Real Estate License Act, Tex. Occ. Code ch. 1101, authorizes the Texas Real Estate Commission to regulate the actions of brokers, salespersons, real estate inspectors and appraisers, and others. It also contains numerous other provisions relating to real estate transactions involving brokers or salespersons.

§ 2.207 Real Estate Settlement Procedures Act (RESPA)

The Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601–2617, and its implementing Regulation X, 12 C.F.R. pt. 1024, apply to mortgage loan transactions that are secured by a lien on residential real property designed principally for occupancy by one to four families and that otherwise meet the definition of a “federally related mortgage loan” set out in 12 C.F.R. § 1024.2. Certain loans such as business purpose loans and various construction loans with a term of less than two years are exempt from coverage. 12 C.F.R. § 1024.5. On July 21, 2011, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, 124 Stat. 1376) mandated that all rulemaking and enforcement authority for RESPA and Regulation X be transferred to, and consolidated within, the Consumer Financial Protection Bureau (CFPB). In accordance with the Dodd-Frank Act, and in an attempt to provide clear and accurate disclosures to consumers, the CFPB combined the disclosure requirements of RESPA and TILA into new forms for certain loan transactions (TILA-RESPA Integrated Disclosures or “TRID”), effective on October 3, 2015. See the final rule on the TRID, 78 Fed. Reg. 79,730 (Dec. 31, 2013). The initial truth-in-lending disclosure and RESPA good-faith estimate (GFE) forms have combined into the new loan estimate (LE) form that must (1) provide the applicant with a good-faith estimate of credit costs and transaction terms, (2) be in writing and contain the prescribed information in 12 C.F.R. § 1026.37 and appendix H-24, and (3) satisfy timing and delivery requirements. The final truth-in-lending disclosure and RESPA HUD-1 have now been combined into the new closing disclosure (CD) and must (1) provide generally the actual terms and costs of the transaction, (2) be in writing containing the prescribed information in 12 C.F.R. § 1026.38 and appendix H-25, and (3) satisfy timing and delivery requirements as set out in this rule. The integrated disclosures are subject to certain timing, tolerance, or variance requirements for accuracy. See 12 C.F.R. pts. 1024, 1026.

Section 8 of RESPA prohibits kickbacks, referral fees, and unearned fees in connection with federally related mortgage loans. Violators of section 8 may be found civilly liable for treble damages to persons charged for settlement services involved in the violation and criminally liable for both a statutory fine and imprisonment. Referrals of settlement services to affiliates are permitted as an exception to the section 8 prohibitions under strict guidelines for affiliated business arrangements set out in 12 C.F.R. § 1024.15. Sample forms of required consumer disclosures are illustrated in appendix H to Regulation Z, in public guidance documents published in the Federal Register from time to time by the Department of Housing and Urban Development, and as published by the CFPB. See also the discussion in chapter 12 in this manual.

§ 2.208 Recording

The Property Code addresses the recording of instruments used in property transactions. Tex. Prop. Code chs. 11–13. The rerecording of instruments is permitted under the terms of Tex. Civ. Prac. & Rem. Code § 19.008 if the record was lost, destroyed, or removed and is effective from the date of original recordation. See also the section titled “Deeds” above.
§ 2.209 Record Retention

Various federal laws and regulations, including Internal Revenue Service regulations, require the retention of records that affect or involve realty. Records that must be retained under state law may be destroyed after three years, unless otherwise provided. Tex. Bus. & Com. Code § 72.002.

§ 2.210 Recreational Projects and Recreational Use

See the sections titled “Camping Resorts,” “Landowner Liability,” and “Parks and Recreational Projects” above and “Time-shares” below.

§ 2.211 Redemption Rights


§ 2.212 Registered Mail

If a contract or statute requires that notice be delivered by registered mail, certified mail will also suffice unless registered mail is required by law to provide insurance against loss. Tex. Civ. Prac. & Rem. Code § 136.001.

§ 2.213 Release of Lien by Affidavit

If a mortgagee holds a mortgage on one-to-four-family residential property, or on other real property where the original face amount of the debt is less than $1.5 million, and the mortgagee or its mortgage servicer fails to execute a release of the mortgage, an authorized officer of a title insurance company or a title insurance agent may execute and record an affidavit in a form substantially similar to the affidavit prescribed by Tex. Prop. Code § 12.017. An uncontroverted affidavit, executed and recorded as provided in the statute, operates as a release of the mortgage. Tex. Prop. Code § 12.017.

§ 2.214 Release of Lien by Attorney or Others

Tex. Prop. Code § 52.005 allows the agent or attorney of record to release an abstract of judgment by recording a return or copy of the return on an execution issued on the judgment that is certified by the officer making the return and that complies with the requirements of section 52.005 or a receipt, acknowledgement, or release signed by the party (or his agent or attorney of record) entitled to receive payment of the judgment and that is acknowledged or otherwise proven for record. Tex. Prop. Code § 52.021 allows a release by discharge under bankruptcy laws. Tex. Civ. Prac. & Rem. Code § 31.008 authorizes judges to release liens when the amount due is paid to the court. If a judgment creditor refuses to accept payment of a judgment or refuses to execute a release of judgment after accepting payment, the court may hold a hearing to determine whether a release should be issued. Tex. Civ. Prac. & Rem. Code § 31.008(g). Tex. Prop. Code § 12.017 permits authorized title insurance companies and title insurance agents to file affidavits of record as a substitute for an executed release by the lienholder under certain circumstances. See also the sections titled “Abstracts of Judgment” and “Judgment Liens” above.
§ 2.215 Republic of Texas Liens

See the section titled “Fraudulent Filings” above.

§ 2.216 Residential Construction Liability

Liability for damages arising out of defects in residential construction projects is addressed in the Residential Construction Liability Act (Tex. Prop. Code ch. 27).

§ 2.217 Residential Rental Locators

The Real Estate License Act requires that residential rental locators be licensed as brokers or salespersons, with certain exceptions. Tex. Occ. Code §§ 1101.002, 1101.151, 1101.351, 1101.553, 1101.757.

§ 2.218 Restrictive Covenants

Any clause not in contravention of law may be inserted into an instrument of conveyance. Tex. Prop. Code § 5.022(c). Restrictive covenants that require the use of wood shingles for structures on residential properties or that are discriminatory on the basis of race, color, religion, or national origin are void. Tex. Prop. Code §§ 5.025, 5.026. Restrictive covenants that are at odds with certain water conservation initiatives are void. Tex. Prop. Code § 202.007. In an action based on breach of a restrictive covenant, the prevailing party who asserted the action may recover attorney’s fees in addition to the party’s costs and claim. Tex. Prop. Code § 5.006.

The governing body of a municipality that does not have zoning ordinances or that has a population of 1.5 million or more may elect application of Tex. Loc. Gov’t Code §§ 212.151–.157 (“Enforcement of Land Use Restrictions Contained in Plats and Other Instruments”) for enforcement of restrictive covenants. The municipality may require any person who sells or conveys restricted property located within the municipality first to give the purchaser written notice of the restrictions and of the municipality’s right to enforce them. Tex. Loc. Gov’t Code § 212.155. A municipal utility district may enforce restrictive covenants. Tex. Water Code § 54.237.

Tex. Gov’t Code § 27.034 permits enforcement of certain restrictive covenants in a justice court, although a justice court is prohibited from granting a writ of injunction.

See also the sections titled “Community Homes; Group Homes” and “Property Owners Associations” above.

§ 2.219 Reverse Mortgages

A reverse mortgage is a type of home equity loan authorized by the Texas Constitution that permits homeowners, age sixty-two or older, to borrow without recourse, based on the equity in their homesteads. Tex. Const. art. XVI, § 50(a)(7), (k)–(p), (v).

See the section titled “Home Equity Lending” above.
§ 2.220 Right of Rescission

In a credit transaction that involves a principal residence and that is subject to the Truth in Lending Act, the consumer may have a right to rescind the transaction within a certain period. The consumer must be notified of this right. 12 C.F.R. § 226.23.

§ 2.221 Risk of Loss

See the section titled “Uniform Vendor and Purchaser Risk Act” below.

§ 2.222 Roadway Forming County Boundary


§ 2.223 Rule against Perpetuities

Tex. Const. art. I, § 26, provides that perpetuities are not allowed. The principal statutory provision incorporating the rule against perpetuities is found in Tex. Prop. Code § 5.043. The rule as applied to trusts is addressed in Tex. Prop. Code § 112.036.

§ 2.224 Sale of Trust Property to Governmental Entities

A governmental entity may not purchase real property held in trust unless the trustee submits to the governing body of the governmental entity a copy of the trust agreement identifying the true owner of the property. Tex. Gov. Code § 2252.092. See also the section titled “Disclosure of Interested Parties When Contracting with Governmental Entities” above.

§ 2.225 Sculptures

See the section titled “Copyrights” above.

§ 2.226 Securities Acts

The Securities Act of 1933 (15 U.S.C. §§ 77a–77aa) and the Texas Securities Act (Tex. Rev. Civ. Stat. arts. 581–1 to –43) may apply to group ownership of real estate in which passive investors furnish capital and rely on a promoter to make the investment successful. These statutes generally require certain disclosures to the passive investors and prohibit the use of fraudulent devices or schemes in connection with the sale of securities.

§ 2.227 Security Deposits


§ 2.228 Security Interests

§ 2.229 Self-Service Storage Facilities

The Texas Property Code governs the creation and perfection of liens against property held in self-service storage facilities or mini-warehouse facilities. Tex. Prop. Code §§ 59.001–.046.

§ 2.230 Seller’s Disclosure of Property Condition

See the section titled “Disclosures and Notices” above.

§ 2.231 Sewer Service

The sale of sewer service to the public is regulated under Tex. Water Code ch. 13. No retail utility may provide sewer service to the public without first receiving a certificate of convenience and necessity (CCN) from the Texas Commission on Environmental Quality (TCEQ), with the exception of municipalities (which may provide retail service to areas within their corporate limits without a CCN, provided such areas are not within the certificated area of another retail utility provider). Tex. Water Code § 13.242.

Certain owners with property within a proposed service area will receive notice of new applications for certificates and amendments to existing certificate applications. Tex. Water Code § 13.246. Certain owners may “opt out” or exclude their property from the CCN application. Tex. Water Code § 13.246. Certain owners may petition the TCEQ for a release from a CCN if they can demonstrate that the certificate holder conditions the provision of service on the payment of costs not properly allocable directly to the petitioner’s service request. Tex. Water Code § 13.254. Each certificate holder must record a map and a boundary description of the certificated area in the real property records of each applicable county. Tex. Water Code § 13.257.

§ 2.232 Sex Offenders

Convicted sex offenders must register their residences with, and certain notices must be provided to, law enforcement authorities. Tex. Code Crim. Proc. ch. 62.

A convicted sex offender may not own an interest in, be employed by, be an independent contractor for, or be an officer or director of a sexually oriented business. Tex. Bus. & Com. Code ch. 102.

§ 2.233 Shopping Center Stores, Open on Sundays

A clause in a shopping center lease that requires a store to be open when another store in the center is open does not apply on Sundays unless the lease expressly states that it applies on Sundays. Tex. Bus. & Com. Code § 53.001.

§ 2.234 Smoke Alarms

A landlord’s obligation to install smoke alarms in residential leased premises is governed by Tex. Prop. Code §§ 92.251–.262.
§ 2.235  Soldiers’ and Sailors’ Civil Relief Act

The Soldiers’ and Sailors’ Civil Relief Act has been renamed the Servicemembers Civil Relief Act. See the section titled “Military Personnel” above.

§ 2.236  Special Districts

Numerous special districts created by state statutes affect real estate transactions. Among the most important are conservation districts, drainage districts, fresh water supply districts, hospital districts, irrigation districts, levee improvement districts, municipal management districts, municipal utility districts, navigation districts, utility and reclamation districts, and water control and improvement districts. Statutes creating and governing special districts can be found in the Texas Local Government Code, Texas Health & Safety Code, and the Texas Water Code. The 2003 Texas legislature created a Special District Local Laws Code, organized so that each special district’s local law is contained in a single, separate chapter. The Code is a revision of Texas statutes compiled only to make special district laws more accessible and understandable.

§ 2.237  State of Texas Leases

Real property leases between state entities and private parties are governed by the requirements of Tex. Gov’t Code chs. 2165, 2167 and 1 Tex. Admin. Code ch. 115.

§ 2.238  Statute of Frauds

To be enforceable, the following types of transactions, among others, must be in writing: contracts for the sale of real estate; conveyances of an interest in land, including an estate of inheritance, a freehold interest, and an estate for a term longer than one year; agreements to pay a commission for certain real property transactions; and agreements that will not be performed within one year from the date they are made. Tex. Prop. Code § 5.021; Tex. Bus. & Com. Code § 26.01. See also the section titled “Loan Documents” above, relating to a notice that must be given to claim a statute-of-frauds defense in connection with a loan.

See chapter 3 in this manual for comments and suggestions relating to the preparation of documents used in any conveyance of real property.

§ 2.239  Statute of Limitations

See the section titled “Limitations” above.

§ 2.240  Statutes of Repose

§ 2.241 Stormwater Permits


§ 2.242 Streets and Roads


§ 2.243 Subdivisions

Counties may establish substantive requirements for subdivision plats for tracts outside the extraterritorial jurisdiction of municipalities. Tex. Loc. Gov’t Code §§ 232.001–.010, 232.0034, 242.001. Cities have the same power over subdivisions within their corporate limits. Tex. Loc. Gov’t Code §§ 212.001–.018. Generally, counties and cities are required to enter into a written agreement that identifies the entity authorized to regulate subdivision plats in the city’s extraterritorial jurisdiction. Tex. Loc. Gov’t Code § 242.001. If counties and cities do not enter into a written agreement before the dates specified in Tex. Loc. Gov’t Code § 242.0015(a), the parties must arbitrate the disputed issues. Tex. Loc. Gov’t Code § 242.0015.

Special subdivision requirements apply to populous counties (Tex. Loc. Gov’t Code §§ 212.0146, 232.006, 242.002), counties near the Mexican border (Tex. Loc. Gov’t Code §§ 232.021–.043), and to certain economically distressed counties (Tex. Loc. Gov’t Code §§ 232.071–.080). See also the sections titled “Colonias” and “Contracts for Deed” above.

Special subdivision requirements also apply to replats of golf courses in certain counties. Tex. Loc. Gov’t Code § 212.0155.

A subdivision plat, replat, or amended plat or replat may not be recorded unless (1) it is approved by the entity authorized to regulate subdivisions, (2) it has attached to it an original tax certificate from each taxing unit with jurisdiction over the tract indicating that no delinquent ad valorem taxes are owed on the tract, and (3) it has attached to it the documents required by Tex. Loc. Gov’t Code § 212.0105 or Tex. Loc. Gov’t Code § 232.023, if applicable. Tex. Prop. Code § 12.002. If the subdivision plat, replat, or amended plat or replat is filed after September 1 of a year, the plat, replat, or amended plat or replat must also have attached to it a tax receipt from each taxing unit with jurisdiction over the tract indicating that taxes for the current year have been paid or a statement from the collector indicating that taxes for the current year have not been calculated. Tex.
Prop. Code § 12.002(e). The tax collector is required, on request, to give the property owner or his agent a statement indicating that taxes for the current year have not been calculated. Tex. Tax Code § 31.075.

Note that tracts within the extraterritorial jurisdiction of a city may require approval from both the city and the county. See Tex. Loc. Gov’t Code § 242.001. The cancellation and revision of certain subdivision plats are governed by Tex. Loc. Gov’t Code §§ 212.013-.016, 232.008-.009. County-approved subdivision plats terminate on January 1 of the fifty-first year after the year approved if none of the platted land has been sold by that date. Tex. Loc. Gov’t Code § 232.002(c).

A property description based on a pending but unrecorded subdivision plat may be used in a sales contract, contract for deed, or deed only if certain conditions are met. Tex. Prop. Code § 12.002.

In counties with populations of 65,000 or more, if all or part of a subdivision plat is revised to provide for another subdivision within all or part of the earlier subdivision, the restrictions that apply to the earlier subdivision apply to the newly created subdivision. Tex. Prop. Code § 205.003.

Municipalities and counties are authorized to require as a condition of platting that a registered engineer certify the adequacy of groundwater. Tex. Loc. Gov’t Code §§ 212.0101, 232.0032.

Counties may require that plat applications include a digital map meeting certain criteria, provided that the necessary “digital mapping technology” is “reasonably accessible.” Tex. Loc. Gov’t Code §§ 232.001, 232.023, 232.072.

§ 2.244 Subletting or Assignment

Subletting or assignment of leased premises is prohibited without the prior consent of a landlord. Tex. Prop. Code § 91.005.

§ 2.245 Submetering

See the section titled “Utility Submetering and Nonmetering” below.

§ 2.246 Surety


§ 2.247 Surveyors


The circumstances under which a surveyor’s lien attaches to real estate are addressed in Tex. Prop. Code § 53.021(c).

§ 2.248 Survival of Representations and Warranties

Contracts that purport to limit the time in which to bring suit on the contract to less than two years are void. The provision does not apply to transactions of more than $500,000 by business entities. Tex. Civ. Prac. & Rem. Code § 16.070.
§ 2.249 Surviving Spouse of Mortgagor

Chapter 343 of the Texas Finance Code requires a residential mortgage servicer to provide to the surviving spouse of the mortgagor the loan number, the current balance, whether any amounts are delinquent, and what amount, if any, is held in escrow, within thirty days of receiving a request for the loan information. A request from a surviving spouse must include statutory language, a death certificate of the mortgagor, an affidavit from a disinterested party in a form similar to an affidavit of heirship as set forth in Tex. Est. Code § 203.002, and an affidavit from the surviving spouse stating the property is the surviving spouse’s primary residence.

§ 2.250 Swimming Pools

See the section titled “Pool-Yard Enclosures” above.

§ 2.251 Taxes


§ 2.252 Telecommunications

Telecommunications companies have certain rights of access to private commercial buildings under the Texas Utilities Code. See especially Tex. Util. Code chs. 51, 54. A telecommunications provider is defined as a person who has been issued a certificate of convenience and necessity or certificate of operating authority by the Public Utility Commission. Tex. Util. Code § 51.002(10).

§ 2.253 Terrorism Regulation


§ 2.254 Texas Department of Housing and Community Affairs

The Texas Department of Housing and Community Affairs is the principal agency in the state that administers programs of housing assistance and development for individuals and families of low, very low, and extremely low income and families with moderate income. Its general enabling statute can be found at Tex. Gov’t Code ch. 2306.
§ 2.255  Texas General Land Office

Use of evidence to demonstrate superior title to land based on records filed in the General Land Office is addressed in Tex. Prop. Code § 12.003.

§ 2.256  Timber Production

See the section titled “Ad Valorem Taxes” above.

§ 2.257  Timeshares

Timeshare projects coming into existence on or after August 26, 1985, must comply with the terms of the Texas Timeshare Act, Tex. Prop. Code ch. 221.

§ 2.258  Title Insurance

The business of title insurance is governed by the Texas Title Insurance Act, Texas Insurance Code chapters 2501–2704. Insuring forms, rate rules, procedural rules, administrative rules, and claims handling principles and procedures are set out in the “Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas” promulgated by the Texas Department of Insurance in accordance with Texas Insurance Code title 11.

§ 2.259  Towing of Motor Vehicles

Tex. Occ. Code ch. 2308 governs the removal of unauthorized vehicles from a parking facility or public roadway, the establishment of reserved parking spaces, the enforcement of parking restrictions in parking lots and garages, the towing of unauthorized vehicles from private property, and the regulation of towing companies and parking-facility owners.

§ 2.260  Trademark and Trade-Name Rights


§ 2.261  Transfer on Death Deed

The Texas Real Property Transfer on Death Act, Tex. Est. Code ch. 114, authorizes an individual to make a revocable transfer to one or more designated beneficiaries, including alternate beneficiaries, effective at the transferor’s death, by executing and recording a transfer on death deed. During the transferor’s lifetime, a transfer on death deed does not affect any right, title, or interest of the transferor in the property; vest any legal or equitable title in a designated beneficiary; or subject the property to the claims of creditors of any designated beneficiary. Notwithstanding the recording of a transfer on death deed, the transferor retains the right to transfer or encumber the property, any present or future homestead rights, and any present or future ad valorem tax exemptions to which the transferor is entitled. A transfer on death deed does not affect the rights of creditors of the transferor, secured or unsecured, nor does it trigger any due-on-sale clause. A transfer on death deed does not affect the eligibility for public assistance of either the transferor or any designated beneficiary. See form 5-25.
§ 2.262 Transportation

Certain adjacent counties are authorized to create a regional county transportation authority. Tex. Transp. Code ch. 460.

§ 2.263 Trespass to Try Title

Trespass to try title is a statutory action to establish title to real property. Tex. Prop. Code ch. 22; Tex. R. Civ. P. 783–809. A declaratory judgment action can be maintained if the sole title issue is the determination of the boundary between adjoining properties. Tex. Civ. Prac. & Rem. Code § 37.004(c).

§ 2.264 Trust Code

The Texas Trust Code, Tex. Prop. Code §§ 111.001–115.017, governs express trusts. If the Trust Code and the terms of a trust conflict, the trust controls, “except the settlor may not relieve a corporate trustee from the duties, restrictions, and liabilities under Section 113.052 or 113.053” (relating to loans of trust funds to, and purchase or sale of trust property by, the trustee). Tex. Prop. Code § 111.002(a). Trustees have certain management rights if environmental problems arise on properties held in trust under Tex. Prop. Code §§ 113.025, 114.001 even if the trust instrument does not expressly authorize such actions. A trustee may grant an agent authority to act for the trustee with respect to real property transactions unless the governing instrument prohibits the trustee from hiring agents. Tex. Prop. Code § 113.018. See also the section titled “Blind Trusts and Undisclosed Beneficiaries” above.

§ 2.265 Truth in Lending

The Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, and its implementing Regulation Z, 12 C.F.R. pt. 226, promote the informed use of consumer credit by requiring disclosures about the terms and cost of credit transactions. The Act applies to credit transactions, including mortgage credit secured by a lien on real property, if the credit is regularly extended by a creditor to natural persons primarily for personal, family, or household purposes and is subject to a finance charge or payable by a written agreement in more than four installments. See 12 C.F.R. §§ 226.1(c), 226.3. Creditors subject to the Act generally are persons who regularly extend such credit and to whom the credit obligation is initially payable. Creditors must make written disclosures for each credit transaction before consummation that reflect the terms of the actual legal obligation between the parties and show the calculated annual percentage rate, finance charge, and other material disclosures of the cost of credit within permitted tolerances for accuracy. Additional written disclosures are required at the time of application for variable rate transactions in which the annual percentage rate may increase after loan consummation. Certain credit transactions secured by a lien on a consumer’s principal dwelling are subject to rescission, and creditors must provide consumers written notices of their rights of rescission of those transactions at consummation. Special disclosure rules and limitations on permitted terms apply to certain home mortgage transactions secured by a consumer’s principal dwelling in which the annual percentage rate or total points and fees charged the consumer exceed standards set out in the Act. Advertising rules intended to ensure that advertisements promoting credit provide accurate and balanced information about rates, payments, and other loan features apply to all home mortgage loans subject to the Act. Sample forms of various required consumer disclosures are illustrated in appendix H to Regulation Z. Creditors failing to comply with requirements of the Act may be subject to civil liability, administrative penalties, and, in the case of willful and knowing violations, criminal liability. Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) (Pub. L. No. 111-203, 124 Stat. 1376), enacted July 21, 2010, which may be cited by its short title as the Mortgage Reform and Anti-Predatory Lending Act, contains extensive

The Consumer Financial Protection Bureau (CFPB) was created by the Dodd-Frank Act. All rulemaking and enforcement authority for the Real Estate Settlement Procedures Act (RESPA and Regulation X), the Truth in Lending Act and Regulation Z, the Equal Credit Opportunity Act and Regulation B, the Home Mortgage Disclosure Act and Regulation C, and other federal statutes regulating consumer finance was transferred to, and consolidated within, the CFPB as of July 21, 2011. The CFPB is required to adopt new mortgage finance regulations to implement and interpret the extensive reform measures of the Dodd-Frank Act. To date, the CFPB has under consideration seven proposed rules, which have been published in the Federal Register for public comment. The CFPB expects to adopt final rules during calendar year 2013. In an effort to coordinate the effective dates of these expected final rules, the CFPB gave notice in November, 2012, that it is amending Regulation Z (Truth in Lending) to effectively delay implementation of rules and forms required by Title XIV of the Dodd-Frank Act that otherwise would have automatically taken effect on January 21, 2013. See 77 Fed. Reg. 70,105 (Nov. 23, 2012). The CFPB intends to implement these Title XIV consumer disclosures as part of rulemaking in which mortgage disclosure forms that consumers receive under the Truth in Lending Act and RESPA when applying for and closing on a home mortgage loan will be integrated into a single set of disclosures as required by Title X of the Dodd-Frank Act. By delaying the implementation of the Title XIV disclosure rules to coincide with the integrated RESPA and Truth in Lending Act disclosure rules, the CFPB hopes to reduce the consumer confusion and compliance burden on the industry caused by a trickling down of multiple new rule releases over the coming months. Because of the continuing rule-making process, practitioners should check the CFPB website found at www.consumerfinance.gov for current regulations.

§ 2.266 Unauthorized Preparation of Real Estate Documents

The Texas Government Code prohibits the preparation of deeds, deeds of trust, notes, mortgages, and other instruments affecting title to real property for compensation unless the preparer is an attorney licensed in Texas or qualifies under one of the other listed exemptions. Tex. Gov’t Code ch. 83. Texas law broadly construes the meaning of a charge of compensation for this purpose. See Hexter Title & Abstract Co. v. Grievance Committee, 179 S.W.2d 946, 952 (Tex. 1944); Tex. Att’y Gen. Op. No. JM-943 (1988). Written materials, books, printed forms, Internet sites, computer software, and similar products are excluded from the definition of the unauthorized practice of law if the items clearly and conspicuously state that the products are not a substitute for the advice of an attorney licensed to practice law in Texas. Tex. Gov’t Code § 81.101(c). However, this exclusion does not affect the applicability or enforceability of chapter 83 and such products or similar media expressly cannot be used in violation of the prohibitions of that chapter against the unauthorized preparation of real estate documents.

§ 2.267 Unclaimed Property

See the sections titled “Abandonment” and “Escheat” above.

§ 2.268 Underground and Aboveground Storage Tanks

§ 2.269  Underground Facility Damage Prevention and Safety Act

The Underground Facility Damage Prevention and Safety Act, Tex. Util. Code ch. 251, provides for a “one-call” statewide notification service for the location of underground facilities. All excavators in Texas must notify the notification center of their intention to excavate or be subject to penalties.

§ 2.270  Uniform Commercial Code

The Texas version of the Uniform Commercial Code can be found in chapters 1 through 9 of the Texas Business and Commerce Code.

§ 2.271  Uniform Electronic Transactions Act


§ 2.272  Uniform Principal and Income Act


§ 2.273  Uniform Transfers to Minors Act

Texas has adopted the Uniform Transfers to Minors Act, Tex. Prop. Code §§ 141.001–.025. The Act establishes the terms, conditions, manner, and effect of making transfers to minors.

§ 2.274  Uniform Unincorporated Nonprofit Association Act


An “association” is defined as an entity governed as a cooperative association, an unincorporated nonprofit association, or a for-profit professional association. Tex. Bus. Orgs. Code § 1.002(3).

A “nonprofit association” is defined as an unincorporated organization, other than one created by a trust, consisting of three or more members joined by mutual consent for a common, nonprofit purpose. A form of joint tenancy, tenancy in common, or tenancy by the entirety does not by itself establish a nonprofit association, regardless of whether the co-owners share use of the property for a nonprofit purpose. Tex. Bus. Orgs. Code § 252.001(2).

§ 2.275  Uniform Vendor and Purchaser Risk Act

Tex. Prop. Code § 5.007 adopts the Uniform Vendor and Purchaser Risk Act and allocates responsibility for risk of loss between buyers and sellers, depending on whether legal title and possession have been transferred. However, the parties may by contract allocate the risk differently. Tex. Prop. Code § 5.007(a).
§ 2.276 Usury


§ 2.277 Utility District Disclosures

Any person selling or transferring property located in a water, sewer, or other district with taxing authority must give a prospective purchaser notice of the current tax rate and amount of authorized bonded indebtedness and whether the property is located in a municipality’s extraterritorial jurisdiction before or at the time of the execution of the contract. A separate copy of the notice must be executed at closing and recorded. Tex. Water Code § 49.452. See the form of utility district disclosure in chapter 4 in this manual. See also the sections titled “Disclosures and Notices” and “Municipal Utility Districts (MUDs)” above.

§ 2.278 Utility Submetering and Nonmetering

The Texas Water Code requires that multiunit facilities built after January 1, 2003, be submetered or individually metered and imposes certain requirements before conversion of an existing facility to submetering or allocated billing. Tex. Water Code §§ 13.502, 13.506. The Water Code also limits the right of certain condominium managers and landlords of apartments, manufactured-home rental communities, and commercial multiple-use facilities to charge tenants for utility expenses without proper evidence to show how the utility expenses were calculated. These provisions also limit rent increases before the installation of submeters and provide tenants means of enforcement. Tex. Water Code §§ 13.501–.506.

Utility disconnections by landlords are also limited under the provisions of Tex. Prop. Code § 92.008.

§ 2.279 Variable Interest Rates

The Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801–3806, was enacted to give nonfederally chartered housing creditors the same ability to devise alternatives to fixed-rate financing as federal institutions have. It permits nonfederally chartered lenders to make, purchase, and enforce certain mortgage transactions in which the interest rate can change as long as the transactions comply with federal regulations. See also the section titled “Usury” above.

§ 2.280 Vendor and Purchaser Risk Act

See the section titled “Uniform Vendor and Purchaser Risk Act” above.

§ 2.281 Venue

Venue for “major transactions” (in which the consideration is more than $1 million) may be determined by the parties. Tex. Civ. Prac. & Rem. Code § 15.020. Venue for actions for the recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to quiet title to real property is in the county in which all or a part of the property is located. Tex. Civ. Prac. & Rem. Code § 15.011. Venue for most suits between landlord and tenant is in the county in which all or part of the property is located. Tex. Civ. Prac. & Rem. Code § 15.0115. Venue for trust-related actions is governed by Tex. Prop. Code § 115.002. Venue provi-

§ 2.282 Vested Land Use Rights

Chapter 245 of the Local Government Code regulates the issuance of local permits and provides that, if a series of permits is required for a project, the rules, regulations, and other requirements in effect at the time the application for the first permit is filed shall be the sole basis for considering all subsequent permits to complete the project. Tex. Loc. Gov’t Code § 245.002(b). Permit holders may take advantage of new rules or changes to the law that enhance a project. Tex. Loc. Gov’t Code § 245.002(d). A municipality may adopt a moratorium on the development of residential or commercial property only if it finds a need to prevent a shortage of essential public facilities or that the moratorium is justified because existing commercial development laws are inadequate to protect the public health, safety, or welfare of its residents. Notice and hearing procedures are required. Tex. Loc. Gov’t Code §§ 212.131–.136. Certain types of regulations are exempt from the application of chapter 245. See Tex. Loc. Gov’t Code § 245.004.

After annexing an area, a municipality may not prohibit a person from (1) continuing to use land in the area in the manner in which the land was being used on the date the annexation proceedings were instituted if the land use was legal at that time or (2) beginning to use land in the area in the manner that was planned for the land before the ninetieth day before the effective date of the annexation if certain conditions are met. Tex. Loc. Gov’t Code § 43.002. These prohibitions also apply to municipalities incorporated after September 1, 2003. Tex. Loc. Gov’t Code § 211.016. See also the section titled “Private Property Rights” above.

§ 2.283 Visual Arts

The Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A, protects the reputations of certain visual artists and the works of art they create. With numerous exceptions, VARA grants three rights: the right of attribution; the right of integrity; and in the case of works of visual art of “recognized stature,” the right to prevent destruction. 17 U.S.C. § 106A.

§ 2.284 Voluntary Cleanup Program


§ 2.285 Wage Liens

Under chapter 61 of the Texas Labor Code and chapter 113 of the Texas Tax Code, if the Texas Workforce Commission (TWC) determines that an employer owes unpaid wages to an employee, the TWC is authorized to file an administrative lien against the employer’s property to secure the payment of the unpaid wages. See Tex. Lab. Code §§ 61.081–.085. Section 61.0825 of the Texas Labor Code provides that such wage liens have priority over all other liens against the same property, except for a lien securing the payment of ad valorem taxes. See Tex. Lab. Code § 61.0825.
§ 2.286 Warehouseman’s Liens

A warehouseman’s lien for property removed from a tenant’s premises is governed by Tex. Prop. Code § 24.0062. See also the section titled “Self-Service Storage Facilities” above.

§ 2.287 Water

Groundwater districts and water rights are subject to the Texas Water Code. A district has the authority to collect assessments, pursuant to Tex. Water Code ch. 51, including the ability to place a lien on real and personal property. Tex. Water Code § 51.309. As a condition of service, a water district may require a service applicant or developer to grant permanent recorded easements for the construction and maintenance of the facilities necessary for service. Tex. Water Code § 49.218. Under certain circumstances, a landowner can petition a water district board to have his property deannexed from a water district. Tex. Water Code §§ 49.3075–.3077. See also the section titled “Utility District Disclosures” above.

§ 2.288 Watercourse Forming County Boundary


§ 2.289 Water Service

The sale of potable water to the public is regulated under Tex. Water Code ch. 13. See also the section titled “Sewer Service” above.

§ 2.290 Water Wells


Counties with populations of 1.8 million or more may adopt rules to regulate the placement of private water wells in unincorporated areas of the county. See Tex. Loc. Gov’t Code §§ 240.041–.048.

§ 2.291 Weeds

It is a public nuisance in the unincorporated area of a county to allow weeds to grow within three hundred feet of another residence or commercial establishment. Tex. Health & Safety Code § 343.011. Municipalities may require property owners to keep property free from weeds. Tex. Health & Safety Code §§ 342.004, 342.008.

§ 2.292 Wetlands

Wetlands are regulated under section 404 of the Clean Water Act, codified at 33 U.S.C. § 1344. Under section 1344, dredging and filling activities in wetlands are prohibited unless a permit is obtained from the Army Corps of Engineers or other statutory exceptions apply.
§ 2.293 Wills and Estates

A will may be admitted to probate as a muniment of title if the court is satisfied that there are no unpaid debts, excluding debts secured by liens on real estate. Tex. Est. Code § 257.001. Title to real estate can be transferred by a duly probated will. Tex. Est. Code §§ 251.002, 256.001. Subject to the payment of certain debts, the estate devised or bequeathed in a lawful will vests immediately in the devisees or legatees when the testator dies. Tex. Est. Code § 101.001. See also the section titled “Affidavits of Heirship” above.

§ 2.294 Windstorm Inspection

Completed structures in coastal counties are required to comply with the state windstorm building specifications and inspection program to qualify for windstorm and hail insurance through the Texas Windstorm Insurance Association. This program is administered by the State Board of Insurance. After January 1, 2004, notice of a windstorm inspection must be submitted before beginning construction, repairs, or remodeling of a structure. Tex. Ins. Code § 2210.251(c). See also the section titled “Building Codes” above.

§ 2.295 Wood Shingles

A restrictive covenant that requires the use of wood shingles on a residential building is void under Texas law. Tex. Prop. Code § 5.025.

§ 2.296 Zoning

The authority of municipalities to establish and regulate zoning in their territorial jurisdictions is governed by the provisions of Tex. Loc. Gov’t Code ch. 211. Certain counties also have limited authority to impose zoning regulations in unincorporated areas. Tex. Loc. Gov’t Code ch. 231.

The authority of municipalities and other political subdivisions to regulate oil and gas operations within the state is expressly preempted in favor of the state’s authority to regulate all such operations. Such operations include exploration and production, processing, drilling, hydraulic fracturing, transporting (including by pipelines), disposal, plugging of wells, and remediation activities. Commercially reasonable regulation by municipalities and other political subdivisions of aboveground activities, such as fire safety regulations, emergency response, and traffic control measures that would not prohibit operations by a reasonably prudent operator are permitted. Tex. Nat. Res. Code § 81.0523.
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Additional Resources

Forms

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Form 3-2 Document Components: Spouses

Form 3-3 Document Components: Natural Person—Nonhomestead

Form 3-4 Document Components: Multiple Persons—Nonhomestead

Form 3-5 Document Components: Spouses—Nonhomestead

Form 3-6 Document Components: Married Person—Separate Property

Form 3-7 Document Components: Natural Person—Assumed Name

Form 3-8 Document Components: Natural Person by Attorney-in-Fact

Form 3-9 Document Components: General Partnership—Individual Partner

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Texas statutes require that a real property conveyance of an estate of more than one year must be in writing, subscribed, and delivered by the grantor or by the grantor’s agent authorized in writing. Tex. Prop. Code § 5.021. The following comments and suggestions relate to the preparation of documents used in any conveyance of real property.

§ 3.1 Amounts

No particular form is required for writing the amount of the transaction; it may be spelled out, written numerically, or both. Many attorneys prefer to write the amount in capital letters immediately followed by the numerical amount in parentheses—for example, ONE THOUSAND AND NO/100 DOLLARS ($1,000.00) or ONE THOUSAND, TWO HUNDRED AND FIFTY AND 10/100 DOLLARS ($1,250.10). If there is a variance between unambiguous written words and figures, the written words control. Guthrie v. National Homes Corp., 394 S.W.2d 494, 495 (Tex. 1965). See also Tex. Bus. & Com. Code § 3.114.

§ 3.2 Captions

Instruments have traditionally commenced with these captions, to indicate the county in which the instrument is to be recorded:

THE STATE OF TEXAS )
) KNOW ALL MEN BY THESE PRESENTS:
COUNTY OF ________ )

These captions are not required in modern conveyancing documents and are omitted from the forms in this manual. Even though instruments no longer need a caption, certificates of acknowledgment, which are the written record of the acknowledgment ceremony made by the presiding officer and appended to many real estate instruments, require a caption showing where the acknowledgment ceremony occurred. Captions are therefore included in the certificate of acknowledgment forms contained in this manual. See Tex. Civ. Prac. & Rem. Code § 121.007.

§ 3.3 Dates in Instruments

When a transaction requires more than one instrument (such as a deed, a note, and a deed of trust, or a note and a mechanic’s lien contract), all instruments should bear the same date. Arbitrary dating of all instruments at the time of preparation will make all copies, including file copies, reflect the same date. Conveyances can commence on a future date (Tex. Prop. Code § 5.041); thus, the effective date of an instrument can be different from the date of signing. Because instruments are adequately referred to by date, the expression “Executed this _____ day of _____” is unnecessary. Also, as a practical matter, all file copies should show the actual date of the original document to facilitate subsequent amendment of the document or reference to it in other documents relating to the transaction. When the deed has been dated one date and acknowledged on another, absent evidence regarding the actual date of delivery of the deed, the presumption arises that delivery occurred on the date of the deed, not the date of the acknowledgment. Bell v. Smith, 532 S.W.2d 680, 685 (Tex. Civ. App.—Fort Worth 1976, no writ).
§ 3.4 Headings

Each instrument to be recorded should have a heading clearly identifying it at the top of the first page. Tex. Loc. Gov’t Code § 191.007(c).

§ 3.5 Mailing Address of Grantee

The grantee’s mailing address should be shown on instruments conveying an interest in real property, such as deeds, deeds of trust, assignments of leases, and transfers of liens. Preferably, the address should appear in the instrument; it may also be given in a separate, signed writing attached to the instrument. For failure to show the address, the county clerk may assess a penalty filing fee equal to the greater of $25 or twice the statutory recording fee. Tex. Prop. Code § 11.003.

Forms in this manual considered to be conveyances provide for the grantee’s address. Some county clerks may require the grantee’s address on other documents as well.

§ 3.6 Preparer of Instrument

Although not required, including the preparer’s name and address may be useful for the parties and the public generally. Additionally, any document being recorded should be labeled “Record and return to:” with the address of the designated recipient added.

§ 3.7 Property Description

§ 3.7:1 Specificity of Description

An accurate property description is essential to a valid conveyance. The property must be described with enough certainty that it can be readily identified from the description. The description should include the city, county, and state in which the property is located, and courses and distances in metes-and-bounds descriptions must be unambiguous. If a deed conveys only part of a tract of land and does not designate which part, for example, the description may be insufficient to convey title. See De Martinez v. De Vidaurri, 219 S.W.2d 823, 826 (Tex. Civ. App.—San Antonio 1949, writ ref’d n.r.e.). If the property has been described in a filed plat, the plat reference to the lot and block of the property should be used.

§ 3.7:2 General Instructions

The property description can include references to other recorded instruments, such as other deeds, but to depend solely on this reference as the entire description poses the danger that it may not match the intended description exactly or that it may be inaccurate or invalid. Conversely, if the metes-and-bounds description of the property is defective, but reference is made to another recorded document that contains a proper legal description of the property, the conveyance will probably be enforceable. Sorsby v. State, 624 S.W.2d 227, 232 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

The description should be identical in all documents relating to the same transaction, such as a deed and a deed of trust.

If the description is too long to fit the space provided in the form, it may be attached to the instrument and incorporated in it by a simple statement in the space provided for the description. An example of typical language for this purpose is “Two hundred acres of the Travis tract, out of the Domingo Losoya Survey No. 4, Abstract No. 10, Sunshine County, Texas, more particu-
larly described in Exhibit A attached to this deed and by this reference incorporated in it.” This should be the identical lan-

guage used as the caption or “lead-in” on the description attached as an exhibit. In this case the attorney must make certain

that the exhibit is actually attached and properly identified as the referenced exhibit.

The attorney should consider adding the phrase more or less to references to the quantity of property being conveyed. By
doing this, the grantor may be relieved of liability arising from minor shortages. See Wooten v. State, 177 S.W.2d 56, 58 (Tex.

1944). This is the case whether the property has recently been surveyed or not, because there typically are minor variations

between surveys concerning measurements and area computations.

If included in the body of the form, the description should be indented and set out in block form, to make it easily identifiable

in the instrument.

§ 3.7:3  Description of Platted Property

Traditionally the lot, block, and addition or subdivision numbers designating the property are used for describing platted prop-

erty. A typical description using lot, block, and addition numbers takes this form:

Lot _____, Block _____, _____ Addition, [city], [county] County, Texas, according to the map or plat thereof

recorded in Volume _____, Page _____, of the real property records of [county] County, Texas.

§ 3.7:4  Description by Metes and Bounds

Metes-and-bounds descriptions are the most common type used for property outside urban areas and for unplatted urban land.

These descriptions have been a steady source of litigation. Metes-and-bounds descriptions, as well as other types of legal
descriptions, have been liberally construed by the courts. When obvious errors have occurred in a legal description, courts will
generally attempt to find and correct the error, so as to give effect to the conveyance. See Poitevent v. Scarborough, 124 S.W.

87 (Tex. 1910). Calls of distance have been held to be the weakest, and calls of distance and quantity must yield to well-estab-

lished corners. Warren v. Swanzy, 361 S.W.2d 479, 484 (Tex. Civ. App.—Beaumont 1962, writ ref’d n.r.e.). A missing call in

a metes-and-bounds description may be supplied when the omitted call was the only logical one that would make the descrip-
tion close. See Mansel v. Castles, 55 S.W. 559 (Tex. 1900).

§ 3.7:5  Recording Reference

It is common to refer to recorded instruments in descriptions, subrogation clauses, releases, transfers, and the like. The refer-
ence consists of volume and page recording information or a particular record of the appropriate county. From the earliest
days, the particular records were named after the instruments themselves—that is, deed records, deed-of-trust records,

mechanic’s lien records, and so on—and the reference would be, for example: “recorded in Volume _____, Page _____, Deed

of Trust Records of _____ County, Texas.”
Instruments filed with a county clerk under the microfilm system will be assigned both a file number and, on recording, volume and page numbers, film code numbers, or other applicable identification data. An instrument recorded under the microfilm system may be referred to as: “recorded in Film Code No. _____ through _____ (or Volume _____, Page _____ or County Clerk File No. _____ or Instrument No. _____), Official Public Records of Real Property of _____ County, Texas.”

Section 11.007 of the Texas Property Code provides a uniform system of references to be used in every county whether a microfilm system is in effect or not. A reference in an instrument to the volume and page number, film code number, or county clerk file number of the “real property records” (or words of similar import) for a particular county is equivalent to a reference to deed records, deed-of-trust records, or other specific records to provide effective notice to all persons of the existence of the referenced instrument. Tex. Prop. Code § 11.007. Uniform references for all recorded instruments can be in the following manner: “recorded in Film Code No. _____ through _____ (or Volume _____, Page _____ or County Clerk File No. _____ or Instrument No. _____) of the real property records of _____ County, Texas.”

In various Texas counties there may be nonstatutory variations in indexing real property records, which the practitioner should identify before referring back to a previously recorded instrument in a new instrument.

§ 3.8 Signatures

§ 3.8:1 Beneath Signature Lines

If names are not legibly typed or printed under each signature, the county clerk may double the filing fee for every nonconforming page. Tex. Loc. Gov’t Code § 191.007(e), (h). If there are no printed signature lines, they should be added below the text of the instrument, unless an instrument is promulgated by the Texas legislature and contains text below the proposed signature space. See, for example, the statutory durable power of attorney (Tex. Est. Code § 752.051) and the directive to physicians (Tex. Health & Safety Code § 166.032).

§ 3.8:2 Person with Physical Disability

If an individual who is physically unable to sign or to make a mark on a document presented for notarization so directs, a notary public may sign the individual’s name, in the presence of a witness who has no legal or equitable interest in any property that is the subject of the document. The notary public must require identification of the witness in the same manner as from an acknowledging person under section 121.005 of the Texas Civil Practice and Remedies Code. The notary should then write the following beneath the signature: “Signature affixed by notary in the presence of (name of witness), a disinterested witness, under section 406.0165 of the Texas Government Code.” Tex. Gov’t Code § 406.0165(b).

§ 3.8:3 Signing with Mark

If the person signing cannot sign his or her name, but can only make a mark, an “X” should be marked in place of the signature, with the signatory’s name typed beneath the mark, followed by “, his/her mark.”

§ 3.8:4 Original Signatures for Paper Documents

A paper document concerning real or personal property may not be recorded or serve as notice of the paper document unless the paper document contains an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved
A paper document can instead be attached as an exhibit to a paper affidavit or other document that has an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved according to law. An original signature is not required for an electronic instrument or other document that complies with chapter 15 of the Texas Property Code, chapter 195 of the Texas Local Government Code, chapter 43 of the Texas Business and Commerce Code, or other applicable law. A “paper document” means a document that is not electronic received by a county clerk. See Tex. Prop. Code § 12.0011.

§ 3.9 Names

The parties’ names in the text of an instrument should be followed by their status—for example, “John J. Doe and Jane R. Doe, spouses.” Use an individual’s middle name or middle initial to help avoid confusion with other individuals with similar names. For a married woman or widow, a name such as “Mrs. John Doe” should never be used.

Ordinarily, titles showing a person’s rank or profession, such as “Captain John J. Doe” or “John J. Doe, M.D.,” should not be used unless they are part of the legal name. Use the labels “Sr.” and “Jr.” in appropriate instances to distinguish between the ancestor and the legally named “Jr.”

Whenever possible, to maintain uniformity of names in the chain of title, all legal instruments to be filed should use precisely the same name for an individual as that used in instruments already recorded. If the party’s legal name changes between conveyances, the change should be explained in a note following the name. For example, if title has been conveyed to Helen J. Doe, a single woman, and she later conveys title as Helen D. Jones, the fact that she was formerly known as Helen J. Doe or was conveyed title as Helen J. Doe should be noted.

If the property being conveyed or encumbered is homestead property, the record title holder’s spouse is required to join in any conveyance or encumbrance. See Tex. Fam. Code § 5.001.

If the grantor or grantee is a legal entity rather than a person, it should be specifically identified.

A description usually follows the name of a financial institution but may be unnecessary if the name adequately describes the institution—for example, “First National Bank of Sunshine,” “Sunshine Federal Credit Union,” or “Sunshine Federal Land Bank Association.”

A deed by a corporation, if signed by an officer when recorded, constitutes prima facie evidence that execution was authorized by appropriate resolution of the board of directors; if the deed is executed by anyone other than an officer, it should be accompanied with a certified copy of the board of directors’ resolution. Before August 28, 1989, the deed had to be executed by the president or a vice-president to constitute that prima facie evidence. Filing a certified copy of the appropriate resolution provides an additional safeguard to establish the validity of the corporate conveyance. Neither a corporate seal nor attestation by the corporate secretary is required in Texas, unless required by the bylaws of the corporation.

§ 3.10 Acknowledgments

§ 3.10:1 Necessity for Acknowledgment

Instruments may be recorded only if they have been acknowledged, proved, or sworn to according to law. See Tex. Prop. Code §§ 11.004(a)(1), 12.001, 12.0011. County clerks may record an instrument only if it contains original signatures that are duly
acknowledged, sworn to with a proper jurat, or otherwise proved in compliance with applicable law. The recordation of an instrument not duly acknowledged, otherwise proved, or sworn is a nullity and is not constructive notice of its contents. See, e.g., *Sanchez v. Telles*, 960 S.W.2d 762, 767 (Tex. App.—El Paso 1997, writ denied); *Reserve Petroleum Co. v. Hutcheson*, 254 S.W.2d 802, 806 (Tex. Civ. App.—Amarillo, 1952, writ ref’d n.r.e.). An instrument filed after September 1, 2007, containing a defective acknowledgment is considered lawfully recorded and is constructive notice of its contents after it has been of record for two years. Tex. Civ. Prac. & Rem. Code § 16.033(c).

Generally, the absence of an acknowledgment will not affect the validity of a deed, mortgage, or conveyance between the parties or affect the instrument as a conveyance. See, e.g., *Haile v. Holtzclaw*, 414 S.W.2d 916, 928 (Tex. 1967). However, by statute, certain instruments must include an acknowledgment. These include subdivision plats, powers of attorney, extensions of real estate lien debt, and management certificates by property owners associations. See Tex. Loc. Gov’t Code § 212.004(c); Tex. Est. Code § 751.002; Tex. Civ. Prac. & Rem. Code § 16.036; Tex. Prop. Code § 209.004. Failure of the acknowledgment may render the instrument a nullity, even between the parties to the instrument.

§ 3.10:2 Distinguishing Acknowledgment and Certificate of Acknowledgment

Though used interchangeably, the terms *acknowledgment* and *certificate of acknowledgment* refer to two different concepts. An acknowledgment is the statutory ceremony in which a person who has executed an instrument appears before a competent officer and declares the instrument to be that person’s act and deed. A certificate of acknowledgment is the written record of that proceeding made by the officer and appended to the instrument. To effect a valid acknowledgment, there must be both a valid ceremony of acknowledgment and a valid certificate of acknowledgment. See Tex. Civ. Prac. & Rem. Code § 121.004; *Punchard v. Masterson*, 101 S.W. 204 (Tex. 1907).

§ 3.10:3 Short-Form Certificate of Acknowledgment

Many practitioners prefer to use the short-form certificate of acknowledgment when the acknowledgment is taken in Texas and if the acknowledger is within one of the five categories of persons or entities specified by statute. Those categories are—

1. natural persons;
2. natural persons acting by attorneys-in-fact;
3. partnerships;
4. corporations; and
5. public officers, trustees, executors, administrators, guardians, or other representative signers.


§ 3.10:4 Ordinary (Long-Form) Certificate of Acknowledgment

The ordinary, or long-form, certificate should be used if documents are to be executed outside Texas or in instances in which the acknowledger does not fall within one of the five categories for which short-form certificates may be used. Some practitioners have adapted various short-form certificates for use in Texas that do not fit the literal definition of the Texas Civil Practice and Remedies Code. See Tex. Civ. Prac. & Rem. Code § 121.008. The practitioner should use the long-form certificate in all instances in which the acknowledger is not within one of the classes specified by the statute.
§ 3.11 Requirements of Valid Ceremony of Acknowledgment

A valid ceremony of acknowledgment requires—

1. a competent officer to take the acknowledgment (see Tex. Civ. Prac. & Rem. Code § 121.001);
2. a personal appearance by the acknowledger before the officer (see Tex. Civ. Prac. & Rem. Code § 121.004(a));
3. the identification of the acknowledger by the officer (see Tex. Civ. Prac. & Rem. Code § 121.005); and
4. a statement by the acknowledger that the acknowledger has executed the instrument for the purposes and consideration stated in the instrument (see Tex. Civ. Prac. & Rem. Code § 121.004(a)).

§ 3.11:1 Competent Officer to Take Acknowledgment

Acknowledgments Taken within Texas: Acknowledgments taken in Texas may be made before—

1. a notary public;
2. a clerk of a district court (or deputy district clerk);
3. a judge of a county court;
4. a clerk of a county court (or deputy county clerk);
5. a federal judge, justice, or magistrate; or
6. certain other public officers for specific statutory instruments.


Acknowledgments Taken outside Texas but inside United States or Its Territories: Acknowledgments taken outside Texas but inside the United States or its territories may be made before—

1. a notary public;
2. a clerk of a court of record having a seal;
3. a commissioner of deeds appointed under the laws of Texas; or
4. a federal judge, justice, or magistrate.


Acknowledgments Taken outside United States or Its Territories: Acknowledgments taken outside the United States or its territories may be made before—

1. a minister, commissioner, or chargé d’affaires of the United States who is a resident of and is accredited in the country in which the acknowledgment is taken;
2. a consul general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul, or consular agent of the United States who is a resident of the country in which the acknowledgment is taken; or
3. a notary public or other official authorized to administer oaths in the jurisdiction in which the acknowledgment or proof by affidavit is taken.
The preferred method of taking an acknowledgment outside the United States is to use a U.S. foreign service officer authorized in item 1 or 2 above. A form for acknowledgment by a foreign service officer of the United States is included as form 3-30 in this chapter.

If an acknowledgment is taken before a foreign notary public or any other official authorized to administer oaths in the jurisdiction in which the acknowledgment is taken as authorized in Texas Civil Practice and Remedies Code section 121.001(c)(3), it is advisable for the attorney to comply with the Hague Convention on Legalization of Foreign Public Documents, if the instrument is executed in a country that has adopted the Hague Convention, and to seek certification and authentication of the document through an embassy or consular office for a country that has not adopted it. For additional information, see https://www.hcch.net, https://travel.state.gov, and, more specifically, https://travel.state.gov/content/travel/en/legal-considerations/judicial/authentication-of-documents.html.

Acknowledgments Taken of Military Personnel and Their Spouses: A commissioned officer of the United States Armed Forces or of a United States Armed Forces auxiliary may take an acknowledgment of a written instrument of a member of the armed forces, a member of an armed forces auxiliary, or a member’s spouse. Tex. Civ. Prac. & Rem. Code § 121.001(d). A form for a military acknowledgment is included as form 3-31.

Territorial Limitations on Officer’s Authority: Texas notaries may take an acknowledgment anywhere in the state but not outside the boundaries of Texas. Tex. Gov’t Code § 406.003.

Time Limitations on Officer’s Authority: The term of a notary’s appointment is four years. Tex. Gov’t Code § 406.002. Reapplication may be made for successive terms. Tex. Gov’t Code § 406.011. Texas law requires that the expiration date of the notary’s commission appear as part of the notary’s seal. See Tex. Gov’t Code § 406.013(a).

The authority of other intrastate officers is limited to the terms of their offices.

Interested Officers Disqualified to Take Acknowledgment: A party to an instrument may not take an acknowledgment for that instrument because one who is financially or beneficially interested in a transaction is disqualified from taking an acknowledgment concerning the transaction. Dyson Descendant Corp. v. Sonat Exploration Co., 861 S.W.2d 942, 948 (Tex. App.—Houston [1st Dist.] 1993, no writ).

A beneficiary or trustee of a trust may not take an acknowledgment of an instrument to which the trust is a party. Nor may a trustee of a deed of trust take an acknowledgment for that instrument. See Rothschild v. Dougher, 20 S.W. 142 (Tex. 1892).

Generally, an agent of a party to an instrument is also disqualified to take an acknowledgment if that agency appears on the face of the instrument. To be disqualified, however, the agent must have discretionary authority to negotiate the terms of a particular transaction for the principal. See Sample v. Irwin, 45 Tex. 567 (1876); Uvalde Rock Asphalt Co. v. Warren, 59 S.W.2d 272 (Tex. Civ. App.—Galveston 1933), aff’d, 91 S.W.2d 321 (Tex. 1936). But if the agent is a mere salaried employee of a party to an instrument, the agent is not disqualified from taking an acknowledgment of that instrument. Director, Dallas County Child Welfare v. Thompson, 667 S.W.2d 282 (Tex. App.—Dallas 1984, no writ); Anderson v. Pioneer Building & Loan Ass’n, 163 S.W.2d 421, 425 (Tex. Civ. App.—Waco 1942, writ ref’d w.o.m.).

An officer or director of a corporation may not take an acknowledgment of an instrument to which the corporation is a party. A shareholder of a corporation is likewise disqualified if the corporation has one thousand or fewer stockholders and the offi-
 Generally, an acknowledgment taken by an interested officer is void and may not be reformed or corrected. However, effect will be given to such an acknowledgment to protect an innocent purchaser who relies on the instrument as constructive notice and having no knowledge of the disqualifying interest of the officer. To render an acknowledgment ineffective by reason of a disqualifying interest of the notary, the officer’s financial or beneficial interest must appear on the face of the instrument or be otherwise known to the party relying on the instrument. Constructive notice of the disqualifying interest may come from a prior recorded instrument. See, e.g., Gulf Production Co. v. Continental Oil Co., 164 S.W.2d 488, 493–94 (Tex. 1942); Dyson Descendant Corp., 861 S.W.2d at 948.

§ 3.11:2 Personal Appearance before Officer

An acknowledgment is invalid unless the acknowledger personally appears before the competent officer. Tex. Civ. Prac. & Rem. Code § 121.004(a). An acknowledgment taken over the telephone or otherwise made without personal contact with the acknowledger fails to satisfy the statutory requirements of an acknowledgment ceremony.

§ 3.11:3 Acknowledger Must Be Identified by Officer

An officer may not take an acknowledgment unless the officer knows the acknowledger or has satisfactory evidence that the acknowledging person is the same person who executed the instrument. Tex. Civ. Prac. & Rem. Code § 121.005(a).

The law does not prescribe the extent of acquaintance necessary for the acknowledger to be known to the officer. The acquaintance may be of one year or one hour. However, mere introduction by another may be insufficient for the acknowledger to be known to the officer.

Satisfactory evidence of the identity of an acknowledger not known to the officer may be made only by the oath of a credible witness personally known to the officer, by a current identification card or other document issued by the federal government or any state government that contains the photograph and signature of the acknowledging person, or, in the case of a deed or other instrument relating to a residential real estate transaction, by a current passport issued by a foreign country. Tex. Civ. Prac. & Rem. Code § 121.005(a). The most common examples seen are driver’s licenses and passports. However, the form provided in Texas Civil Practice and Remedies Code section 121.010 provides for identification only by personal knowledge or oath of a witness.

§ 3.11:4 Acknowledger Must Acknowledge Signature before Officer

An officer may not take a valid acknowledgment by simply sitting in mute observation of a person signing the instrument. To effect a valid ceremony of acknowledgment, the acknowledger must state to the officer that the acknowledger executed the instrument in the capacity and for the purposes and consideration stated in the instrument. The officer should treat the acknowledgment as a scripted ceremony and obtain from the acknowledger, as applicable, the following declarations.

1. Individual Acknowledgment. A natural person must acknowledge to the officer that the acknowledger executed the instrument for the purposes and consideration expressed in the instrument.
2. Attorney-in-Fact. An acknowledger executing an instrument as attorney-in-fact for a principal must acknowledge that the acknowledger executed the instrument as the act of the principal for the purposes and consideration expressed in the instrument.

3. Partnership. An acknowledger executing a document on behalf of a partnership must acknowledge that the acknowledger executed the instrument as the act of the partnership for the purposes and consideration expressed in the instrument.

4. Corporate Acknowledgment. A corporate officer or agent must acknowledge that the acknowledger executed the instrument in the capacity stated, as the act of the corporation, for the purposes and consideration expressed in the instrument.

5. Public Officer, Trustee, Executor or Administrator of an Estate, Guardian, or Other Representative Signer. An acknowledger executing a document as a public officer, trustee, executor or administrator of an estate, or guardian or in another representative capacity must acknowledge that the acknowledger executed the instrument by proper authority in the capacity stated and for the purposes and consideration expressed in the instrument.


§ 3.12 Requirements for Valid Certificate of Acknowledgment

A valid certificate of acknowledgment must—

1. be in English;
2. contain a caption showing where the acknowledgment was taken;
3. recite the official capacity of the officer taking the acknowledgment;
4. recite a personal appearance before the officer;
5. recite that the acknowledger was identified by the officer;
6. recite that the acknowledger acknowledged the instrument;
7. identify the acknowledger;
8. recite the date of the acknowledgment;
9. bear the signature of the officer; and
10. bear the official seal of the officer.

See sections 3.12:1 through 3.12:11 below for more detailed information.

The legislature has prescribed statutory forms for an ordinary (long-form) certificate of acknowledgment and for certain short-form certificates of acknowledgment. See Tex. Civ. Prac. & Rem. Code §§ 121.007, 121.008. The short-form certificates of acknowledgment are preferred for acknowledgments taken within Texas. Short-form certificates of acknowledgment should not be used for acknowledgments taken outside the state of Texas. This chapter includes examples of both ordinary and short-form certificates of acknowledgment. Short-form certificates of acknowledgment are shown in this chapter for acknowledgers falling within the classes identified in Texas Civil Practice and Remedies Code section 121.008.
Ordinary (long-form) certificates of acknowledgment are shown in this chapter for all acknowledgers, and a separate form is included as form 3-29 in this chapter.

Short-form certificates of acknowledgment do not require that the certificate state how the officer identified the acknowledger. In all other respects, short-form certificates of acknowledgment must contain all essential elements of a certificate of acknowledgment. For an ordinary, or long-form, certificate, it is necessary that the officer state in the certificate either that the officer personally knows the acknowledger or that evidence of a witness or an identification card or other document was used to identify the acknowledger. Tex. Civ. Prac. & Rem. Code § 121.005(b).

There are statutory requirements for the ordinary, or long-form, certificate of acknowledgment, and there are different statutory requirements for the short-form certificate of acknowledgment; in either case, substantial compliance with the statutory forms is all that is required. Literal compliance is not essential as long as, on balance, the certificate shows that substantially all things required by law to be done have been done. See *Williams v. Cruse*, 130 S.W.2d 908 (Tex. Civ. App.—Beaumont 1939, writ ref’d) (construing an ordinary certificate of acknowledgment).

§ 3.12:1 Certificate Must Be in English

The certificate of acknowledgment and the remainder of the instrument may not be recorded unless they are in English or comply with Tex. Prop. Code § 11.002. For those illiterate in English, no special form of certificate of acknowledgment is specified. However, prudence may dictate that an affidavit of interpreter be executed and attached to the instrument. An affidavit of interpreter is included as form 3-36 in this chapter.

An instrument acknowledged outside the United States or its territories in accordance with Texas Civil Practice and Remedies Code section 121.001(c)(3) that contains a certificate, stamp, or seal of a notary public or other official before whom the acknowledgment was taken or an apostille relating to the acknowledgment, any portion of which is not in English, may be recorded and operate as constructive notice from the date of filing if—

1. a correct English translation of any non-English portion of the certificate, stamp, seal, or apostille is recorded with the original instrument;

2. the accuracy of the translation is sworn to before an officer authorized to administer oaths; and

3. any apostille relating to the acknowledgment complies with the Hague Convention dated October 5, 1961, entitled “Convention Abolishing the Requirement of Legalisation for Foreign Public Documents,” a copy of which can be obtained online at [https://www.hcch.net/](https://www.hcch.net/).


§ 3.12:2 Certificate Must Identify Location of Acknowledgment

Each separate certificate of acknowledgment must bear a caption or other indication of where the acknowledgment was taken so that it can be determined that the officer taking the acknowledgment acted within the scope of the officer’s geographic authority. Each separate certificate of acknowledgment must contain its own caption. See Tex. Civ. Prac. & Rem. Code §§ 121.007, 121.008.
§ 3.12:3 Certificate Must Recite Capacity of Officer

It is not enough that the officer taking the acknowledgment take it correctly within the officer’s official capacity. The certificate of acknowledgment must recite the official capacity of the officer on the instrument. See Gulf, Colorado & Santa Fe Railway Co. v. Carter, 24 S.W. 1083 (Tex. Civ. App.—Dallas 1893, no writ).

§ 3.12:4 Certificate Must Recite Personal Appearance by Acknowledger before Officer

The certificate of acknowledgment must state that the acknowledger made a personal appearance before the officer. Statutory short forms for certificates of acknowledgment accomplish this by stating that the acknowledgment was taken “before me.” See Tex. Civ. Prac. & Rem. Code §§ 121.006–.008.

§ 3.12:5 Certificate Must Recite That Acknowledger Was Identified by Officer

For an ordinary, or long-form, certificate of acknowledgment, the certificate must recite how the officer identified the acknowledger by the accepted statutory methods. The certificate of acknowledgment must state that the acknowledger was—

1. known to the officer;
2. identified to the officer by the oath of a credible witness personally known to the officer;
3. identified by a current identification card or other document issued by the federal government or any state government that contains the photograph and signature of the acknowledging person; or
4. in the case of a deed or other instrument relating to a residential real estate transaction, identified by a current passport issued by a foreign country.

This requirement does not apply to short-form certificates of acknowledgment.


§ 3.12:6 Certificate Must Recite That Signatory Acknowledged Instrument

The certificate of acknowledgment must recite that the signatory acknowledged the execution of the instrument. Failure to state this essential fact renders the certificate fatally defective. See Tex. Civ. Prac. & Rem. Code §§ 121.007, 121.008.

A long-form certificate of acknowledgment should contain all the components required for a valid ceremony of acknowledgment. See section 3.11 above.

Short-form certificates of acknowledgment require only an abbreviated statement of acknowledgment. Generally, each short-form certificate of acknowledgment requires only a statement that the instrument was “acknowledged.” However, short-form certificates of acknowledgment for attorneys-in-fact, partnerships, and corporations must additionally state that the instrument was acknowledged “on behalf of” the principal, partnership, or corporation. The short-form certificate of acknowledgment for a public officer, trustee, executor, administrator, guardian, or other representative signer must state that the instrument was acknowledged by the representative signer “as (title of representative) of (name of entity or person represented).” Tex. Civ. Prac. & Rem. Code § 121.008.
§ 3.12:7 Certificate Must Identify Acknowledger

The certificate of acknowledgment must show that the person acknowledging the instrument is the same person who signed it. A slight variance between the name of the person shown to have signed and the name of the person shown to have acknowledged the instrument may, but will not necessarily, invalidate the certificate. See, e.g., Cheek v. Herndon, 17 S.W. 763 (Tex. 1891).

Pronouns may be employed in certificates of acknowledgment as a substitute for the name of the acknowledger given elsewhere in the certificate. As with the names for which they substitute, errors in the use of pronouns may, but will not necessarily, have the effect of invalidating the certificate. Cheek, 17 S.W. at 764.

§ 3.12:8 Certificate Must Recite Date of Acknowledgment

All statutory forms for certificates of acknowledgment provide for the certificate to be dated. The date must be the date on which the instrument was acknowledged. The date of the acknowledgment must not be earlier than the date of execution of the instrument; otherwise, the notary would appear to have taken the acknowledgment before the document was actually executed, giving rise to an ineffective acknowledgment. However, an instrument may be dated to become effective on some future date while the acknowledgment is taken and dated with a current date.

§ 3.12:9 Certificate Must Bear Signature of Officer


§ 3.12:10 Certificate Must Bear Official Seal of Officer


The notary must use a seal of office that clearly shows, when embossed, stamped, or printed on a document, the words “Notary Public, State of Texas” around a star of five points, the notary’s name, and the date the notary’s commission expires. For notaries commissioned or reappointed on or after January 1, 2016, the seal of office must also show the notary’s identification number assigned by the secretary of state. The seal may be in a circular form not more than two inches in diameter or a rectangular form not more than one inch in width and two and one-half inches in length; must have a serrated or milled-edge border; and must be affixed by a seal press or stamp that embosses or prints a seal that legibly reproduces the required elements of a seal under photographic methods. An indelible ink pad must be used for the stamp. Tex. Gov’t Code § 406.013.

Documents notarized before September 1, 1989, are valid if the seal used contained the words “Notary Public, State of Texas” or “Notary Public” and the name of the county but did not have the notary’s name and commission expiration date. Continued use of previously authorized forms of seals is not authorized after August 31, 1989.

The notary’s seal should not cover or obscure signatures or text.
The ordinary, or long-form, certificate of acknowledgment includes the language above the signature of the officer that the certificate is “given under my hand and seal of office.” Tex. Civ. Prac. & Rem. Code § 121.007. However, the presence or absence of these words does not affect the validity of the certificate. The phrase has been eliminated from short-form certificates of acknowledgment. See Tex. Civ. Prac. & Rem. Code § 121.008.

§ 3.12:11 Officer Required to Keep Record of Acknowledgments Taken

Unless specifically excused by statute, each officer authorized to take acknowledgments of instruments must enter in a “well-bound book” and officially sign a short statement of each acknowledgment taken. There are general requirements of the information to be recorded in the book, such as the date of the instrument, the date the acknowledgment or proof was taken, the name and mailing address of the acknowledger, information about how the acknowledger was identified, the name of the grantee of the land, the county in which the land is located, and a brief description of the instrument. See Tex. Civ. Prac. & Rem. Code § 121.012; Tex. Gov’t Code § 406.014(a). Books suitable for this purpose are available commercially.

No penalty is prescribed for the failure of an officer to maintain a well-bound book or to make entries of acknowledgments taken. The failure to make the entry does not affect the validity of the instrument or prove that the acknowledgment was not taken. See Martin v. Bane, 450 S.W.2d 142, 144 (Tex. Civ. App.—Dallas 1969, no writ).

§ 3.13 Alternative Methods of Proving Instruments

Notwithstanding that an instrument may not contain a valid acknowledgment, it may nevertheless be recorded if proved by alternative methods. The alternative methods of proving a document for recordation include proof by jurat, proof by subscribing witness, acknowledgment by handwriting, proof by suit, and proof by an unsworn declaration.

See sections 3.13:1 through 3.13:5 below for more detailed information.

§ 3.13:1 Proof by Jurat

Jurat are ordinarily used only for affidavits. However, since September 1, 1989, instruments that are only sworn to and not acknowledged or otherwise proved are eligible for recordation. See Tex. Prop. Code § 12.001. Affidavits recorded before September 1, 1989, must have been accompanied by an acknowledgment. Any affidavit recorded without an acknowledgment before that date may not constitute constructive notice.

As with acknowledgments, an officer cannot take a valid affidavit by simply sitting in mute observation of the affiant signing the instrument. The officer taking the affidavit should place the affiant under oath or receive the affiant’s declaration that the statements contained in the affidavit are true and correct. Failure to attend to these formalities may render the affidavit ineffective. See Tex. Gov’t Code § 312.011(1). A sample oath for the officer to administer to the affiant is: “Do you swear or affirm to tell the truth, the whole truth, and nothing but the truth?” The affiant must answer “yes” before signing the sworn document.

Affidavits in this manual contain a statement similar to the following: “Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant.” Although the statement is not required by statute, the Supreme Court of Texas has held that an affidavit is insufficient unless the allegations contained in it are direct and unequivocal and perjury can be assigned to them. This requires that the affidavit positively and unqualifiably represent that the facts disclosed in the affidavit are true and within the personal knowledge of the affiant. Brownlee v. Brownlee, 665 S.W.2d 111 (Tex. 1984).
The persons before whom oaths, affidavits, and affirmations may be made include—

1. a notary public;
2. a judge, retired judge, or clerk of a municipal court, in a matter pertaining to a duty of the court;
3. a judge, retired judge, senior judge, clerk, or commissioner of a court of record;
4. a justice of the peace or a clerk of a justice court;
5. a member of a board or commission created by a law of this state, in a matter pertaining to a duty of the board or commission;
6. a person employed by the Texas Ethics Commission who has a duty related to a report required by title 15 of the Texas Election Code in a matter pertaining to that duty;
7. a county tax assessor-collector or an employee of the county tax assessor-collector if the oath relates to a document that is required or authorized to be filed in the office of the county tax assessor-collector;
8. the secretary of state or a former secretary of state;
9. an employee of a personal bond office, or an employee of a county, who is employed to obtain information required to be obtained under oath if the oath is required or authorized by article 17.04 or article 26.04(n) or (o) of the Texas Code of Criminal Procedure;
10. the lieutenant governor or a former lieutenant governor;
11. the speaker of the house of representatives or a former speaker of the house of representatives;
12. the governor or a former governor;
13. a legislator or retired legislator;
14. the attorney general or a former attorney general;
15. the secretary or clerk of a municipality in a matter pertaining to the official business of the municipality;
16. a peace officer described by article 2.12 of the Texas Code of Criminal Procedure if the oath is administered when the officer is engaged in the performance of the officer’s duties and the administration of the oath relates to the officer’s duties; or
17. an associate judge, magistrate, master, referee, or criminal law hearing officer.

Tex. Gov’t Code § 602.002.

§ 3.13:2 Proof by Subscribing Witness

In some cases, an instrument cannot be proved by acknowledgment or jurat because a signatory is dead, unavailable, incompetent, or uncooperative. Proof by subscribing witness may be used if there is a credible witness who saw the signatory sign the instrument or in whose presence the signatory acknowledged the signature. The requirements of proof of an instrument by a subscribing witness are set out in Tex. Civ. Prac. & Rem. Code §§ 121.009, 121.010. Proofs of an instrument by a subscribing witness are included in forms 3-32 and 3-33 in this chapter.
§ 3.13:3 Acknowledgment by Handwriting

In certain limited instances in which neither a standard acknowledgment nor an acknowledgment by witness is available, an instrument may be proved by an acknowledgment by handwriting. The execution of an instrument may be established for recording by proof of the handwriting of persons who signed the instrument only if—

1. the grantor of the instrument and all the witnesses are dead;
2. the grantor and all the witnesses are not residents of Texas;
3. the residences of the grantor and the witnesses are unknown to the person seeking to prove the instrument and cannot be ascertained;
4. the witnesses have become legally incompetent to testify; or
5. the grantor of the instrument refuses to acknowledge the execution of the instrument and all the witnesses are dead, not residents of Texas, or legally incompetent or their places of residence are unknown.


§ 3.13:4 Proof by Suit

Any person having an interest in an instrument may bring an action in state district court for a judgment proving the instrument. Tex. Prop. Code § 11.005(a). Once a judgment in the action is obtained, a certified copy of it may be attached to the instrument; the instrument may then be recorded as if it contained a proper certificate of acknowledgment. Tex. Prop. Code § 11.005(c). This statute provides an alternative for making an instrument recordable; it does not cure those instruments missing an acknowledgment that require an acknowledgment for their validity. See McCracken v. Sullivan, 221 S.W. 336 (Tex. Civ. App.—San Antonio 1920, no writ).

§ 3.13:5 Proof by Unsworn Declaration

Chapter 132 of the Texas Civil Practices and Remedies Code provides that an unsworn declaration made under penalty of perjury may be used in lieu of some declarations, verifications, certifications, oaths, or affidavits required by law to be taken before a notary public. Tex. Civ. Prac. & Rem. Code § 132.001. Under this statute it may be possible for an instrument to be proved by an unsworn declaration of either the signatories to the instrument, the subscribing witnesses, or persons authorized to give evidence of handwriting. To be effective, unsworn declarations must substantially comply with the statutory forms. Tex. Civ. Prac. & Rem. Code § 132.001(d)–(f). This statute does not apply to a lien required to be filed with a county clerk, an instrument concerning real or personal property required to be filed with a county clerk, or an oath of office or an oath required to be taken before a specified official other than a notary public. Tex. Civ. Prac. & Rem. Code § 132.001(b).

§ 3.14 Filing of Documents

Texas is a race-notice state, and all real property conveyance instruments should be filed in the real property records (also referred to as the official public records, deed records, or deed-of-trust records, depending on the county) of the county in which the property is located as soon as possible after the transaction is complete. Powers of attorney and other authority documents requiring recordation used in connection with a sale or loan secured by real estate should be recorded before the conveyance or loan documents so that the proper authority is in place for the conveyance. Powers of attorney used for real
property transactions must be recorded no later than thirty days after the recordation of the instrument signed by the agent. Tex. Est. Code § 751.151.

Some county clerks have filing requirements and fees unique to their county. Contacting the clerk for the specific guidelines before sending documents to be filed of record may prevent the return of unrecorded documents.


§ 3.15 Filing Fees

Filing fees of county clerks are usually computed per page. See Tex. Loc. Gov’t Code § 118.011. The per-page filing fee is twice the usual amount if the first page of the document has no identifying heading, the page is not legible, any signature on a page appears without having the name legibly typed or printed beneath it, or a page is oversized. A page must be printed in type no smaller than eight point. However, failure to meet the type-size requirement does not result in a fee increase or invalidate the recordation of the document. See Tex. Loc. Gov’t Code §§ 118.0525, 191.007.

If a manuscript cover with legible marks (for example, the name of the attorney preparing the document) is affixed to a document delivered for recording, the clerk is authorized to charge the usual recording fee for the page. See Tex. Loc. Gov’t Code § 118.011(a)(2).

Filing fees for a low- or moderate-income person buying or improving the person’s residence with federal or state assistance may be waived on the county clerk’s receipt of a commissioners court directive to waive such fees. A county clerk may have a list of approved grant or aid programs issued by that county’s commissioners court, which provides the authorization for waiver of these fees. Tex. Loc. Gov’t Code § 118.0135.

No additional fee may be charged for electronic filing. Tex. Loc. Gov’t Code § 195.006. A county clerk may not impose requirements or fees for filing or recording a legal paper in addition to those prescribed by statute. Tex. Loc. Gov’t Code § 191.007(a). Attorneys should consult, in advance, with the county clerk’s office or website to determine applicable fee policies for the instrument(s) at issue.

§ 3.16 Confidentiality Notice

Section 11.008 of the Texas Property Code provides that an individual’s Social Security number is not required and should not be included in a document presented for recording in the county clerk’s office and that the county clerk does not obtain or maintain the Social Security numbers of individuals. See Tex. Prop. Code § 11.008(b). An instrument transferring an interest in real property to or from an individual, regardless of whether the document contains an individual’s Social Security number or driver’s license number, must include a notice that appears on the top of the first page of the instrument in twelve-point bold-faced type or twelve-point uppercase letters and reads substantially as follows:

    Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it
is filed for record in the public records: your Social Security number or your driver’s license number.


An “instrument” is “a deed or deed of trust.” Tex. Prop. Code § 11.008(a). Even though this statute requires the confidentiality notice only on a deed or deed of trust, it is recommended that the notice be added to any instrument, to be recorded in the public records, transferring an interest in real estate to or from an individual. For example, see the sections titled “Contracts for Deed” and “Mechanic’s Liens” in chapter 2 of this manual, section 25.2, and section 10.3:2.

“The validity of an instrument as between the parties to the instrument and the notice provided by the instrument are not affected by the party’s failure to include the notice required under Subsection (c).” Tex. Prop. Code § 11.008(d).
Additional Resources


Form 3-1

Document Components: Single Person

1. **Party Designation**

   [Name], a single person,

2. **Signature Block**

   ____________________________________________________________
   [Name]
   ____________________________________________________________

3. **Certificate of Acknowledgment**

   3.A. **Short-Form Certificate of Acknowledgment**

   STATE OF TEXAS
   COUNTY OF [county]

   This instrument was acknowledged before me on [date] by [name].

   [SEAL]
   [Title of officer]
   My commission expires: [date]

   3.B. **Ordinary Certificate of Acknowledgment**

   STATE OF TEXAS
   COUNTY OF [county]

   Before me, [name and title of officer], on this day personally appeared [name of acknowledger], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument...
and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]  
[Title of officer]  
My commission expires: [date]
Form 3-2

Document Components: Spouses

1. **Party Designation**

   [Name of spouse A] and [name of spouse B], spouses,

2. **Signature Block**

   ____________________________________________________________________________________________________________________________ ...
   ____________________________________________________________________________________________________________________________ ...
   ____________________________________________________________________________________________________________________________ ...
   ____________________________________________________________________________________________________________________________ ...
   ____________________________________________________________________________________________________________________________ ...

   [Name of spouse A]

   [Name of spouse B]

3. **Certificate of Acknowledgment**

   3.A. **Short-Form Certificate of Acknowledgment**

   
   
   
   
   STATE OF TEXAS
   COUNTY OF [county]

   This instrument was acknowledged before me on [date] by [name of spouse A] and [name of spouse B].

   [SEAL]  
   [Title of officer]  
   My commission expires: [date]

   3.B. **Ordinary Certificate of Acknowledgment**

   
   
   
   
   STATE OF TEXAS
   COUNTY OF [county]

   Before me, [name and title of officer], on this day personally appeared [name of spouse A] and [name of spouse B], [known to me/proved to me on
the oath of [name of witness]/proved to me through [description of identity card[s] or other document[s]] to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL] [Title of officer]
My commission expires: [date]
Form 3-3

Document Components: Natural Person—Nonhomestead

1. **Party Designation**

   [Name], owning, occupying, and claiming other property as homestead,

2. **Signature Block**

   ____________________________________________________________________________________________________________________________ ... ____________________________________________________________________________________________________________________________

   [Name]

3. **Certificate of Acknowledgment**

   3.A. **Short-Form Certificate of Acknowledgment**

   STATE OF TEXAS

   COUNTY OF [county]

   This instrument was acknowledged before me on [date] by [name].

   ____________________________________________________________________________________________________________________________ ... ____________________________________________________________________________________________________________________________

   [SEAL] [Title of officer]

   My commission expires: [date]

3.B. **Ordinary Certificate of Acknowledgment**

   STATE OF TEXAS

   COUNTY OF [county]

   Before me, [name and title of officer], on this day personally appeared [name of acknowledger], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument
and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]  
[Title of officer]  
My commission expires: [date]
Form 3-4

Document Components: Multiple Persons—Nonhomestead

1. **Party Designation**

   [Name] and [name], each owning, occupying, and claiming other property as homestead,

2. **Signature Block**

   __________________________________________________________________________________________
   __________________________________________________________________________________________
   __________________________________________________________________________________________

   [Name]

   [Name]

3. **Certificate of Acknowledgment**

   **3.A. Short-Form Certificate of Acknowledgment**

   STATE OF TEXAS
   COUNTY OF [county]

   This instrument was acknowledged before me on [date] by [name[s]].

   [SEAL] [Title of officer]
   My commission expires: [date]

   **3.B. Ordinary Certificate of Acknowledgment**

   STATE OF TEXAS
   COUNTY OF [county]

   Before me, [name and title of officer], on this day personally appeared

   [name[s] of acknowledger[s]], [known to me/proved to me on the oath of
[name of witness] proved to me through [description of identity card[s] or other document[s]] to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL] [Title of officer]
My commission expires: [date]
Form 3-5

Document Components: Spouses—Nonhomestead

1. **Party Designation**

   [Name of spouse A] and [name of spouse B], spouses, owning, occupying, and claiming other property as homestead,

2. **Signature Block**

   [Name of spouse A]

   [Name of spouse B]

3. **Certificate of Acknowledgment**

   3.A. **Short-Form Certificate of Acknowledgment**

   STATE OF TEXAS
   COUNTY OF [county]

   This instrument was acknowledged before me on [date] by [name of spouse A] and [name of spouse B].

   [SEAL]  
   [Title of officer]  
   My commission expires: [date]
3.B. **Ordinary Certificate of Acknowledgment**

STATE OF TEXAS  
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of spouse A] and [name of spouse B], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card[s] or other document[s]] to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]  
[Title of officer]  
My commission expires: [date]
Form 3-6

Document Components: Married Person—Separate Property

1. Party Designation

[Name], spouse of [name], dealing with [include if applicable: nonhomestead] separate property,

2. Signature Block

________________________________________________________________________________________________________________________

[Name]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name].

[SEAL] [Title of officer]
My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of acknowledger], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument
and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]  
[Title of officer]  
My commission expires: [date]
Form 3-7

Document Components: Natural Person—Assumed Name

1. **Party Designation**

   [Name], d/b/a [assumed name].

2. **Signature Block**

   ________________________________________________________________
   ____________________________
   [Name]

3. **Certificate of Acknowledgment**

   **3.A. Short-Form Certificate of Acknowledgment**

   STATE OF TEXAS
   COUNTY OF [county]

   This instrument was acknowledged before me on [date] by [name] doing business as [assumed name].

   [SEAL]  
   [Title of officer]
   My commission expires: [date]

   **3.B. Ordinary Certificate of Acknowledgment**

   STATE OF TEXAS
   COUNTY OF [county]

   Before me, [name and title of officer], on this day personally appeared [name of acknowledger], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument.
and acknowledged to me that [he/she] does business as [assumed name] and executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL] [Title of officer]
My commission expires: [date]
Form 3-8

Document Components: Natural Person by Attorney-in-Fact

1. **Party Designation**

   [Name of principal], acting by [name of attorney-in-fact],
   attorney-in-fact,

2. **Signature Block**

   [Name of principal]

   __________________________________________
   [Name of attorney-in-fact], attorney-in-fact

3. **Certificate of Acknowledgment**

   **3.A. Short-Form Certificate of Acknowledgment**

   STATE OF TEXAS
   COUNTY OF [county]

   This instrument was acknowledged before me on [date] by [name of
   attorney-in-fact] as attorney-in-fact on behalf of [name of principal].

   [SEAL] [Title of officer]
   My commission expires: [date]

   **3.B. Ordinary Certificate of Acknowledgment**

   STATE OF TEXAS
   COUNTY OF [county]

   Before me, [name and title of officer], on this day personally appeared
   [name of attorney-in-fact], [known to me/proved to me on the oath of [name of
witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same on behalf of [name of principal] as attorney-in-fact of [name of principal] for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]  
[Title of officer]  
My commission expires: [date]
Document Components: General Partnership—Individual Partner

1. Party Designation

[Name of partnership], a [state of formation] general partnership,

2. Signature Block

[Name of partnership]

By ________________________________

[Name of partner], partner

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of acknowledging partner], partner, on behalf of [name of partnership], a [state of formation] general partnership.

[SEAL]  
[Title of officer]  
My commission expires: [date]
3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of acknowledging partner], [known to meproved to me on the oath of [name of witness]proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of partnership], a [state of formation] general partnership, as partner, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL] [Title of officer]
My commission expires: [date]
Form 3-10

Document Components: General Partnership—Composition of Partners

1. Party Designation

[Name of partnership], a [state of formation] general partnership composed of [names],

2. Signature Block

[Name of partnership]

By ________________________________

[Name of partner], partner

By ________________________________

[Name of partner], partner

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name[s] of acknowledging partner[s]], partner[s], on behalf of [name of partnership], a [state of formation] general partnership.

[SEAL] [Title of officer]
My commission expires: [date]
3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name[s] of acknowledging partner[s]], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card[s] or other document[s]]] to be the person[s] whose name[s] [is/are] subscribed to the foregoing instrument and acknowledged to me that [he/she/they] executed the same as partner[s] as the act of [name of partnership], a [state of formation] general partnership, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL] [Title of officer]
My commission expires: [date]
Form 3-11

Document Components: Limited Partnership—Individual General Partner

1. Party Designation

[Name of limited partnership], a [state of formation] limited partnership,

2. Signature Block

[Name of limited partnership]

By ________________________________

[Name of partner], general partner of

[Name of limited partnership]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of general partner], general partner, on behalf of [name of limited partnership], a [state of formation] limited partnership.

[SEAL] [Title of officer]
My commission expires: [date]
3.B. **Ordinary Certificate of Acknowledgment**

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of general partner], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of limited partnership], a [state of formation] limited partnership, as its general partner, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]  
[Title of officer]  
My commission expires: [date]
Form 3-12

Document Components: Limited Partnership—Entity General Partner

1. **Party Designation**

   [Name of limited partnership], a [state of formation] limited partnership,

2. **Signature Block**

   [Name of limited partnership]

   By ________________________________

   [Name and title of officer or agent for general partner]

3. **Certificate of Acknowledgment**

   **3.A. Short-Form Certificate of Acknowledgment**

   STATE OF TEXAS

   COUNTY OF [county]

   This instrument was acknowledged before me on [date] by [name of acknowledger], [title] of [name of general partner], a [state of formation] [type of entity] general partner, on behalf of [name of limited partnership], a [state of formation] limited partnership.

   [SEAL]

   [Title of officer]

   My commission expires: [date]
3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of acknowledger], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as [title] of [name of general partner], a [state of formation] [type of entity] general partner, as the act of [name of limited partnership], a [state of formation] limited partnership, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL] [Title of officer]
My commission expires: [date]
1. **Party Designation**

[Name of venture], a [state of formation] joint venture,

2. **Signature Block**

[Name of venture]

By ________________________________

[Name of venturer], joint venturer

3. **Certificate of Acknowledgment**

3.A. **Short-Form Certificate of Acknowledgment**

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of acknowledging venturer], joint venturer, on behalf of [name of venture], a [state of formation] joint venture.

[SEAL]  
[Title of officer]

My commission expires: [date]
3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of acknowledging venturer], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of venture], a [state of formation] joint venture, as joint venturer, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL] [Title of officer]
My commission expires: [date]
1. **Party Designation**

   [Name of venture], a [state of formation] joint venture composed of [names of joint venturers],

2. **Signature Block**

   [Name of venture]

   By ________________________________

   [Name of joint venturer], joint venturer

   By ________________________________

   [Name of joint venturer], joint venturer

3. **Certificate of Acknowledgment**

   3.A. **Short-Form Certificate of Acknowledgment**

   STATE OF TEXAS

   COUNTY OF [county]

   This instrument was acknowledged before me on [date] by [name[s] of venturer[s]], joint venturer[s], on behalf of [name of venture], a [state of formation] joint venture.

   [SEAL]

   [Title of officer]

   My commission expires: [date]
3.B. **Ordinary Certificate of Acknowledgment**

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name[s] of joint venturer[s]], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card[s] or other document[s]]] to be the person[s] whose name[s] [is/are] subscribed to the foregoing instrument and acknowledged to me that [he/she/they] executed the same as the act of [name of venture], a [state of formation] joint venture, as joint venturer[s], for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]
Form 3-15

Document Components: Corporation

1. **Party Designation**

   [Name of corporation], a [state of formation] corporation,

2. **Signature Block**

   By ________________________________
   [Name of corporation]

   [Name and title of corporate officer or agent]

3. **Certificate of Acknowledgment**

   3.A. **Short-Form Certificate of Acknowledgment**

   STATE OF TEXAS
   COUNTY OF [county]

   This instrument was acknowledged before me on [date] by [name of corporate officer or agent], as the [title of corporate officer or agent] of [name of corporation], a [state of formation] corporation, on behalf of said corporation.

   [SEAL]  
   [Title of officer]  
   My commission expires: [date]
3.B. **Ordinary Certificate of Acknowledgment**

STATE OF TEXAS  
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of corporate officer or agent], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of corporation], a [state of formation] corporation, as its [title of corporate officer or agent], for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]  
[Title of officer]  
My commission expires: [date]
1. **Party Designation**

   [Name of corporation], a [state of formation] nonprofit corporation,

2. **Signature Block**

   [Name of corporation]

   By ________________________________
   [Name and title of corporate officer or agent]

3. **Certificate of Acknowledgment**

   **3.A. Short-Form Certificate of Acknowledgment**

   STATE OF TEXAS

   COUNTY OF [county]

   This instrument was acknowledged before me on [date] by [name and title of corporate officer or agent], of [name of corporation], a [state of formation] nonprofit corporation, on behalf of said nonprofit corporation.

   [SEAL]  [Title of officer]

   My commission expires: [date]
3.B. **Ordinary Certificate of Acknowledgment**

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of corporate officer or agent], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of corporation], a [state of formation] nonprofit corporation, as its [title of corporate officer or agent], for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]  
[Title of officer]  
My commission expires: [date]
Form 3-17

Document Components: Trustee—Individual

1. Party Designation

[Name of trustee], trustee of the [name of trust] trust under an instrument dated [date], recorded in [recording data of trust] of the real property records of [county] County, Texas,

2. Signature Block

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of trustee], trustee of the [name of trust] trust

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of trustee], as trustee of [name of trust].

[SEAL]  
[Title of officer]  
My commission expires: [date]
3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of trustee], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same by proper authority as trustee of [name of trust], on behalf of said trust, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]  
[Title of officer]  
My commission expires: [date]
Document Components: Trustee—Entity

1. Party Designation

[Name of trustee], a [state of formation] [type of entity], as trustee for the [name of trust] trust under an instrument dated [date], recorded in [recording data of trust] of the real property records of [county] County, Texas,

2. Signature Block

[Name of trust]

By ________________________________

[Name and title of trustee’s agent]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of trustee’s agent], as [title of trustee’s agent] of [name of trustee], a [state of formation] [type of entity], as the trustee of [name of trust].

[SEAL] [Title of officer]

My commission expires: [date]
3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of trustee’s agent], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as [title of trustee’s agent] of [name of trustee], a [state of formation] [type of entity], by proper authority as the trustee of [name of trust], on behalf of said trust, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]  [Title of officer]
My commission expires: [date]
Form 3-19

Document Components: Trustee—Testamentary

1. Party Designation

[Name of individual trustee] and [name of bank trustee], testamentary trustees under the will of [name of decedent], probated in [county] County, Texas,

2. Signature Block

______________________________
[Name of individual trustee], testamentary trustee under the will of [name of decedent], probated in [county] County, Texas

______________________________
[Name of bank officer], as [title of bank officer] of [name of bank trustee], testamentary trustee under the will of [name of decedent], probated in [county] County, Texas

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of individual trustee] and [name of bank officer], as [title of bank officer] of [name of bank trustee], the testamentary trustees under the will of [name of decedent], probated in [county] County, Texas.
3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of individual trustee] and [name of bank officer], as [title of bank officer] of [name of bank trustee], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card[s] or other document[s]]] to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same by proper authority as testamentary trustees under the will of [name of decedent], probated in [county] County, Texas, on behalf of said testamentary trust, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL] [Title of officer]
My commission expires: [date]
Form 3-20

Document Components: Decedent’s Estate—Personal Representative

1. **Party Designation**

   [Name of personal representative], [title of personal representative] of the estate of [name of decedent], deceased,

2. **Signature Block**

   [Name of personal representative], [title of personal representative] of the estate of [name of decedent], deceased

3. **Certificate of Acknowledgment**

   3.A. **Short-Form Certificate of Acknowledgment**

   STATE OF TEXAS
   
   COUNTY OF [county]
   
   This instrument was acknowledged before me on [date] by [name of personal representative], as [title of personal representative] of the estate of [name of decedent], deceased.

   [SEAL]  
   [Title of officer]  
   My commission expires: [date]
3.B. **Ordinary Certificate of Acknowledgment**

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of personal representative], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same by proper authority as [title of personal representative], on behalf of the estate of [name of decedent], deceased, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL] [Title of officer]

My commission expires: [date]
Form 3-21

Document Components: Decedent’s Estate by Personal Representative Also Signing Individually

1. Party Designation

[Name of personal representative], individually and as [title of personal representative] of the estate of [name of decedent], deceased,

2. Signature Block

__________________________________________________________________________________________________________________________ ...
__________________________________________________________________________________________________________________________

[Name of personal representative], individually and as [title of personal representative] of the estate of [name of decedent], deceased

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of personal representative], individually and as [title of personal representative] for the estate of [name of decedent], deceased.

[SEAL] [Title of officer]
My commission expires: [date]
3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of personal representative], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same individually and by proper authority as [title of personal representative], on behalf of the estate of [name of decedent], deceased, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]  [Title of officer]
My commission expires: [date]
Form 3-22

Document Components: Guardian for Ward

1. Party Designation

[Name of guardian], guardian of the [include if applicable: person and] estate of [name of ward], an incapacitated person,

2. Signature Block

[Name of guardian], guardian of the [include if applicable: person and] estate of [name of ward], an incapacitated person

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of guardian] as guardian of the [include if applicable: person and] estate of [name of ward], an incapacitated person.

[SEAL] [Title of officer]
My commission expires: [date]
3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of guardian], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same on behalf of [name of ward], an incapacitated person, as guardian of the [include if applicable: person and] estate of [name of ward], for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]  [Title of officer]
My commission expires: [date]
1. **Party Designation**

   [Name of custodian], custodian for [name of minor], a minor, under the Texas Uniform Transfers to Minors Act,

2. **Signature Block**

   [Name of custodian], custodian for [name of minor]

3. **Certificate of Acknowledgment**

3.A. **Short-Form Certificate of Acknowledgment**

   STATE OF TEXAS
   COUNTY OF [county]

   This instrument was acknowledged before me on [date] by [name of custodian] as custodian for [name of minor], a minor, under the Texas Uniform Transfers to Minors Act.

   [SEAL]  
   [Title of officer]  
   My commission expires: [date]
3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of custodian], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same on behalf of [name of minor], a minor, as custodian under the Texas Uniform Transfers to Minors Act, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL] [Title of officer]
My commission expires: [date]
Form 3-24

Document Components: Entity

1. **Party Designation**

   [Name of entity], a [state of formation] [type of entity],

2. **Signature Block**

   [Name of entity]

   By ________________________________

   [Name and title of officer or agent]

3. **Certificate of Acknowledgment**

   No short-form certificate of acknowledgment is provided by statute for entities other than corporations or partnerships. The following is the ordinary certificate of acknowledgment modified for other types of entities.

   STATE OF TEXAS

   COUNTY OF [county]

   Before me, [name and title of officer], on this day personally appeared [name of entity’s officer or agent], [known to me/proved to me on the oath of name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of entity], a [state of formation] [type of entity], as its [title of entity’s officer or agent], for the purposes and consideration therein expressed.

   Given under my hand and seal of office this [specify] day of [month], [year].
[SEAL]  

[Title of officer]  
My commission expires: [date]
Form 3-25

Document Components: Entity with Assumed Name

1. **Party Designation**

   [Name of entity], a [state of formation] [type of entity], d/b/a [assumed name],

2. **Signature Block**

   [Name of entity]

   By ________________________________

   [Name and title of entity’s officer or agent]

3. **Certificate of Acknowledgment**

   **3.A. Short-Form Certificate of Acknowledgment**

   By statute, a short-form certificate of acknowledgment can be used only if the entity is a corporation or partnership.

   STATE OF TEXAS

   COUNTY OF [county]

   This instrument was acknowledged before me on [date] by [name of entity’s officer or agent] as [title of entity’s officer or agent] of [name of entity], a [state of formation] [corporation/partnership], d/b/a [assumed name], on behalf of said [corporation/partnership].

   [SEAL] [Title of officer]

   My commission expires: [date]
3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of entity’s officer or agent], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of entity], a [state of formation] [type of entity], d/b/a [assumed name], as its [title of entity’s officer or agent], for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL] [Title of officer]
My commission expires: [date]
Form 3-26

Document Components: Cooperative

1. **Party Designation**

   [Name of cooperative], a [state of formation] cooperative association,

2. **Signature Block**

   [Name of cooperative]

   By ________________________________

   [Name and title of officer]

3. **Certificate of Acknowledgment**

   No short-form certificate of acknowledgment is provided by statute for a cooperative. The following is the ordinary certificate of acknowledgment modified for a cooperative.

   STATE OF TEXAS
   COUNTY OF [county]

   Before me, [name and title of officer], on this day personally appeared

   [name of officer of cooperative], [known to me/proved to me on the oath of
   name of witness]/proved to me through [description of identity card or other
document]] to be the person whose name is subscribed to the foregoing instru-
ment and acknowledged to me that [he/she] executed the same as the act of

   [name of cooperative], a [state of formation] cooperative association, as its
   [title of officer of cooperative], for the purposes and consideration therein
   expressed.

   Given under my hand and seal of office this [specify] day of [month],

   [year].
[SEAL]

[Title of officer]

My commission expires: [date]
Form 3-27

Document Components: Unincorporated Association—Statement of Authority

1. **Party Designation**

   [Name of association], an unincorporated association, by and through [name of authorized person], acting under the statement of authority recorded in [recording data] of the real property records of [county] County, Texas,

2. **Signature Block**

   By ________________________________,

   [Name of authorized person], acting under the statement of authority recorded in [recording data] of the real property records of [county] County, Texas

3. **Signature Block**

   [Name of association], an unincorporated association,

4. **Certificate of Acknowledgment**

   No short-form certificate of acknowledgment is provided by statute for an unincorporated association. The following is the ordinary certificate of acknowledgment modified for an unincorporated association.

   STATE OF TEXAS
   COUNTY OF [county]
Before me, [name and title of officer], on this day personally appeared [name of authorized person], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of association], an unincorporated association, under the statement of authority recorded in [recording data] of the real property records of [county] County, Texas, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL] [Title of officer]
My commission expires: [date]
Form 3-28

Document Components: Unincorporated Association—Trustees

1. Party Designation

[Names of trustees], trustees for [name of association], an unincorporated association,

2. Signature Block

[Name of association], an unincorporated association,

__________________________________________
[Name of trustee], trustee

__________________________________________
[Name of trustee], trustee

3. Certificate of Acknowledgment

No short-form certificate of acknowledgment is provided by statute for an unincorporated association. The following is the ordinary certificate of acknowledgment modified for an unincorporated association.

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [names of trustees], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card[s] or other document[s]]] to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same as the act of [name of association], an unincorporated association, as its trustees, for the purposes and consideration therein expressed.
Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]  [Title of officer]
My commission expires: [date]
Form 3-29

Statutory Form for Ordinary Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of acknowledger], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]  [Title of officer]
My commission expires: [date]
Form 3-30

Acknowledgment by Foreign Service Officer

[Name of country]

[County and/or other political subdivision]

[City and/or other political subdivision]

[Name of foreign service office]

Before me, [name, rank, and title of foreign service officer], of the United States of America at [city and country], duly commissioned and qualified and a resident of [city and country], on this day personally appeared [name of acknowledger], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]  [Name, rank, and title of foreign service officer]
Military Acknowledgment

IN THE ARMED FORCES OF THE UNITED STATES OF AMERICA with the [branch of military] at [name of base or post], [include if applicable: city and state], [country].

Before me, [name, rank, branch, and serial number of officer in U.S. armed forces], a duly commissioned officer in [the Armed Forces/ [specify auxiliary to armed forces]] of the United States of America at [city and country], on this day personally appeared [name of acknowledger], [include if applicable: the spouse of [name, rank, branch, and serial number of military personnel]], [known to me/proved to me on the oath of [name, rank, branch, and serial number of witness]], a member of [the Armed Forces/[specify auxiliary to armed forces]] of the United States of America/proved to me through [description of identity card or other document] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Name, rank, branch, and serial number of officer]
Statement of Subscribing Witness in Presence of Subscriber

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer taking proof], on this day personally appeared [name of subscribing witness], [known to me/proved to me on the oath of [name of witness]] to be the person whose name is subscribed as a witness to the foregoing instrument of writing, and after being duly sworn by me, stated on oath that [he/she] saw [name], the [grantor/person who executed the foregoing instrument], subscribe the same and that [he/she] had signed the same as a witness at the request of the [grantor/person who executed same].

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]
Statement of Subscribing Witness on Acknowledgment by Subscriber

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of subscribing witness], [known to me/proved to me on the oath of [name of witness]] to be the person whose name is subscribed as a witness to the foregoing instrument of writing, and after being duly sworn by me, stated on oath that [name], the [grantor/person who executed the foregoing instrument], acknowledged in [his/her] presence that the [grantor/person who executed same] had executed the same for the purposes and consideration expressed therein and that [he/she] had signed the same as a witness at the request of the [grantor/person who executed same].

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL] [Title of officer]
My commission expires: [date]
Form 3-34

Acknowledgment of Signature Affixed at Direction of Person with Disability

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of person with disability], a person having a physical impairment that impedes [his/her] ability to sign the foregoing instrument, [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and directed me to affix [his/her] signature to the foregoing instrument in the presence of [name of disinterested witness], a person having no legal or equitable interest in any real or personal property that is the subject of or is affected by the foregoing instrument and whose identity is [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]], and [name of person with disability] directed me to execute the foregoing instrument on [his/her] behalf for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL] [Title of officer]
My commission expires: [date]
Form 3-35

Jurat

SUBSCRIBED AND SWORN TO before me on _________________ by [name of affiant].

__________________________________________
Notary Public, State of Texas
Form 3-36

Affidavit of Interpreter

Date:

Affiant: [name of interpreter]

Date of Interpretation:

Item Interpreted: [describe instrument interpreted]

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

“I, the undersigned interpreter, am well versed in and competent to speak the [Spanish/[other language]] and the English languages, and on the date of interpretation I gave a true and faithful interpretation of the item interpreted in [Spanish/[other language]], which is understood by [name].”

[Name of interpreter]

Sworn to and subscribed before me on [date] by [name of interpreter].

[SEAL] [Title of officer administering oath]
My commission expires: [date]
Chapter 4
Sales Contracts and Transaction Guide

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§ 4.1 General Considerations

The real estate sales contract, form 4-1 in this chapter, is drafted as a neutral form of contract, intending to favor neither the buyer nor the seller. The basic elements of the transaction are stated in the sections to be completed at the beginning of the form. The general terms that follow may be used without change for many transactions. Terms that generally vary are located in the exhibits. Contracts for the purchase and sale of real estate are as diverse as their subject matter, and additional drafting will likely be necessary to tailor the form to the transaction.

§ 4.2 Real Estate Sales Contract

The following sections describe the provisions of the real estate sales contract and include considerations for the attorney in drafting or reviewing a contract, assisting the client during investigation of the property, and closing the transaction. This commentary is organized in the same order as the sections of the contract.

§ 4.3 Introductory Paragraph: Offer and Acceptance

The introductory paragraph of the contract states what the parties must do to form the contract of purchase and sale. If the buyer’s earnest money cannot be collected, the buyer will be in default.

§ 4.4 Defined Terms

§ 4.4:1 Seller and Buyer

There are sections for the names and other information concerning the seller, the buyer, and their respective attorneys and brokers. Proper identification of the parties is important, and the seller and the buyer should be identified as fully as possible. Capacity and authority should be considered, especially if a party is not an individual acting on his or her own behalf. See chapter 3 in this manual for a discussion of party designations.

§ 4.4:2 Property

The real and personal property are described in exhibit A. The contract should describe the real and personal property with legal specificity. If the property is not described sufficiently, the contract may be unenforceable because of vagueness. See chapter 3 in this manual for a discussion of property descriptions. Attention should also be given to the conveyance of appurtenant rights, such as permits, licenses, access easements, access to utilities, and similar rights.
§ 4.4:3 Escrow Agent

The contract designates an escrow and closing agent. The escrow agent will be responsible for closing the transaction and receiving and disbursing funds under the terms of the contract. Form 4-2 in this chapter is the escrow agent receipt and escrow agreement, which defines the rights and duties of the escrow agent and is to be signed by the buyer, the seller, and the escrow agent’s representative.

The escrow agent’s representative should sign the receipt on the last page of the contract and acknowledge the deposit of the earnest money with the escrow agent.

§ 4.4:4 Underwriter

The contract designates an underwriter. In the event a title policy will be issued in the transaction, the drafting attorney should verify that the escrow agent named in the contract is an agent for the underwriter selected. Because not all escrow agents can issue policies for all underwriters, verification is needed.

§ 4.4:5 Consideration

The contract provides for a purchase price that is a stated sum, but the price may be determined by a formula based on the gross or net area of the land or by other methods devised by the parties. The net area is typically computed by deducting from the gross area any portion of the land within roadways, floodplains, or other areas where rights are restricted, as shown on the survey. If this method is used, the purchase price cannot be calculated until after the survey is delivered, so applying a minimum and maximum price to the formula should be considered.

The contract provides for several payment options: the total consideration may be paid in cash at closing, or all or a portion of the purchase price may be financed.

At closing in the typical seller-financed transaction, the buyer delivers the cash portion of the purchase price, signs and delivers a promissory note payable to the seller, and also usually signs and delivers a deed of trust encumbering the property as security for the debt.

If the transaction is to be contingent on the buyer’s obtaining third-party financing, the buyer has two options. The buyer can apply for the financing early enough to know before the end of the inspection period if the loan application has been accepted. Alternatively, the buyer can negotiate a right to terminate the contract after the end of the inspection period if the buyer is unable to obtain third-party financing. The parties may negotiate time limits within which the buyer must separately apply for and obtain third-party financing. The parties may also agree to limit or share the expenses of obtaining the financing.

See chapters 6 and 8 in this manual for further discussion of financing.

If the contract terminates before closing, and the buyer is otherwise entitled to have the earnest money returned, the contract provides that a stated amount ($100) not be returned to the buyer but be paid to the seller, because that amount is the independent consideration to the seller for the buyer’s right to terminate the contract.
§ 4.4:6 Earnest Money

The amount of earnest money is negotiable and depends on several factors, including the purchase price, the type of financing, and the relative financial strengths of the parties.

§ 4.4:7 Buyer’s and Seller’s Additional Liquidated Damages

These sections are provided so that the parties can agree on additional liquidated damages to be paid by the defaulting party to the nondefaulting party on default.

§ 4.4:8 County for Performance

This section permits the parties to designate the county in which litigation arising from the contract must be filed except as otherwise provided by applicable law.

§ 4.5 Deadlines

Section A of the contract groups most of the deadlines for ease of reference and provides two alternate ways to determine most of the deadlines: either a stated date or a specified number of days after the effective date of the contract or another milestone. The contract provides that time is of the essence. The contract provides that closing will occur at a certain time on a certain date, but closing may also be scheduled to occur a certain number of days following a stated event—for example, forty-five days after approval by the buyer’s lender. The closing date may also be specified as “on or before” a certain date or event.

§ 4.6 Closing Documents

Section B of the contract lists the documents to be signed and delivered to close the transaction and serves as a checklist to prepare for closing.

§ 4.6:1 Exhibit B—Representations; Environmental Matters

Exhibit B contains the parties’ representations. These items are always negotiated by the parties and will vary from transaction to transaction. See section 4.10 below for further discussion of representations.

§ 4.6:2 Exhibit C—Seller’s Records

Exhibit C is a list of the seller’s records of the property that will be delivered or made available to the buyer for review during the inspection period and also delivered to the buyer at closing.

§ 4.6:3 Exhibit D—Notices, Statements, and Certificates

Exhibit D lists notices, statements, and certificates required by federal and state laws and regulations to be delivered when common real estate contracts are executed. The items applicable to a specific transaction should be selected. See chapter 2 in this manual for a brief discussion of each law and regulation and for references to other laws and regulations that require notices, statements, and certificates for less common transactions.
§ 4.6:4 Exhibit E—Seller Financing Addendum

This addendum is for use only in situations in which the seller is providing the financing. If obtaining third-party financing is a condition to the buyer’s obligations, that fact and the terms of the complying financing may need to be addressed in the contract.

§ 4.7 Investment of Earnest Money

The contract provides that the buyer may direct the escrow agent to invest the earnest money in an interest-bearing account in a federally insured financial institution. If the earnest money is to be invested, the escrow agent will require the buyer’s tax identification or Social Security number so that accrued interest may be reported to the Internal Revenue Service. Form 4-2 (escrow agent receipt and escrow agreement) in this chapter provides that the buyer pays the fees charged by the financial institution.

§ 4.8 Title and Survey

The contract incorporates the statutory notice that the Texas Real Estate License Act requires real estate brokers and real estate salespersons to give to a buyer, advising that the buyer should either have title examined by an attorney or obtain a title insurance policy. Tex. Occ. Code § 1101.652(b)(29). If a broker or salesperson is not involved, the paragraph may be deleted.

The contract requires that the seller provide to the buyer by the deadlines stated in the contract the title commitment, the survey, the UCC search, and legible copies of each document referred to in these instruments.

The contract provides a typical procedure under which the buyer reviews the title commitment, the survey, and the UCC search and notifies the seller of any objections. After notice, the seller may elect to cure the buyer’s objections but is not required to do so. If the seller does not agree to cure, the buyer may either proceed to close the transaction and accept the property subject to the uncured matters or terminate the contract. The seller is obligated to cure title matters that arise by, through, or under the seller after the contract is signed.

§ 4.8:1 Review of Title Commitment

The contract provides that the condition of title will be established by the title commitment and that the seller will pay for an owner title policy for the buyer at closing.

An essential reference on title insurance is the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*, available from the Texas Department of Insurance at [https://www.tdi.texas.gov/title/titleman.html](https://www.tdi.texas.gov/title/titleman.html). The manual contains Texas rate and procedural rules; the text of title 11 of the Texas Insurance Code, relating to title insurance; and various bulletins of the Texas State Board of Insurance dealing with title insurance practices.

The attorney should review the signature and effective date of the commitment.

**Schedule A:** The attorney should confirm that the proposed insured parties are correctly named, the amounts of insurance are correctly stated, and the correct estate is insured—for example, fee simple, easement, or leasehold. Record title should be vested in the seller. The attorney should confirm that the property description is correct and conforms to the description in the survey (if applicable).
Schedule B: The attorney should review the following matters:

- Item 1, relating to covenants and restrictions, should be noted as either “Covenants, conditions, and restrictions (other than any restrictions indicating preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin) as set forth in [recording data] of the real property records of [county] County, Texas” or “Item 1 of schedule B is hereby deleted in its entirety.”

- Item 2, relating to the standard survey exception, may be amended and partially deleted to read “any shortages in area” if a current survey approved by the title company is obtained. An additional 5 percent premium is charged to amend the owner policy for a residential transaction; an additional 15 percent premium is charged to amend the owner policy for a commercial transaction. No additional premium is required to amend the loan policy. The responsibility for paying the extra premium for the survey modification in the owner policy of title insurance is often negotiated between the parties, although the pertinent provision in the contract form provides for the extra premium to be paid by the buyer.

- Item 3, relating to homestead or community property or survivorship rights, and paragraph 4, relating to tidelines, lands comprising the shores and beds of waterways, lands beyond the line of the harbor or bulkhead lines, filled-in lands, artificial islands, statutory water rights, and areas extending from the line of mean low tide to the line of vegetation, apply only to the owner policy and cannot be deleted or amended.

- Paragraph 5, relating to property taxes, should be reviewed for the status of tax payments and the existence of rollback taxes. In the title policy, the exception for taxes should be restricted to taxes for the year in which the closing occurs (unless paid at or before closing), taxes for subsequent years, and rollback taxes for prior years.

- Paragraph 6, relating to the terms and conditions of the documents creating the insured’s interest in the land, cannot be revised but will not appear on the title policy. The referenced documents should, however, be reviewed.

- Paragraph 7, relating to materialman’s and mechanic’s liens, applies only to mortgagee policies on interim construction loans and may be deleted if satisfactory evidence is furnished to the title company.

- Paragraph 8, relating to subordinate liens and leases, applies only to the mortgagee policy.

- Paragraph 9, relating to existing liens, should show only liens permitted by the contract. Copies of all lien documents should be reviewed with regard to due-on-sale provisions; dragnet clauses relating to other debt; condemnation provisions; notice, cure, and default provisions; and subordinate financing. A superior lienholder’s estoppel agreement should be obtained from any lienholder whose note and lien are being either assumed or taken “subject to.” All other special exceptions, such as easements, mineral interests, leases, or matters shown on a current survey, should be listed specifically and carefully reviewed to determine if they affect the buyer’s intended use of the property.

Schedule C: The attorney should ensure that the seller has complied with the contract by curing and effectively removing all matters appearing on schedule C at or before closing. Schedule C matters may require obtaining releases of liens, settling specific claims or lawsuits affecting title to the property, furnishing evidence of good standing and authority (corporate resolution or partnership agreement), and obtaining proof of property settlement and divorce, proof of heirship or probate of a particular estate, or evidence relating to a bankruptcy. From the buyer’s perspective, curative matters appearing on schedule C should be attended to by either the seller or the title company. The buyer should object to all schedule C items in the commitment to ensure that they are not added to schedule B of the title policy.
Note: Endorsements providing additional coverage may be available on request, subject to payment of the applicable additional premium. The Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas should be consulted for the eligibility, cost, and use of these endorsements and policy.

§ 4.8:2 Review of Survey

The contract requires that the seller provide a current survey of the property. Different types of surveys and survey certifications are available, depending on the nature of the property and the requirements of the parties. An excellent resource on surveys is the Manual of Practice for Land Surveying in the State of Texas ("Texas Standards"), published by the Texas Society of Professional Surveyors. It describes the various categories and conditions for surveys in Texas, the level of accuracy required for each category of survey, matters to be depicted on the survey, and the nature of certificates. In some cases the lender or buyer may require the surveyor to comply with the most recent Minimum Standard Detail Requirements and Accuracy Standards for ALTA/ACSM Land Title Surveys ("ALTA"), as adopted by the American Land Title Association and the National Society of Professional Surveyors. See www.alta.org/publications/#policy.

The attorney should keep the following points in mind when reviewing the survey:

- The survey should bear a recent date and should conform to, as applicable, ALTA or the required category and condition under the Texas Standards for the type of survey specified in the contract and location of the property.
- The certificate should be sealed and signed and should conform to any certificate specified in the contract.
- There should be a north compass bearing on the survey.
- The attorney should observe the system of reference used for the survey, locate the beginning point, and determine that it is monumented and locatable.
- The survey, particularly all course and distance notations, should be compared to the legal description either appearing on or attached to the survey. This description then should be compared to the one appearing in the contract and the title commitment or title opinion.
- All recorded easements appearing in the title commitment should be located and noted on the survey with the appropriate recording data. Conversely, the attorney should examine the survey for any matters (such as easements) not appearing in the title commitment.
- The survey should be examined for the location of improvements: Do improvements protrude onto adjoining property or easement areas; are there encroachments of improvements from adjoining property onto the property; are there building setback line violations?
- Any written notations on the survey, such as those relating to rights of parties in possession, should be reviewed to determine their effect on the property and its anticipated use.
- The property should have legal and adequate access to public streets or roads.
- The survey should show the existence and location of utilities.
- The surveyor’s certificate should indicate the location of the floodplain, if applicable.

§ 4.8:3 Review of UCC Search

The contract includes provisions for personal property and requires that the seller furnish UCC searches of appropriate records. The scope of the search would depend on the nature of the collateral. See sections 9.2 through 9.6 in this manual.
§ 4.9 Inspection Period

The inspection period is intended to give the buyer the opportunity to investigate the property and decide whether to close the transaction. The contract provides that the buyer may terminate the contract at any time before the end of the inspection period for any reason and have the earnest money returned, except for the $100 independent consideration described above.

The contract provides for reasonable rules of entry and that the buyer will indemnify the seller for claims resulting from the buyer’s inspection of the property. Except for the environmental indemnity stated in exhibit B in the contract, the indemnity provisions of the contract are not intended to shift risk from the indemnified party to the indemnitor for the indemnified party’s own negligence. One consequence of this allocation of risk is that the indemnified party may not be able to recover the costs of defense from the indemnitor if the indemnified party is sued for the consequences of its alleged negligence. See Fisk Electric Co. v. Constructors & Associates, 888 S.W.2d 813 (Tex. 1994). The environmental indemnity shifts risk for the seller’s own negligence from the seller to the buyer. It is unlikely, however, that the environmental indemnity will be effective to shift risk in the event of misrepresentation or fraud.

The contract provides that the earnest money will be deposited in one lump sum. The parties alternatively may agree that the buyer is obligated to deposit additional earnest money after agreed conditions have been satisfied—for example, if the buyer decides not to terminate the contract at the end of the inspection period and to proceed to closing.

§ 4.10 Representations

Representations are negotiated by the parties with specific reference to the transaction. Representations may include such matters as ownership of the property; organization of the parties; authority to execute the contract and close the transaction; condition of title; parties in possession; pending litigation and claims that may ripen into litigation; pending or threatened condemnation or other taking; use restrictions, such as zoning and restrictive covenants; condition of the property or disclaimer of representations—for example, “as is”; presence of landfills or hazardous and toxic wastes; floodplain location; utility availability and capacity; compliance with all laws; effectiveness of required licenses and permits; status of leases; operation and maintenance of property before closing; accuracy of books and records; agricultural or other special-use tax assessment; payment of ad valorem taxes; and status of debt to be assumed or taken “subject to.”

In negotiating representations, the parties often consider issues such as whether the representations will be absolute or based on the seller’s knowledge and belief; whether the representations will be based on the knowledge of the entity that is the seller or on the knowledge of specified individuals; whether the seller must perform further investigation to make the representations or may rely on its current knowledge, without further investigation; and whether and to what extent the representations will survive closing.

The approach used in this contract limits the seller’s representations, but it is not intended to insulate the seller from liability for fraud or misrepresentation.

- The seller represents only facts, not opinions. For example, the seller does not represent whether, in the seller’s opinion, the property is in compliance with applicable laws and regulations. Instead, the seller represents that it has not received notice of violation of any law, ordinance, regulation, or requirement affecting the property or use of the property, except as stated in the contract.
- The seller makes no representation that is not stated in the contract, including exhibit D (notices, statements, and certificates required by law and regulation).
The following optional clauses are also provided:

- The buyer agrees to accept the property in its “as is, where is” condition, investigate the property on the buyer’s own behalf, and not rely on information or representations attributable to the seller, except to the extent stated in the contract.
- The buyer waives its rights under the Texas Deceptive Trade Practices–Consumer Protection Act.
- The buyer assumes responsibility after closing for all environmental matters relating to the property.

If the parties negotiate different representations, exhibit B must be revised accordingly.

The contract provides that the parties’ representations are true and accurate when made and must be true and accurate at closing, or the buyer may terminate the contract.

It is common practice to include representations regarding the organization and authority of the parties in contracts but to defer the obligation to deliver documentary evidence confirming those representations until the closing of the transaction. That evidence customarily consists of certificates of existence and good standing from public officials, certified copies of organizational documents, certified corporate resolutions or partnership consents, and certificates of incumbency. The attorney may consider requiring such documentary evidence at the execution of the contract to avoid encountering a claim after substantial obligations have been paid or incurred that the other party is not authorized to consummate the transaction. While the seller’s organizational documents should be available at the time of execution of the contract, the buyer’s organizational documents are often not prepared until before closing.

§ 4.11 Condition of Property until Closing; Cooperation; No Recording

The contract provides for the parties’ obligations after signing the contract concerning maintenance and operation of the property, casualty damage, condemnation, claims, governmental proceedings, permits, licenses, and inspections. The contract also sets out the parties’ agreement not to record the contract.

§ 4.12 Termination

The contract provides for disposition of the earnest money after termination and for post-termination obligations in certain events.

§ 4.13 Closing

The contract provides that, unless the parties agree otherwise before closing, certain closing documents will be on the forms contained in the current edition of the Texas Real Estate Forms Manual (State Bar of Texas). This approach defers the time and expense of negotiating the closing documents until after the contract is signed, while providing certainty if the parties do not otherwise negotiate closing documents. Alternately, the closing documents can be negotiated before the contract is signed and, if so, should be attached as exhibits to the contract.

The contract allocates closing obligations and transaction costs between the parties and provides for proration of ad valorem taxes, income, and expenses and for postclosing adjustments.
The contract provides that the buyer acquires possession of the property at closing. The parties may agree, however, on earlier or later possession by the buyer. If the buyer takes possession before closing or the seller remains in possession after closing, a lease may be appropriate. See chapter 25 in this manual.

Real estate brokers and real estate salespersons must have a written commission agreement to enforce payment of a real estate commission. The commission may be payable on contract execution, when the contract closes, or as otherwise agreed by the parties. The contract provides that the commission agreement is a separate document between the broker and the party responsible for paying the commission. For applicable forms, see forms 26-29 through 26-31 in this manual. Alternately, the contract may include the commission agreement or restate its key terms. The parties indemnify each other against claims by brokers and finders arising by, through, or under the indemnifying party. The contract may state that there are no brokers, but there is no requirement to do so.

If either buyer or seller is licensed as a real estate salesperson or real estate broker and is acting as a broker in the transaction, a disclosure to that effect is required under the Real Estate License Act. Tex. Occ. Code § 1101.652(b)(16).

§ 4.14 Default and Remedies

The contract provides that each party may elect one of the following remedies for the other’s default: termination (with disposition of the earnest money and payment of additional liquidated damages to the nondefaulting party) or specific performance. In addition, the buyer may terminate if the seller’s representations are not true and correct for a reason not the seller’s fault. The parties may alternately agree to payment of actual damages and perhaps consequential damages. The contract is drafted to limit the parties’ remedies, but remedies are often negotiated.

The contract provides that the party prevailing in litigation is entitled to recover attorney’s fees and court and other costs.

§ 4.15 Assignment

The contract contains alternate clauses concerning assignment. The buyer either may not assign the contract or may assign the contract only to an entity controlled by the buyer.

If the contract provides that the buyer has the right to assign, the assignment provision should state whether the buyer is relieved from obligations under the contract after assignment.

§ 4.16 Closing Functions

The party handling the closing (in this instance, the escrow agent) commonly attends to the following matters.

§ 4.16:1 Payoff Information and Other Closing Expenses

Written request should be made to each lienholder for the lienholder’s written payoff statement. The lienholder should be requested through an authorized representative to state the remaining principal balance due on the note, the accrued interest as of a certain date, a per diem amount of interest, and whether the lienholder will credit the amount held in the escrow account, if one exists, to the total due or, alternatively, refund the amount directly to the borrower. Closing must occur and payment be made to the lienholder before the release of lien will be signed.
Additionally, information concerning other matters requiring payment at closing should be obtained, such as payoff amounts for mechanic’s lien claims, federal or state tax liens, property taxes, paving assessments, and abstracted judgments that affect the property.

The closing agent must also determine the amounts of closing costs, such as surveying expenses, attorney’s fees, brokers’ commissions, and loan fees.

§ 4.16:2 Prorations and Deposits

Unless otherwise provided in the contract, the buyer acquires both the monetary benefits and burdens of the property. Prorations are generally based on the settlement or closing date.

**Tax Prorations:** Tax prorations may be based on the most current property tax information available to the closing agent. The tax proration serves as a bookkeeping adjustment on the closing statement between the seller and the buyer relating to taxes. If taxes have not been paid for the current year, this adjustment involves the seller’s being charged on the closing statement with property taxes for the period the seller owned the property. The buyer is then responsible for actual payment of taxes. The buyer receives a corresponding credit of the seller’s prorated amount. The contract requires that the seller and the buyer reprorate taxes when actual tax statements become available after closing.

**Insurance Prorations:** If the seller assigns its fire and extended coverage to the buyer, the buyer should be charged the unearned portion of the prepaid premium. The seller should receive a corresponding credit.

**Rent Prorations:** If the property is income-producing, rents already received by the seller for the current rental period should be prorated. The seller should be charged the amount for the prorated period, and the buyer should receive a corresponding credit.

**Interest Prorations:** If the sale is being financed through an assumption or “subject to” transaction, interest becoming due at the next regular payment period should be prorated between the seller and the buyer, usually as of the closing date.

**Security Deposits:** Tenant security deposits that the seller is holding should be charged to the seller and credited to the buyer, because the buyer ultimately should be responsible for the refund of the deposits. The seller will remain liable to the tenants for security deposits received while the seller was the owner of the property, until the buyer delivers to the tenants a signed statement acknowledging that the buyer of the property has received and is responsible for the tenants’ security deposits and setting forth the amount of each deposit. See Tex. Prop. Code §§ 92.105(b), 93.007. Additional drafting is required to obligate the buyer to deliver the signed statements.

§ 4.16:3 Preparation of Closing Documents

The closing agent may be expected to prepare several documents.

**Closing Statements:** Closing statements may be on either the federally prescribed HUD-1 settlement statement, the State Board of Insurance settlement statement, or a separate seller’s, buyer’s, or borrower’s statement, depending on the nature of the transaction. The purpose of a closing statement is to assemble in one document all the pertinent financial features of the contract, including purchase price, loan amounts, costs and expenses of closing the transaction, and prorations. Execution of the statement evidences the parties’ agreement with the numbers and computations appearing on the statement.
Affidavits: Affidavits concerning debts and liens, parties in possession, identity of the parties, leases, and marital status will likely be required at closing by the escrow agent.

Financing documents are typically prepared by the lender’s attorney. Conveyancing and other closing documents may be prepared by the parties to the transaction, by their attorneys, or by an attorney for the closing agent.

§ 4.16:4 Funding

The closing agent typically disburses funds in connection with closing. Disbursements are made according to the closing statement, usually from funds paid by the buyer and its lenders.

Except in the case of certain nontaxable sales of principal residences, the person responsible for closing a real estate transaction is required to file an information return with the Internal Revenue Service relating to the transaction and is subject to penalties for failing to report. See 26 U.S.C. § 6045. This reporting requirement is often satisfied by the responsible person by delivering the seller’s closing statement, together with an attachment of additional required information, to the IRS.

If funds will be disbursed at closing, payments must be made to the closing agent with “good funds” as defined by the regulations of the Texas State Board of Insurance. See Procedural Rule P-27, Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

If it is not necessary to disburse funds at closing, the parties need not comply with the “good funds” rule, and payment may be made in other ways.

The attorney for each buyer and lender should consider obtaining an insured closing service letter from the title insurance underwriter whose policies are to be issued. This letter indemnifies the lender for any fraudulent acts of the closing title insurance company or agency relating to the handling of closing funds. See forms T-50 and T-51, Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas. See https://www.tdi.texas.gov/title/titlemm5.html.

§ 4.16:5 Recording Documents

The closing agent is responsible for recording documents intended to be recorded. This responsibility extends to the recording of releases or transfers of liens for notes paid at closing. Each document should be checked before recording to ensure that exhibits referred to in the document are attached and the name and address of the person to whom the document is to be returned after recording is included.

§ 4.16:6 Closing Instructions

Attorneys for the buyer, the seller, and the lender may each prepare closing instructions for the closing agent. For applicable forms, see forms 26-15 through 26-18 in this manual. These instructions relate to the conditions precedent to closing, including the status of the title after closing, the title insurance policies to be issued, disposition of funds, and distribution of documents received by the closing agent.
§ 4.17 Additional Considerations

§ 4.17:1 Transactions Involving Foreign Persons

Buyer: If the buyer is a foreign person, certain disclosures and reports may be required under the Foreign Investment in Real Property Act of 1980. See 26 U.S.C. § 6039C.

Seller: With certain exceptions, if the seller of real property located in the United States is a foreign person, the buyer must withhold 15 percent of the price and remit the funds to the Internal Revenue Service within twenty days of the date of transfer. See 26 U.S.C. § 1445(a), (b). The buyer should assume that the seller is a foreign person until the contrary is established, because buyers act at their own peril until they obtain a nonforeign affidavit. See 26 U.S.C. § 1445(b)(2). Forms 26-19 and 26-20 in this manual are suggested for use in all transactions.

§ 4.17:2 Other Requirements

Before closing, the buyer should arrange for Causes of Loss—Special Form property insurance coverage, liability, flood, and similar types of insurance for any required mortgagee endorsements. The buyer and seller should arrange for payment out of the closing proceeds of any accrued taxes even if the taxes will not be delinquent until after closing. The buyer should notify the tax appraisal district of any change in ownership.

§ 4.17:3 Closing Checklist

The attorney should prepare a closing checklist, itemizing the documents that will be required to close the transaction, including curative documents. The checklist should also refer to all other preclosing considerations relating to the transaction.

§ 4.17:4 Postclosing Considerations

After closing, recorded documents and relevant title insurance policies issued after closing should be reviewed for accuracy and compliance with the title commitment. The owner policy should be dated on or after the recording date of the deed conveying title to the buyer, and the mortgagee policy should be dated on or after the recording date of the deed of trust of the insured lien.

An original or escrow agent’s certified copy of each executed document relating to the closing should be provided to the seller and the buyer or the borrower by their attorneys. Generally, the party benefiting from a document receives the original, and the other parties receive copies.


Real Estate Sales Contract

This contract to buy and sell real [include if applicable: and personal] property is between Seller and Buyer as identified below and is effective on the date (“Effective Date”) of the last of the signatures by Seller and Buyer as parties to this contract and by Escrow Agent to acknowledge receipt of the [Initial] Earnest Money. Buyer must deliver the [Initial] Earnest Money to Escrow Agent and obtain Escrow Agent’s signature before the [Initial] Earnest Money Deadline provided in paragraph A.1. for this contract to be effective. If the Earnest Money is paid by check and payment on presentation is refused, Buyer is in default.

Seller:

Address:

Phone:

E-mail:

Type of entity:

Seller’s Attorney:

Law firm:

Address:

Phone:

E-mail:

Seller’s Sales Agent:
E-mail:

Property: The land commonly known as [describe property] and more fully described in Exhibit A (“Land”) [include the following phrases that are applicable, tailoring punctuation and conjunctions as necessary: , together with improvements to the Land (“Improvements”), the leases associated with the Land and Improvements (“Leases”), and the personal property described in Exhibit A (“Personal Property”)].

Underwriter:

Escrow Agent:

Name of Closer:

Address:

Phone:

E-mail:

[Include if applicable: Estimated] Purchase Price

Cash portion:

Seller-financed portion (principal amount of note):

Interest rate:

Maturity date:

Payment schedule:

See exhibit E for additional terms and conditions.
Third-party-financed portion:

Total purchase price:

Earnest Money

[Initial Earnest Money:]

[Additional Earnest Money:]

Surveyor:

Survey Category:

Include the following if applicable.

Buyer’s Liquidated Damages:

Include the following if applicable.

Seller’s Additional Liquidated Damages:

Continue with the following.

County for Performance:

A. Deadlines and Other Dates

All deadlines in this contract expire at 5:00 P.M. local time where the Property is located. If a deadline falls on a Saturday, Sunday, or holiday, the deadline will be extended to the next day that is not a Saturday, Sunday, or holiday. A holiday is a day, other than a Saturday or Sunday, on which state or local governmental agencies and financial institutions are not generally open for business where the Property is located. Time is of the essence.

A.1. [Initial] Earnest Money Deadline: [date]
A.2. Delivery of Title Commitment: [[date]/[number] days after the Effective Date]

A.3. Delivery of Survey: [[date]/[number] days after the Effective Date]

A.4. Delivery of UCC Search: [[date]/[number] days after the Effective Date]

A.5. Delivery of legible copies of instruments referenced in the Title Commitment, Survey, and UCC Search: [[date]/[number] days after the Effective Date]

A.6. Delivery of Title Objections: [[date]/[number] days after delivery of the last of the Title Commitment, Survey, and legible copies of the instruments referenced in them]

A.7. Delivery of Seller’s records as specified in Exhibit C: [[date]/[number] days after the Effective Date]

Select one of the following.

A.8. End of Inspection Period: [[date]/[number] days after the Effective Date]

Or

A.8. End of Inspection Period: [[date]/[number] days after the latter of (a) the Effective Date or (b) the delivery of the Partial Release Agreement described in paragraph G.6.]

Include the following if applicable.

A.9. Additional Earnest Money Deadline: [[date]/[number] days after the end of the Inspection Period]

Continue with the following.

[A.9./A.10.] Closing Date: [[date]/[number] days after the end of the Inspection Period]

[A.10./A.11.] Closing Time: [time]
B. Closing Documents

B.1. At Closing, Seller will deliver the following items:

Select one of the following.

General Warranty Deed [include if applicable: with Vendor’s Lien at Buyer’s option]

Or

Special Warranty Deed [include if applicable: with Vendor’s Lien at Buyer’s option]

Continue with the following as applicable.

Bill of Sale and Assignment

IRS Nonforeign Person Affidavit

Evidence of Seller’s authority to close this transaction

Notices, statements, and certificates as specified in Exhibit D

Assignment and Assumption of Leases

Assignment and Assumption of Contracts

Tenant Estoppel Certificate

B.2. At Closing, Buyer will deliver the following items:

Include all applicable items.

Balance of Purchase Price

Evidence of Buyer’s authority to close this transaction
Deceptive Trade Practices Act waiver

Assignment and Assumption of Leases

Assignment and Assumption of Contracts

Acknowledgment(s) of receipt of notices, statements, and certificates as specified in Exhibit D

Seller-financing documents

Promissory Note

Deed of Trust

Deed of Trust to Secure Assumption

Security Agreement

Financing Statement

Loan Documents required by third-party lender

The documents listed in this section B. are collectively known as the “Closing Documents.” Unless otherwise agreed by the parties before Closing, the Closing Documents for which forms exist in the current edition of the Texas Real Estate Forms Manual (State Bar of Texas) will be prepared using those forms.

C. Exhibits

The following are attached to and are a part of this contract:

Exhibit A—Description of the Land [include if applicable: and Personal Property]
D. Purchase and Sale of Property

D.1. Purchase and Sale Agreement. Seller agrees to sell and convey the Property to Buyer, and Buyer agrees to buy and pay Seller for the Property. The promises by Buyer and Seller stated in this contract are the consideration for the formation of this contract.

D.2. Adjusted Purchase Price. The Purchase Price will be adjusted on the basis of the Survey to be equal to the product of $[amount] multiplied by the number of [net/gross] square feet of surface area of the Land disclosed by the Survey, subject to the following provisions:

D.2.a. If the adjusted Purchase Price based on the Survey exceeds an amount (“Maximum Adjusted Purchase Price”) that is equal to [percent] percent of the [Estimated] Purchase Price, Buyer may terminate this contract and recover the Earnest Money by giving Seller Buyer’s calculation of the adjusted Purchase Price and notice of termination within ten days after the Survey was delivered to both parties; provided, however, that Buyer’s notice of termination will be automatically rescinded and the Purchase Price will be equal to the Maximum Adjusted Purchase Price if Seller gives Buyer notice within ten days after receiving Buyer’s notice of termination that Seller has waived the right to receive the portion of the adjusted Purchase Price in excess of the Maximum Adjusted Purchase Price.
D.2.b. If the adjusted Purchase Price based on the Survey is less than an amount (“Minimum Adjusted Purchase Price”) that is equal to [percent] percent of the [Estimated] Purchase Price, Seller may terminate this contract by giving Buyer Seller’s calculation of the adjusted Purchase Price and notice of termination within ten days after the Survey was delivered to both parties; provided, however, that Seller’s notice of termination will be automatically rescinded if Buyer gives Seller notice within ten days after receiving Seller’s notice of termination that Buyer has waived the right to purchase the Property for an adjusted Purchase Price that is less than the Minimum Adjusted Purchase Price.

D.2.c. If the calculation of the adjusted Purchase Price is to be made on the basis of the net square feet of surface area disclosed by the Survey, the net square feet of surface area will be the gross square feet of surface area within the Land less any portion of the surface area of the Land that is within a flood plain as specified on the applicable current FEMA map and any portion of the surface area of the Land that is subject to a right-of-way or easement that serves any land other than the Land.

E. Interest on Earnest Money

Buyer may direct Escrow Agent to invest the Earnest Money in an interest-bearing account in a federally insured financial institution by giving notice to Escrow Agent and satisfying Escrow Agent’s requirements for investing the Earnest Money in an interest-bearing account. Any interest earned on the Earnest Money will become part of the Earnest Money.

F. Title and Survey

F.1. Review of Title. The following statutory notice is provided to Buyer on behalf of the real estate licensees, if any, involved in this transaction: Buyer is advised that it should

Continue with the following.
either have the abstract covering the Property examined by an attorney of Buyer’s own selection or be furnished with or obtain a policy of title insurance.

**F.2. Title Commitment; Title Policy.** “Title Commitment” means a Commitment for Issuance of an Owner Policy of Title Insurance by Underwriter stating the condition of title to the Land. The “effective date” stated in the Title Commitment must be after the Effective Date of this contract. “Title Policy” means an Owner Policy of Title Insurance issued by Underwriter in conformity with the last Title Commitment delivered to and approved by Buyer.

**F.3. Survey.** “Survey” means an on-the-ground, staked plat of survey and metes-and-bounds description of the Land, prepared by Surveyor or another surveyor satisfactory to Underwriter, dated after the Effective Date, and certified to [include as applicable: Seller, Buyer, Underwriter, and any other person specified by Buyer] to comply with the current standards and specifications as published by the [American Land Title Association/Texas Society of Professional Surveyors] for the Survey Category.

**F.3. Survey.** “Survey” means an on-the-ground, staked plat of survey and metes-and-bounds description of the Land, prepared by Surveyor or another surveyor satisfactory to Underwriter. Any existing survey delivered by Seller must be accompanied by an affidavit detailing any changes to the Property since the date of the Survey.

**F.4. UCC Search.** “UCC Search” means written reports stating the instruments that are on file in the Texas secretary of state’s UCC records, the UCC records of any other appropriate state, and the UCC records in the jurisdiction in which Seller is organized, show-
ing as debtor Seller and all other owners of the Personal Property during the five years before
the Effective Date of this contract.

F.5. Delivery of Title Commitment, Survey, UCC Search, and Legible
Copies. Seller must deliver the Title Commitment to Buyer and Buyer’s attorney by the
deadline stated in paragraph A.2.; the Survey by the deadline stated in paragraph A.3.; the
UCC Search by the deadline stated in paragraph A.4.; and legible copies of the instruments
referenced in the Title Commitment, Survey, and UCC Search by the deadline stated in para-
graph A.5.

F.6. Title Objections. Buyer has until the deadline stated in paragraph A.6. (“Title
Objection Deadline”) to review the Survey, Title Commitment, UCC Search, and legible cop-
ies of the title instruments referenced in them and notify Seller of Buyer’s objections to any of
them (“Title Objections”). Buyer will be deemed to have approved all matters reflected by the
Survey, Title Commitment, and UCC Search to which Buyer has made no Title Objection by
the Title Objection Deadline. The matters that Buyer either approves or is deemed to have
approved are “Permitted Exceptions.” If Buyer notifies Seller of any Title Objections, Seller
has five business days from receipt of Buyer’s notice to notify Buyer whether Seller agrees to
cure the Title Objections before Closing (“Cure Notice”). If Seller does not timely give its
Cure Notice or timely gives its Cure Notice but does not agree to cure all the Title Objections
before Closing, Buyer may, within five business days after the deadline for the giving of
Seller’s Cure Notice, notify Seller that either this contract is terminated or Buyer will proceed
to close, subject to Seller’s obligations to remove all liquidated liens, remove all exceptions
that arise by, through, or under Seller after the Effective Date, and cure only any other Title
Objections that Seller has agreed to cure in the Cure Notice. At or before Closing, Seller must
remove all liquidated liens, remove all exceptions that arise by, through, or under Seller after
the Effective Date of this contract, and cure any other Title Objections that Seller has agreed to cure.

G. Inspection Period

G.1. Review of Seller’s Records. Seller will deliver to Buyer copies of Seller’s records specified in Exhibit C, or otherwise make those records available for Buyer’s review, by the deadline stated in paragraph A.7.

G.2. Entry onto the Property. Buyer may enter the Property before Closing to inspect it at Buyer’s cost and risk, subject to the following:

G.2.a. Buyer must deliver evidence to Seller that Buyer has commercial general liability insurance, with coverages and in amounts that are substantially the same as those maintained by Seller or with such lesser coverages and in such lesser amounts as are reasonably satisfactory to Seller.

G.2.b. Buyer may not interfere in any material manner with existing operations or occupants of the Property.

G.2.c. Buyer must notify Seller in advance of Buyer’s plans to conduct tests so that Seller may be present during the tests.

G.2.d. If the Property is physically altered because of Buyer’s inspections, Buyer must return the Property to its preinspection condition promptly after the alteration occurs.

G.2.e. Buyer must deliver to Seller copies of all inspection reports that Buyer receives from third-party consultants or contractors within three days after their preparation or receipt.

G.2.f. Buyer must abide by any other reasonable entry rules imposed by Seller.
G.3. Environmental Assessment. Buyer has the right to conduct environmental assessments of the Property. Seller will provide, or will designate a person with knowledge of the use and condition of the Property to provide, information requested by Buyer or Buyer’s agent or representative regarding the use and condition of the Property during the period of Seller’s ownership of the Property. Seller will cooperate with Buyer in obtaining and providing to Buyer or its agent or representative information regarding the use and condition of the Property before Seller’s period of ownership to the extent that the information is within Seller’s possession or control.

G.4. Buyer’s Right to Terminate. Buyer may terminate this contract for any reason by notifying Seller of the termination before the end of the Inspection Period. If Buyer does not notify Seller of Buyer’s termination of the contract before the end of the Inspection Period, Buyer waives the right to terminate this contract pursuant to this provision. [Include if applicable: If Buyer does not terminate this contract pursuant to this provision, Buyer must deposit the Additional Earnest Money with Escrow Agent on or before the deadline stated in paragraph A.9.]

G.5. Buyer’s Indemnity and Release of Seller

G.5.a. Indemnity. Buyer will indemnify, defend, and hold Seller harmless from any loss, attorney’s fees, expenses, or claims arising out of Buyer’s investigation of the Property, except those arising out of the acts or omissions of Seller and those for repair or remediation of existing conditions discovered by Buyer’s inspection. The obligations of Buyer under this provision will survive termination of this contract and Closing, any other provision of this contract to the contrary notwithstanding.

G.5.b. Release. Buyer releases Seller and those persons acting on Seller’s behalf from all claims and causes of action (including claims for attorney’s fees and court and other costs) resulting from Buyer’s investigation of the Property [include if applicable: , }
including claims arising out of Seller’s negligence, but not Seller’s gross negligence or intentional misconduct].

Include the following if applicable.

G.6. **Partial Release of Liens.** If, as of the Effective Date, the Property is subject to any liens that secure indebtedness in excess of the estimated net proceeds of the Purchase Price after the satisfaction of brokers’ commissions and other transaction costs for which Seller is responsible, then Seller promptly must obtain a written agreement or agreements (collectively, the “Partial Release Agreement”) binding and enforceable against the holders of such liens (“Holders”) for the benefit of Seller. The Partial Release Agreement must constitute an agreement to release all of such liens with respect to the Property on the payment to the Holders of an amount that does not exceed the net proceeds of the Purchase Price after the satisfaction of brokers’ commissions and other transaction costs for which Seller is responsible. If Seller is required to provide a Partial Release Agreement, the Inspection Period will not commence until the executed Partial Release Agreement, in a form reasonably satisfactory to Buyer, is delivered to Buyer.

H. **Representations [, As Is, Where Is Provision, and Environmental Matters]**

The parties’ representations stated in Sections A. and D. of Exhibit B are true and correct as of the Effective Date and must be true and correct on the Closing Date. A party who becomes aware that any of the representations of either party are not true and correct will promptly notify the other party. Unless a party notifies the other party to the contrary on or before the Closing Date, or a party has actual knowledge to the contrary as of the Closing Date, each party is entitled to presume that the representations of the other party in Exhibit B are true and correct as of the Closing Date.

Include the following if applicable.
The parties agree to the terms of Section B. (As Is, Where Is) and Section C. (Environmental Matters) in Exhibit B.

I. Condition of the Property until Closing; Cooperation; No Recording of Contract

I.1. Maintenance and Operation. Until Closing, Seller will (a) maintain the Property as it existed on the Effective Date, except for reasonable wear and tear and casualty damage; (b) use the Property in the same manner as it was used on the Effective Date; (c) comply with all Leases and other contracts of Seller pertaining to the Property in effect on the Effective Date and all laws and all governmental regulations affecting the Property; and (d) not encumber, transfer, or dispose of any of the Property [include if applicable: or Personal Property], except to sell inventory, replace equipment, and use supplies in the normal course of operating the Property. Until the end of the Inspection Period, Seller will not enter into, amend, or terminate any Lease or other contract that affects the Property other than in the ordinary course of operating the Property and will promptly give notice to Buyer of each new, amended, or terminated Lease or other contract, including a copy of the Lease or other contract, in sufficient time so that Buyer may consider the new information before the end of the Inspection Period. If Seller’s notice is given within three days before the end of the Inspection Period, the Inspection Period will be extended for three days. After the end of the Inspection Period, Seller may not enter into, amend, or terminate any Lease or other contract that affects the Property without first obtaining Buyer’s written consent, which Buyer will have no obligation to grant and, if granted, may be conditioned in any manner Buyer in its sole discretion deems appropriate.

I.2. Casualty Damage. Seller will notify Buyer promptly after discovery of any casualty damage to the Property. Seller will have no obligation to repair or replace the Property if it is damaged by casualty before Closing. Buyer may terminate this contract if the casualty damage that occurs before Closing would materially affect Buyer’s intended use of the Property, by giving notice to Seller within fifteen days after receipt of Seller’s notice of the
casualty (or before Closing if Seller’s notice of the casualty is received less than fifteen days before Closing). [Include if applicable: The casualty damage will be deemed to materially affect Buyer’s intended use if the estimated amount of the damage exceeds [percent] percent of the Purchase Price.] If Buyer does not terminate this contract, Seller will (a) convey the Property to Buyer in its damaged condition, (b) assign to Buyer all of Seller’s rights under any property insurance policies covering the Property, and (c) credit to Buyer the amount of the deductibles and coinsurance provisions under any insurance policies covering the Property, but not in excess of the cost to repair the casualty damage and less any amounts previously paid or incurred by Seller to repair the Property. If Seller has not insured the Property and Buyer does not elect to terminate this contract in accordance with this section, the Purchase Price will be reduced by the cost to repair the casualty damage less any amounts previously paid or incurred by Seller to repair the Property.

I.3. Condemnation. Seller will notify Buyer promptly after Seller receives notice that any part of the Property has been or is threatened to be condemned or otherwise taken by a governmental or quasi-governmental authority. Buyer may terminate this contract if the condemnation would materially affect Buyer’s intended use of the Property by giving notice to Seller within fifteen days after receipt of Seller’s notice to Buyer (or before Closing if Seller’s notice is received less than fifteen days before Closing). The condemnation will be deemed to materially affect Buyer’s intended use if [specify reason, e.g., the condemnation would eliminate all curb cuts on Main Street]. If Buyer does not terminate this contract, (a) Buyer and Seller will each have the right to appear and defend their respective interests in the Property in the condemnation proceedings, (b) any award in condemnation will be assigned to Buyer, (c) if the taking occurs before Closing, the description of the Property will be revised to delete the portion taken, and (d) no change in the Purchase Price will be made.
I.4. **Claims; Hearings.** Seller will notify Buyer promptly after Seller receives notice of any claim or administrative hearing that is threatened, filed, or initiated before Closing that involves or directly affects the Property.

I.5. **Cooperation.** Seller will cooperate with Buyer (a) before and after Closing, to transfer the applications, permits, and licenses held by Seller and used in the operation of the Property and to obtain any consents necessary for Buyer to operate the Property after Closing and (b) before Closing, with any reasonable evaluation, inspection, audit, or study of the Property prepared by, for, or at the request of Buyer.

I.6. **No Recording.** Buyer may not file this contract or any memorandum or notice of this contract in the real property records of any county. If Buyer records this contract or a memorandum or notice, Seller may terminate this contract and record a notice of termination.

J. **Termination**

J.1. **Disposition of Earnest Money after Termination**

J.1.a. **To Buyer.** If Buyer terminates this contract in accordance with Buyer’s rights to terminate, Buyer will send a request for release of the Earnest Money to Seller, with a copy to Escrow Agent, to be signed by Seller. If Seller fails to deliver a signed release to Escrow Agent within five days after delivery of the request for release, Buyer may make a written demand on Escrow Agent for the Earnest Money, and Escrow Agent will promptly deliver a copy of the demand to Seller. Unless Seller delivers a written objection to Escrow Agent, within fifteen days after Escrow Agent delivers Buyer’s written demand for the Earnest Money, Escrow Agent will, without any further authorization from Seller, deliver the Earnest Money to Buyer, less $100, which will be paid to Seller as consideration for the right granted by Seller to Buyer to terminate this contract.
J.1.b. **To Seller.** If Seller terminates this contract in accordance with Seller’s rights to terminate, Seller will send a request for release of the Earnest Money to Buyer, with a copy to Escrow Agent, to be signed by Buyer. If Buyer fails to deliver a signed release to Escrow Agent within five days after delivery of the request for release, Seller may make a written demand on Escrow Agent for the Earnest Money, and Escrow Agent will promptly deliver a copy of the demand to Buyer. Unless Buyer delivers a written objection to Escrow Agent, within fifteen days after Escrow Agent delivers Seller’s written demand for the Earnest Money, Escrow Agent will, without any further authorization from Buyer, deliver the Earnest Money to Seller.

J.2. **Duties after Termination.** If this contract is terminated, Buyer will promptly return to Seller all of Seller’s records in Buyer’s possession or control. After return of the records, neither party will have further duties or obligations to the other under this contract, except for those obligations that cannot be or were not performed before termination of this contract or that expressly survive termination of this contract.

**K. Closing**

K.1. **Conditions of Closing.** Neither party will be obligated to close the sale and purchase of the Property unless the other party has satisfied the following conditions, any of which may be waived by the first party in its discretion:

K.1.a. **Representations and Warranties.** The representations and warranties of the other party must be true and correct at Closing.

K.1.b. **Performance of Covenants and Agreements.** The other party must have performed all covenants and agreements required to be performed at or before Closing by that party.
K.1.c. No Bankruptcy. No voluntary or involuntary proceeding in bankruptcy shall be pending with respect to that party.

K.2. Closing. This transaction will close (“Closing”) at Escrow Agent’s offices at the Closing Date and Closing Time. At Closing, the following will occur:

K.2.a. Closing Documents; Escrow Agent/Underwriter Documents. The parties will execute and deliver the Closing Documents and any documents required by Escrow Agent and Underwriter.

K.2.b. Payment of Purchase Price. Buyer will deliver the Purchase Price and other amounts that Buyer is obligated to pay under this contract to Escrow Agent in funds acceptable to Escrow Agent. The Earnest Money will be applied to the Purchase Price. [Include if applicable: Buyer will execute, acknowledge as required, and deliver the documents described in Exhibit E—Seller Financing Addendum.]

K.2.c. Disbursement of Funds; Recording; Copies. Escrow Agent will be instructed to disburse the Purchase Price and other funds in accordance with this contract, record the deed and the other Closing Documents directed to be recorded, and distribute documents and copies in accordance with the parties’ written instructions.


K.2.e. Possession. Seller will deliver possession of the Property to Buyer, subject to the Permitted Exceptions existing at Closing and any liens and security interests created at Closing to secure financing for the Purchase Price.

K.3. Transaction Costs
K.3.a. Seller’s Costs. Seller will pay the basic charge for the Title Policy; one-half of the escrow fee; the costs to prepare the deed; the costs to obtain, deliver, and record releases of any liens required to be released in connection with the sale; the costs to record documents to cure Title Objections agreed or required to be cured by Seller and to resolve matters shown in Schedule C of the Title Commitment; [include if applicable: Escrow Agent’s inspection fee to delete from the Title Policy the customary exception for rights of parties in possession.] the costs to obtain the [Survey, UCC Search, and] certificates or reports of ad valorem taxes; the costs to deliver copies of the instruments described in paragraph A.5. and Seller’s records; any other costs expressly required to be paid by Seller in this contract; and Seller’s attorney’s fees and expenses.

K.3.b. Buyer’s Costs. Buyer will pay one-half of the escrow fee; the costs to obtain, deliver, and record all documents other than those to be obtained or recorded at Seller’s expense; [include if applicable: the additional premium for the “survey/area and boundary deletion” in the Title Policy, if the deletion is requested by Buyer, as well as the cost of any other endorsements or modifications of the standard form of Title Policy requested by Buyer; the costs of work required by Buyer to have the Survey reflect matters other than those required under this contract except changes required for curative purposes;] the costs to obtain financing of the Purchase Price, including the incremental premium costs of the loan title policies and endorsements and deletions required by Buyer’s lender; any other costs expressly required to be paid by Buyer in this contract; and Buyer’s attorney’s fees and expenses.

K.3.c. Ad Valorem Taxes. Except for subsequent assessments for prior years due to changes in use or ownership discussed below, ad valorem taxes on the Property for all periods before the period in which Closing occurs must be paid by Seller at or before Closing. Ad valorem taxes for the Property for the calendar year of Closing will be prorated between Buyer and Seller as of the Closing Date. Seller’s portion of the prorated taxes will be paid to Buyer at Closing as a credit to the Purchase Price. Buyer will assume the obligation to pay,
and shall pay in full, such taxes for the year of Closing before delinquency. If the assessment for the calendar year of Closing is not known at the Closing Date, the proration will be based on tax rates for the previous tax year applied to the most current assessed value, and Buyer and Seller will adjust the prorations in cash within thirty days after the actual assessment and taxes are known. Seller will promptly notify Buyer of all notices of proposed or final tax valuations and assessments that Seller receives after the Effective Date and after Closing. All taxes (including any penalties, interest, and attorney’s fees) due as of Closing will be paid at Closing.

Include the following if the property is not a single tax parcel.

**K.3.c.i. Partial Tax Parcels.** If the Property contains one or more unimproved partial tax parcels for the year of Closing, then the taxes and other assessments attributable to any such tax parcel for the year of Closing shall be allocated between the portion of such tax parcel that is within the Property and the portion of such tax parcel that is outside the Property on the basis of the respective percentages that the gross surface area of the portion of such tax parcel that is within the Property and the gross surface area of the portion of such tax parcel that is outside the Property represent of the total gross surface area of such tax parcel; provided, however, that the result of the foregoing computation shall be adjusted as applicable in order to reflect the taxable value of any improvements that have been constructed on either or both of the portions of such tax parcel. If the Property contains one or more partial tax parcels for the year of Closing, and all taxes and other assessments attributable to such tax parcel have not been paid in full at or prior to Closing, each of Seller and Buyer shall be obligated to pay the taxes and other assessments due with respect to their respective portions of such tax parcel for the entire year of Closing on or before the due date thereof and to indemnify, defend, and hold the other party harmless from and against any loss resulting from a failure to pay such taxes and assessments when they become due and payable.
K.3.c.ii. Special Valuations and Reduced Tax Valuations. If the Property has been the subject of special valuation and reduced tax assessments pursuant to the provisions of chapter 23, subchapter D, of the Texas Tax Code or under any other provision of law with respect to any period before the Closing, and if additional taxes, penalties, or interest are assessed pursuant to Code section 23.55 or under the other provision of law, the following will apply:

(a) If Seller changes the use of the Property before Closing, resulting in the assessment of additional taxes for periods before Closing, Seller will pay the additional taxes.

(b) If this sale or Buyer’s use of the Property results in the assessment of additional taxes for periods before Closing, Buyer will pay the additional taxes.

(c) At Closing, the parties will determine the amount of deferred taxes payable if the sale of the Property as herein contemplated were deemed as of the Closing Date to constitute a change in the use of the Property that would result in the “roll-back” or recapture of deferred taxes for the current year and all preceding tax years for which the “roll-back” or recapture could be imposed (“Potential Roll-Back Amount”). Seller will pay at Closing an amount equal to the Potential Roll-Back Amount to all applicable taxing jurisdictions. On such payment, Seller will have no further liability for any further roll-back amounts and Buyer will assume any and all obligations for, and indemnify, defend, and hold Seller
harmless from and against, any liability for any further roll-back amounts.

(d) At Closing, the parties will determine the amount of deferred taxes payable if the sale of the Property as herein contemplated were deemed as of the Closing Date to constitute a change in the use of the Property that would result in the “roll-back” or recapture of deferred taxes for the current year and all preceding tax years for which the “roll-back” or recapture could be imposed (“Potential Roll-Back Amount”) as of the Closing Date. Seller will deposit at Closing an amount equal to the Potential Roll-Back Amount with Escrow Agent, to be held in an interest-bearing escrow account in accordance with the terms and conditions hereinafter set forth (“Roll-Back Escrow Account”). If a subsequent change in the use of the Property results in a roll-back of deferred taxes, the portion of recaptured deferred taxes attributable to the period before the Closing, if any, will be paid from the Roll-Back Escrow Account and the portion of deferred taxes attributable to the period from and after the closing, if any, will be paid by Buyer (or its successors or assigns). On the earlier of (1) the date on which there is no longer any statutory basis for recapturing any deferred taxes attributable to the period before the Closing or (2) the date on which all taxes that may then potentially be recaptured for any period before the Closing have been recaptured, the remaining balance in the Roll-Back Escrow Account, if any, will be distributed to Seller.
K.3.d. Income and Expenses. Except as provided in paragraph K.3.c. above, income and expenses pertaining to operation of the Property will be prorated as of the Closing Date on an accrual basis and paid at Closing as a credit or debit adjustment to the Purchase Price. Invoices that are received after Closing for operating expenses incurred on or before the Closing Date and not adjusted at Closing will be prorated between the parties as of the Closing Date, and Seller will pay its share within ten days after receipt of Buyer’s notice of the deficiency.

K.3.e. Postclosing Adjustments. If errors in the prorations made at Closing are identified within ninety days after Closing, Seller and Buyer will make postclosing adjustments to correct the errors within fifteen days after receipt of notice of the errors.

K.3.f. Brokers’ Commissions. Buyer and Seller each indemnify and agree to defend and hold the other party harmless from any loss, attorney’s fees, and court and other costs arising out of a claim by any person or entity claiming by, through, or under the indemnitor for a broker’s or finder’s fee or commission because of this transaction or this contract, whether the claimant is disclosed to the indemnitee or not. At Closing, each party will provide the other party with a release of broker’s or appraiser’s liens from all brokers or appraisers for which such party is responsible.

K.4. Issuance of Title Policy. Seller will cause Escrow Agent to issue the Title Policy to Buyer as soon as practicable after Closing.

L. Default and Remedies

L.1. Seller’s Default; Remedies before Closing. If Seller fails to perform its obligations under this contract or if Seller’s representations are not true and correct as of the Closing Date (“Seller’s Default”), Buyer may elect one of the following as its sole and exclusive remedy before Closing:
L.1.a. Termination; Liquidated Damages. Buyer may terminate this contract by giving notice to Seller on or before the Closing Date and Closing Time and have the Earnest Money, less $100 as described above, returned to Buyer. Unless Seller’s Default relates to the untruth or incorrectness of Seller’s representations for reasons not reasonably within Seller’s control, if Seller’s Default occurs after Buyer has incurred costs to investigate the Property after the Effective Date and Buyer terminates this contract in accordance with the previous sentence, Seller will also pay to Buyer as liquidated damages the lesser of Buyer’s actual out-of-pocket expenses incurred to investigate the Property after the Effective Date (“Buyer’s Expenses”) or the amount of Buyer’s Liquidated Damages, within ten days after Seller’s receipt of an invoice from Buyer stating the amount of Buyer’s Expenses accompanied by reasonable evidence of Buyer’s Expenses.

L.1.b. Specific Performance. Unless Seller’s Default relates to the untruth or incorrectness of Seller’s representations for reasons not reasonably within Seller’s control, Buyer may enforce specific performance of Seller’s obligations under this contract, but any such action must be initiated, if at all, within ninety days after the breach or alleged breach of this contract. If such action is not initiated within that period and this contract has not previously been terminated, Buyer will be deemed to have elected to terminate this contract as of the expiration of that period. If title to the Property is awarded to Buyer, the conveyance will be subject to the matters stated in the Title Commitment.

L.1.c. Actual Damages. If Seller conveys or encumbers any portion of the Property before Closing so that Buyer’s ability to enforce specific performance of Seller’s obligations under this contract is precluded or impaired, Buyer will be entitled to seek recovery from Seller for the actual damages sustained by Buyer by reason of Seller’s Default, including attorney’s fees and expenses and court costs.
L.2. **Seller’s Default; Remedies after Closing.** If Seller’s representations are not true and correct at Closing due to circumstances reasonably within Seller’s control and Buyer does not become aware of the untruth or incorrectness of such representations until after Closing, Buyer will have all the rights and remedies available at law or in equity. If Seller fails to perform any of its obligations under this contract that survive Closing, Buyer will have all rights and remedies available at law or in equity unless otherwise provided by the Closing Documents.

L.3. **Buyer’s Default; Remedies before Closing.** If Buyer fails to perform any of its obligations under this contract (“Buyer’s Default”), Seller may terminate this contract by giving notice to Buyer on or before Closing and have the Earnest Money paid to Seller. If Buyer’s Default occurs after Seller has incurred costs to perform its obligations under this contract and Seller terminates this contract in accordance with the previous sentence, Buyer will also reimburse Seller for the lesser of Seller’s actual out-of-pocket expenses incurred after the Effective Date to perform its obligations under this contract (“Seller’s Expenses”) or the amount of Seller’s Additional Liquidated Damages, within ten days after Buyer’s receipt of an invoice from Seller stating the amount of Seller’s Expenses accompanied by reasonable evidence of Seller’s Expenses. The foregoing constitutes Seller’s sole and exclusive remedies for a default by Buyer before Closing.

L.4. **Buyer’s Default; Remedies after Closing.** If Buyer fails to perform any of its obligations under this contract that survive Closing, Seller will have all rights and remedies available at law or in equity unless otherwise provided by the Closing Documents.

L.5. **Liquidated Damages.** The parties agree that just compensation for the harm that would be caused by a default by either party cannot be accurately estimated or would be very difficult to accurately estimate and that Buyer’s Liquidated Damages or the Earnest
Money and Seller’s Additional Liquidated Damages are reasonable forecasts of just compensation to the nondefaulting party for the harm that would be caused by a default.

L.6. Attorney’s Fees. If either party retains an attorney to enforce this contract, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and other costs.

M. Miscellaneous Provisions

M.1. Notices. Any notice required by or permitted under this contract must be in writing. Any notice required by this contract will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this contract. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received, provided that (a) any notice received on a Saturday, Sunday, or holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or holiday and (b) any notice received after 5:00 P.M. local time at the place of delivery on a day that is not a Saturday, Sunday, or holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or holiday. Any address for notice may be changed by not less than ten days’ prior written notice given as provided herein. Copies of each notice must be given by one of these methods to the attorney of the party to whom notice is given.

M.2. Entire Agreement. This contract, its exhibits, and any Closing Documents delivered at Closing are the entire agreement of the parties concerning the sale of the Property by Seller to Buyer. There are no representations, warranties, agreements, or promises pertaining to the Property or the sale of the Property by Seller to Buyer, and Buyer is not relying on any statements or representations of Seller or any agent of Seller, that are not in those documents.
M.3. Amendment. This contract may be amended only by an instrument in writing signed by the parties.

Select one of the following.

M.4. Prohibition of Assignment. Buyer may not assign this contract or Buyer’s rights under it without Seller’s prior written consent, which Seller has no obligation to grant and which, if granted, may be conditioned in any manner Seller deems appropriate, and any attempted assignment without Seller’s consent is void. The consent by Seller to any assignment by Buyer will not release Buyer of its obligations under this contract, and Buyer and the assignee will be jointly and severally liable for the performance of those obligations after any such assignment.

Or

M.4. Assignment. Buyer may assign this contract and Buyer’s rights under it only to an entity in which Buyer possesses, directly or indirectly, the power to direct or cause the direction of its management and policies, whether through the ownership of voting securities or otherwise, and any other assignment is void. No such assignment will release Buyer of its obligations under this contract, and Buyer and the assignee will be jointly and severally liable for the performance of such obligations after any such assignment.

Continue with the following.

M.5. Survival. The provisions of this contract that expressly survive termination or Closing and other obligations of this contract that cannot be performed before termination of this contract or before Closing survive termination of this contract or Closing, and the legal doctrine of merger does not apply to these matters. If there is any conflict between the Closing Documents and this contract, the Closing Documents control. The representations made by the parties as of Closing survive Closing.
M.6. *Choice of Law; Venue.* This contract is to be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county for performance.

M.7. *Waiver of Default.* Default is not waived if the nondefaulting party fails to declare a default immediately or delays taking any action with respect to the default.

M.8. *No Third-Party Beneficiaries.* There are no third-party beneficiaries of this contract.

M.9. *Severability.* If a provision in this contract is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this contract, and this contract is to be construed as if the unenforceable provision is not a part of the contract.

M.10. *Ambiguities Not to Be Construed against Party Who Drafted Contract.* The rule of construction that ambiguities in a document are construed against the party who drafted it does not apply in interpreting this contract.

M.11. *No Special Relationship.* The parties’ relationship is an ordinary commercial relationship, and the parties do not intend to create the relationship of principal and agent, partners, joint venturers, or any other special relationship.

M.12. *Counterparts.* If this contract is executed in multiple counterparts, all counterparts taken together constitute this contract. Copies of signatures to this contract are effective as original signatures.

M.13. *Confidentiality.* This contract, this transaction, and all information learned in the course of this transaction shall be kept confidential, except to the extent disclosure is required by law or court order or to enable third parties to advise or assist Buyer to investigate the Property or either party to close this transaction. Remedies for violations of this provision
are limited to injunctions and no damages or rescission may be sought or recovered as a result
of any such violations.

M.14. Binding Effect. This contract binds, benefits, and may be enforced by the par-
ties and their respective heirs, successors, and permitted assigns.

Include the following only if the DTPA is applicable and if the
buyer has agreed to waive its rights under the DTPA.

M.15. Waiver of Consumer Rights. BUYER WAIVES ITS RIGHTS UNDER THE TEXAS
DECEPTIVE TRADE PRACTICES–CONSUMER PROTECTION ACT, SECTION 17.41 ET SEQ. OF THE
TEXAS BUSINESS AND COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS
AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF ITS OWN SELECTION,
BUYER VOLUNTARILY CONSENTS TO THIS WAIVER.

Include the following if applicable.

M.16. Waiver of Jury Trial. Buyer and Seller, each after consultation with an
attorney of its own selection (which counsel was not directly or indirectly identified, sug-
gested, or selected by the other party), both voluntarily waive a trial by jury of any issue
arising in an action or proceeding between the parties or their successors, under or con-
ected with this contract or its provisions. Buyer and Seller acknowledge to each other
that Buyer and Seller are not in significantly disparate bargaining positions.

Continue with the following.

[Name and title of seller]
Date:

[Name and title of buyer]
Date:
Escrow Agent’s Acceptance of Contract

Escrow Agent, by its execution and delivery of this Real Estate Sales Contract, acknowledges it is “the person responsible for closing” the transaction that is the subject of this contract pursuant to section 6045(e) of the Internal Revenue Code and to prepare and file all informational returns, including, without limitation, IRS Form 1099S, and to otherwise comply with the provisions of section 6045(e) of the Internal Revenue Code, and acknowledges receipt of a fully executed counterpart of this Real Estate Sales Contract on this ___ day of ________, 20___.

[Name of escrow agent]

By __________________________________________

Name:
Title:

Receipt for Initial Earnest Money Deposit

Escrow Agent acknowledges receipt of the Initial Earnest Money deposit of $__________ required under this Real Estate Sales Contract on this ___ day of ________, 20___.

[Name of escrow agent]

By __________________________________________

Name:
Title:

Receipt for Additional Earnest Money Deposit

Escrow Agent acknowledges receipt of the Additional Earnest Money deposit of $__________ required under this Real Estate Sales Contract on this ___ day of ________, 20___.

© STATE BAR OF TEXAS
[Name of escrow agent]
By ______________________________________
Name:
Title:
Exhibit A

Description of the Land [and Personal Property]

Include legal description of the land.

Include one of the following if the transaction involves some personal property.

All personal property associated with the Land and Improvements, except the following: [list exceptions].

Or

The following described personal property: [describe property].
Exhibit B

Representations; Environmental Matters

A. Seller’s Representations to Buyer

Seller represents to Buyer that the following are true and correct as of the Effective Date and will be true and correct on the Closing Date, unless Seller has given Buyer notice of any changes prior to the Closing Date that such circumstances have changed due to causes not reasonably within Seller’s control.

If the seller is an individual or is acting in a representative capacity, some of the items should be modified.

A.1. Authority. Seller is a [specify type of organization] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[state]] with authority to perform its obligations under this contract. This contract is binding on Seller. This contract is, and all documents required by this contract to be executed and delivered to Buyer at Closing will be, duly authorized, executed, and delivered by Seller.

A.2. Litigation. Seller has not received written notice and has no actual knowledge of any litigation pending or threatened against the Property or Seller that might adversely affect the Property or Seller’s ability to perform its obligations under this contract [include if applicable: , except: [specify]].

A.3. Violation of Governmental Requirements. Seller has not received written notice and has no actual knowledge of violation of any law, ordinance, regulation, restriction, or legal requirements affecting the Property or Seller’s use of the Property [include if applicable: , except: [specify]].

A.4. Licenses, Permits, and Approvals. Seller has not received written notice and has no actual knowledge that any license, permit, or approval necessary to use the Property in
the manner in which it is currently being used has expired or will not be renewed on expiration or that any material condition will be imposed to use or renew the same [include if applicable: , except: [specify]].

A.5. Condemnation; Zoning; Land Use; Hazardous Materials. Seller has not received written notice and has no actual knowledge of any condemnation, zoning, land-use, hazardous materials, or other proceedings affecting the Property or any written inquiries or notices by any governmental authority or third party with respect to condemnation, zoning, or other land-use regulations or the presence of hazardous materials affecting the Property [include if applicable: , except: [specify]].

A.6. Terrorist Organizations Lists. Seller is not and Seller has no actual knowledge that its partners, members, shareholders, owners, employees, officers, directors, representatives, or agents is a person or entity with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control of the Department of the Treasury or under any statute, executive order, or other governmental action.

A.7. No Other Obligation to Sell the Property or Restriction against Sale. Seller is not obligated to sell any of the Property to any person other than Buyer. Seller’s performance of this contract will not cause a breach of any other agreement or obligation to which Seller is a party or by which Seller or the Property is bound.

A.8. No Liens. On the Closing Date, the Property will be free and clear of all mechanic’s and materialman’s liens and other liens and encumbrances of any nature not arising by, through, or under Buyer except the Permitted Exceptions or liens to which Buyer has given its consent in writing, and no work or materials will have been furnished to the Property by Seller that might give rise to mechanic’s, materialman’s, or other liens against the Property other than work or materials to which Buyer has given its consent in writing.
A.9. **Seller’s Records.** The records provided by Seller to Buyer for Buyer’s inspections will be true, correct, and complete copies of the records in Seller’s possession or control. The records that were prepared by or under Seller’s supervision and control will be true, correct, and complete in all material respects. Unless Seller notifies Buyer to the contrary at the time of delivery of records provided by Seller to Buyer that were not prepared by or under Seller’s supervision and control, Seller has no actual knowledge that such records are not true, correct, and complete in any material respect.

A.10. **No Other Representation.** Except as stated above or in the notices, statements, and certificates set forth in Exhibit D, Seller makes no representation with respect to the Property.

A.11. **No Warranty.** Except as set forth in this contract and in the Closing Documents, Seller has made no warranty in connection with this transaction.

B. **“As Is, Where Is”**

This contract is an arm’s-length agreement between the parties. The Purchase Price was bargained on the basis of an “AS IS, WHERE IS” transaction and reflects the agreement of the parties that there are no representations, disclosures, or express or implied warranties, except those in this contract and the Closing Documents.

Buyer is not relying on any representations, disclosures, or express or implied warranties other than those expressly contained in this contract and the closing documents. Buyer is not relying on any information regarding the property provided by any person, other than Buyer’s own inspection and the rep-
REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS CONTRACT AND THE CLOSING DOCUMENTS.

The provisions of this section B. regarding the Property [will/will not] be included in the deed [include if applicable: and bill of sale] with appropriate modification of terms as the context requires.

Include the following if the seller retains no liability for environmental matters after closing.

C. Environmental Matters

AFTER CLOSING, BUYER RELEASES SELLER FROM LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY, INCLUDING LIABILITY (1) UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA), THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), THE TEXAS SOLID WASTE DISPOSAL ACT, OR THE TEXAS WATER CODE; OR (2) ARISING AS THE RESULT OF THEORIES OF PRODUCTS LIABILITY AND STRICT LIABILITY, OR UNDER NEW LAWS OR CHANGES TO EXISTING LAWS ENACTED AFTER THE EFFECTIVE DATE THAT WOULD OTHERWISE IMPOSE ON SELLERS IN THIS TYPE OF TRANSACTION NEW LIABILITIES FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY. THIS RELEASE APPLIES EVEN WHEN THE ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY RESULT FROM SELLER’S OWN NEGLIGENCE OR THE NEGLIGENCE OF SELLER’S REPRESENTATIVE.

The provisions of this section C. regarding the Property [will/will not] be included in the deed [include if applicable: and bill of sale] with appropriate modification of terms as the context requires.
D. **Buyer’s Representations to Seller**

Buyer represents to Seller that the following are true and correct as of the Effective Date and will be true and correct on the Closing Date, unless Buyer has given Seller notice of any changes prior to the Closing Date that such circumstances have changed due to causes not reasonably within Buyer’s control.

*D.1. Authority.* Buyer is a [specify type of organization] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[state]] with authority to perform its obligations under this contract. This contract is binding on Buyer. This contract is, and all documents required by this contract to be executed and delivered to Seller at Closing will be, duly authorized, executed, and delivered by Buyer.

*D.2. Terrorist Organizations Lists.* Buyer is not and Buyer has no actual knowledge that its partners, members, shareholders, owners, employees, officers, directors, representatives, or agents is a person or entity with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control of the Department of the Treasury or under any statute, executive order, or other governmental action.

Include other representations from the buyer to the seller as needed.
Exhibit C

Seller’s Records

To the extent that Seller has possession or control of the following items pertaining to and currently impacting the Property, Seller will deliver or make the items or copies of them available to Buyer by the deadline stated in paragraph A.7.:

Select items as agreed by the parties.

Governmental

governmental licenses, certificates, permits, and approvals

tax statements for the current year and the last [number] years

notices of appraised value for the current year and the last [number] years

records of any tax exemption, special use, or other valuation or exemption applicable to the Property

records of regulatory proceedings or violations (for example, condemnation, environmental)

other: [specify]

Land

soil reports

environmental reports and other information regarding the environmental condition of the Property

water rights

engineering reports
prior surveys

site plans

other: [specify]

Facilities

as-built plans, specifications, and mechanical drawings for improvements

warranty agreements

management, employment, labor, service, equipment, supply, and maintenance agreements

insurance policies

ADA and other building inspection reports

engineering reports

environmental reports

operating and maintenance plans (for example, asbestos maintenance plans)

life-safety plans

other: [specify]

Financial

annual operating statements for the most recent [number] years of operation

monthly operating statements since the close of the last fiscal year

balance sheet as of [date]
books and records for the Property

utility bills for the most recent [number] months of operation

other: [specify]

Leases

Leases

commission and leasing agent agreements

rent roll setting forth for each Lease:

  tenant’s name

  square footage leased

  date of expiration of current and renewal terms

  renewal options

  basic rent and formula for any additional rents

  amount of additional rent paid during the last [number] [months/years]

  prepaid rent

  delinquent rent

  security deposit

  current tenant or landlord defaults

  options to purchase any portion of the Property

  rights of first refusal to lease other space
rights to rent concessions, tenant improvements, or other allowances

unpaid or contingent brokerage commissions (including commission on renewals)
estoppel letters and/or subordination agreements

other: [specify]

Licenses, Agreements, and Encumbrances

all licenses, agreements, and encumbrances (including all amendments and exhibits) affecting title to or use of the Property that have not been recorded in the real property records of the county or counties in which the Property is located
Exhibit D

Notices, Statements, and Certificates

Certain notices must be contained in the contract and others must be provided as separate notices. Please refer to the statutory requirements for each notice.

The notices, statements, and certificates (arranged by their application to particular transactions) that are listed below are [included in the sales contract] [and] [attached for delivery to Buyer], and Buyer acknowledges receipt of the notices, statements, and certificates by executing this contract:

Include one or more of the following paragraphs as applicable and modify section headers and paragraph numbers as appropriate.

A. Consumer Notices

Notice of Cancellation. Notice concerning the purchaser’s three-day right of rescission under a contract to purchase real property if (1) the seller or the seller’s agent solicits the sale at a place other than the seller’s place of business; (2) the purchaser submits the purchase contract to the seller or the seller’s agent at a place other than the seller’s place of business; and (3) the consideration payable under the purchase contract exceeds $100; unless either (1) the purchaser is represented by a licensed attorney; (2) the transaction is negotiated by a licensed real estate broker; or (3) the transaction is negotiated at a place other than the purchaser’s residence by the person who owns the property, as described in chapter 601 of the Texas Business and Commerce Code.

If applicable, attach form 4-4 in this chapter to the end of this exhibit D.

And/Or
B. Residential Transaction Notices


If applicable, attach form 4-22, with all relevant information filled in, to the end of this exhibit D.

And/Or

B.2. Notice of Membership in Property Owners Association. Notice concerning the sale of single-family residential property that is subject to membership in a property owners association, described in section 5.012 of the Texas Property Code.

If applicable, attach form 23-9 in this manual to the end of this exhibit D.

And/Or

B.3. Seller's Disclosure of Location of Conditions under Surface of Unimproved Real Property. Seller’s disclosure of the location of pipelines under the surface of unimproved property to be used for residential purposes, described in section 5.013 of the Texas Property Code. A seller of unimproved property to be used for residential purposes shall provide the purchaser written notice disclosing the location of any transportation pipeline to the best of the seller’s belief and knowledge as of the date the notice is completed and signed by the seller. If the information required to be disclosed is not known by the seller, the seller shall indicate that fact in the notice. A seller is not required to give this notice if (a) the seller is obligated under the terms of the contract to furnish a title insurance commitment to the buyer before Closing and (b) the buyer is entitled to terminate the contract if the buyer’s objections to title as permitted by the contract are not cured by the seller before Closing.

No form is provided, because the real estate sales contract portion of this form 4-1 satisfies the provisions for exemption from disclosure.
B.4. Notice of Obligation to Pay Public Improvement District Assessment. Seller’s disclosure that a single-family residential property is located within a public improvement district, described in section 5.014 of the Texas Property Code.

If applicable, attach form 4-5 to the end of this exhibit D.

B.5. Residential Contracts for Deed. Notice regarding the sale of property used or to be used as the purchaser’s residence if the contract does not provide for delivery of a deed from the seller to the purchaser within 180 days after the final execution of the contract.


If applicable, attach form 4-6 to the end of this exhibit D.

B.7. Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards. Lead-based paint warning statement, described in section 745.100 et seq. of title 40 of the Code of Federal Regulations.

If applicable, attach form 4-7 to the end of this exhibit D.

B.9. Notice Regarding Sale Subject to a Recorded Lien. Notice to the purchaser and each lienholder required under Texas Property Code section 5.016 that property being sold will be conveyed subject to a lien.

C. Condominium Transaction Notices


C.2. Condominium Resale Certificate. Resale certificate from the condominium owners association or waiver of resale certificate, described in section 82.157 of the Texas Property Code.

D. All Real Property Transaction Notices


D.3. Notice to Purchaser Regarding Coastal Area Property. Notice regarding real property located adjacent to tidally influenced, submerged lands of Texas, described in section 33.135 of the Texas Natural Resources Code.


D.5. Notice Regarding Possible Liability for Additional Taxes. Notice of additional tax liability for vacant land that has been subject to a special tax appraisal method, described in section 5.010 of the Texas Property Code.
D.6. **Notice Regarding Possible Annexation.** Notice concerning the sale of property located outside the limits of a municipality that may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality, described in section 5.011 of the Texas Property Code.

If applicable, attach form 4-15 to the end of this exhibit D.

And/Or

D.7. **Notice for Unimproved Property in a Certificated Service Area of a Utility Service Provider.** Notice for property in a certificated service area of a utility service provider, described in section 13.257 of the Texas Water Code.

If applicable, attach form 4-16 to the end of this exhibit D.

And/Or

D.8. **Utility District Notice.** Notice concerning the bonded indebtedness of, or rates to be charged by, a utility or other special district, described in section 49.452 of the Texas Water Code, with the form of notice to be used being dependent on whether the property (a) is located in whole or in part within the extraterritorial jurisdiction of one or more home-rule municipalities but is not located within the corporate boundaries of a municipality, (b) is located in whole or in part within the corporate boundaries of a municipality, or (c) is not located in whole or in part within the corporate boundaries of a municipality or the extraterritorial jurisdiction of one or more home-rule municipalities.

If applicable, attach form 4-17 to the end of this exhibit D.

And/Or

D.9. **Notice to Purchaser of Property Located in Certain Annexed Water Districts.** Notice required by section 54.016(h)(4)(A) of the Texas Water Code when property being sold is in a water or sanitary sewer district that entered a contract with a city with a
population of 1.18 million or less under which the city is permitted to set rates in the district after annexation that are different from rates charged other residents of the city.

If applicable, attach form 4-18 to the end of this exhibit D.

And/Or

D.10. Notice to Purchaser that Property Is Located within the Area of the Alignment of a Transportation Project. Notice required under Texas Local Government Code section 232.0033 that all or part of the subdivision in which the property being sold is located is within the area of the alignment of a transportation project as shown in the final environmental decision document that is applicable to a future transportation corridor identified in a contract between the Texas Department of Transportation and a county under Texas Transportation Code section 201.619.

If applicable, attach form 4-19 to the end of this exhibit D.

And/Or

D.11. Certificates of Mold Remediation. Notice pursuant to section 1958.154 of the Texas Occupations Code, titled “Certificate of Mold Remediation; Duty of Property Owner,” requiring a property owner who sells property that has been issued a certificate of mold remediation pursuant to this section to deliver copies to the purchaser of each certificate of mold remediation issued for the property within the preceding five years.

And/Or

D.12. Notice of Water Level Fluctuations. Notice to purchasers of real property adjoining an impoundment of water, including a reservoir or lake, constructed and maintained under Texas Water Code chapter 11, that has storage capacity of at least 5,000 acre-feet at the impoundment’s normal operating level, provided pursuant to section 5.019 of the Texas Property Code.
E. Property Owners Association Disclosures

E.1. Resale Certificate. Resale certificate from a property owners association that is entitled to levy regular or special assessments as described in sections 207.002–.003 of the Texas Property Code. In contrast to the obligation of a condominium seller to provide the condominium governing documents and resale certificate under section 82.157 of the Texas Property Code, the obligation in chapter 207 is an obligation of the property owners association upon a request from an owner, purchaser, agent, title insurance company, or other interested party.

If applicable, attach form 4-20 to the end of this exhibit D.

If applicable, attach form 23-10 to the end of this exhibit D.
Exhibit E

Seller Financing Addendum

A. Promissory Note. The promissory note ("Note") will be payable by Buyer ("Maker") to the order of Seller ("Payee") at the place designated by Payee. The Note may be prepaid in whole or in part at any time without penalty, premium, or restriction of any kind. Any prepayments are to be applied to the payment of the installments of principal last maturing, and interest will immediately cease on the prepaid principal. The lien securing payment of the Note will be inferior to any lien securing any superior note described in the contract. The Note will be payable as follows:

Select one of the following.

In one payment due [number] days after the date of the Note with interest payable [at maturity/monthly/quarterly/annually].

Or

In [number] installments of $[amount] each [including interest/plus interest] beginning [number] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [date], when the entire balance of the Note will be due and payable.

Or

Interest only in [number] installments for the first [number] year[s] and thereafter in [number] installments of $[amount] each [including interest/plus interest] beginning [number] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [date], when the entire balance of the Note will be due and payable.

Or

Other: [specify].
B. **Deed of Trust.** The deed of trust ("Deed of Trust") securing the Note will provide for the following:

**B.1. Assumption without Consent.** The Property may be sold, transferred, or conveyed without the consent of Payee, provided any subsequent buyer or transferee assumes in writing for the benefit of Payee the obligation to pay the Note and to perform the covenants and agreements in the Deed of Trust in accordance with the terms of those instruments. No such assumption will release Maker from any liabilities or obligations arising under the Note or Deed of Trust. Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Property.

**B.1. Prohibition on Transfer.**

If Maker transfers any part of the Property without Payee’s prior written consent, Payee may declare the Obligation immediately payable and invoke any remedies provided in the deed of trust for default. If the Property is residential real property containing fewer than five dwelling units or a residential manufactured home, this provision does not apply to (a) a subordinate lien or encumbrance that does not transfer rights of occupancy of the Property; (b) creation of a purchase-money security interest for household appliances; (c) transfer by devise, descent, or operation of law on the death of a co-Maker; (d) grant of a leasehold interest of three years or less without an option to purchase; (e) transfer to a spouse or children of Maker or between co-Makers; (f) transfer to a relative of Maker on Maker’s death; (g) a transfer resulting from a decree of a dissolution of marriage, a legal separation agreement, or an
incidental property settlement agreement by which the spouse of Maker becomes an owner of 
the Property; or (h) transfer to an inter vivos trust in which Maker is and remains a beneficiary 
and occupant of the Property.

Include the following for a commercial deed of trust if a due-on-sale clause is desired.

Maker may not sell, transfer, or otherwise dispose of any Property, whether voluntarily 
or by operation of law, without the prior written consent of Payee. If granted, consent may be 
conditioned upon (a) the grantee’s integrity, reputation, character, creditworthiness, and man-
agement ability being satisfactory to Payee; and (b) the grantee’s executing, before such sale, 
transfer, or other disposition, a written assumption agreement containing any terms Payee 
may require, such as a principal pay down on the Obligation, an increase in the rate of interest 
payable with respect to the Obligation, a transfer fee, or any other modification of the Note, 
the Deed of Trust, or any other instruments evidencing or securing the Obligation.

Continue with the following.

B.2. Prohibition on Further Encumbrances. Maker may not cause or permit any 
Property to be encumbered by any liens, security interests, or encumbrances other than the 
liens securing the Obligation and the liens securing ad valorem taxes not yet due and payable 
without the prior written consent of Payee. If granted, consent may be conditioned upon 
Maker’s executing, before granting such lien, a written modification agreement containing 
any terms Payee may require, such as a principal pay down on the Obligation, an increase in 
the rate of interest payable with respect to the Obligation, an approval fee, or any other modi-
fication of the Note, the Deed of Trust, or any other instruments evidencing or securing the 
Obligation.

Maker may not grant any lien, security interest, or other encumbrance (“Subordinate 
Instrument”) covering the Property that is subordinate to the liens created by the Deed of
Trust without the prior written consent of Payee. If granted, consent may be conditioned upon the Subordinate Instrument’s containing express covenants to the effect that—

a. the Subordinate Instrument is unconditionally subordinate to the Deed of Trust;

b. if any action is instituted to foreclose or otherwise enforce the Subordinate Instrument, no action may be taken that would terminate any occupancy or tenancy without the prior written consent of Payee, and that consent, if granted, may be conditioned in any manner Payee determines;

c. rents, if collected by or for the holder of the Subordinate Instrument, will be applied first to the payment of the Obligation then due and to expenses incurred in the ownership, operation, and maintenance of the Property in any order Payee may determine, before being applied to any indebtedness secured by the Subordinate Instrument;

d. written notice of default under the Subordinate Instrument and written notice of the commencement of any action to foreclose or otherwise enforce the Subordinate Instrument must be given to Payee concurrently with or immediately after the occurrence of any such default or commencement; and

e. in the event of the bankruptcy of Maker, all amounts due on or with respect to the Obligation and the Deed of Trust will be payable in full before any payments on the indebtedness secured by the Subordinate Instrument and all decisions or elections in such proceedings affecting the Property will be made and controlled by Payee.

B.3. Prohibition on Transfer of Interests in Borrower. Maker may not cause or permit any of the following events to occur without the prior written consent of Payee: if
Maker is (a) a corporation, the termination of the corporation or the sale, pledge, encumbrance, or assignment of any shares of its stock; (b) a limited liability company, the termination of the company or the sale, pledge, encumbrance, or assignment of any of its membership interests; (c) a general partnership or joint venture, the termination of the partnership or venture or the sale, pledge, encumbrance, or assignment of any of its partnership or joint venture interests, or the withdrawal from or admission into it of any general partner or joint venturer; or (d) a limited partnership, (i) the termination of the partnership; (ii) the sale, pledge, encumbrance, or assignment of any of its general partnership interests, or the withdrawal from or admission into it of any general partner; (iii) the sale, pledge, encumbrance, or assignment of a controlling portion of its limited partnership interests; or (iv) the withdrawal from or admission into it of any controlling limited partner or partners. If granted, consent may be conditioned upon (a) the integrity, reputation, character, creditworthiness, and management ability of the person succeeding to the ownership interest in Maker (or security interest in such ownership) being satisfactory to Payee; and (b) the execution, before such event, by the person succeeding to the interest of Maker in the Property or ownership interest in Maker (or security interest in such ownership) of a written modification or assumption agreement containing such terms as Payee may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, a transfer fee, or any other modification of the Note, the Deed of Trust, or any other instruments evidencing or securing the Obligation.

Select one of the following.

B.4. Without Escrow. Maker will furnish to Payee annually, before the taxes become delinquent, copies of tax receipts showing that all taxes on the Property have been paid. Maker will furnish to Payee annually evidence of current paid-up insurance naming Payee as an insured.
B.4. **With Escrow.** Maker will, in addition to the principal and interest installments, deposit with Payee a pro rata part of the estimated annual ad valorem taxes on the Property and a pro rata part of the estimated annual insurance premiums for the improvements on the Property. These tax and insurance deposits are only estimates and may be insufficient to pay total taxes and insurance premiums. Maker must pay any deficiency within thirty days after notice from Payee. Maker’s failure to pay the deficiency will constitute a default under the Deed of Trust. If any superior lienholder on the Property is collecting escrow payments for taxes and insurance, this paragraph will be inoperative as long as payments are being made to the superior lienholder.

B.5. **Cross-Default.** Any act or occurrence that would constitute default under the terms of any lien superior to the lien securing the Note will constitute a default under the Deed of Trust securing the Note.

C. **Recourse Provisions.** The Note and Deed of Trust are subject to the following provisions:

*Full Recourse.* Maker will have full recourse liability for repayment of the principal and interest of the Note and the performance of all covenants and agreements of Maker in the Deed of Trust.

*No Recourse.* Maker will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Maker in the Deed of Trust. The sole remedy of Payee or other holder of the Note in the event of a default by Maker under the Note or Deed of Trust will be to foreclose the liens and security
interests granted in the Deed of Trust, and Payee or other holder of the Note will not be entitled to any deficiency judgment against Maker.

Partial Recourse. Except as set forth below, Maker will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Maker in the Deed of Trust. Except as set forth below, the sole remedy of Payee or other holder of the Note in the event of a default by Maker under the Note or Deed of Trust will be to foreclose the liens and security interests granted in the Deed of Trust, and Payee or other holder of the Note will not be entitled to any personal judgment against Maker. Maker will have full recourse liability for any loss or damage actually suffered or incurred by Payee or other holder of the Note by reason of the following matters:

1. taxes, assessments, and charges for labor, materials, or other amounts that if unpaid may create an encumbrance against the Property that accrue before foreclosure;

2. unpaid premiums for insurance required hereunder that accrue before foreclosure;

3. damage to the Property to the extent such damage would be otherwise covered by insurance required hereunder that was not maintained;

4. all rents, issues, profits, and income derived from the Property, including forfeited security deposits, after a default occurs and not expended for debt service or operating expenses of the Property before foreclosure;

5. tenant security deposits for leases of the Property not forfeited by or refunded to the tenants;
6. any condemnation or insurance proceeds not paid or applied as required in the Deed of Trust;

7. damage to and depreciation of the Property beyond normal wear and tear caused by the negligence of Maker or the failure of Maker to keep the Property in good repair and condition;

8. the return of or reimbursement for personal property taken from the Property by or on behalf of Maker and not replaced with personal property of equal utility and value;

9. damages resulting from fraud or misrepresentation by Maker;

10. damages resulting from breach of any warranty of title by Maker;

11. interest on the Note from the date of default through foreclosure, payment, or settlement of the debt;

12. all interest on the Note during any bankruptcy proceeding of Maker and all reasonable attorney’s fees and expenses incurred as a result of Maker’s bankruptcy; and

13. all attorney’s fees and expenses incurred by Payee to collect any of the foregoing amounts.

Continue with the following.

Buyer/Maker

__________________________________________________________________________

Seller/Payee

__________________________________________________________________________
Escrow Agent Receipt and Escrow Agreement

Seller:

Buyer:

Date of Contract:

Property:

Earnest Money:

Underwriter:

Escrow Agent:

Escrow Agent Fee:

GF Number:

Escrow Agent acknowledges receipt of one or more fully executed counterparts of the Contract and the Earnest Money. All capitalized terms used in this Escrow Agent Receipt and Escrow Agreement and not otherwise defined herein have the same meanings as in the Contract.

1. **Duties.** Escrow Agent will—

   a. hold and disburse all funds that it receives, as directed in the Contract;

   b. if directed by Buyer, and after Buyer’s compliance with Escrow Agent’s requirements for investing the Earnest Money and agreement to pay the fees reasonably required for investing the Earnest Money, invest the Earnest
Money in an interest-bearing account in a federally insured financial institution, with Escrow Agent having sole signature authority over the account;

c. use its best efforts to obtain from Underwriter the title commitment by the deadline stated in the Contract;

d. obtain tax and other certificates as directed by the parties, at their expense;

e. prepare the closing statement;

f. if closing occurs, use its best efforts to obtain from Underwriter the Title Policy not more than fifteen days after closing, in accordance with the last title commitment delivered to and approved by the parties at or before closing;

g. file for record the deed and other documents requested by the parties to be recorded;

h. be the party responsible for complying with reporting requirements, if any, of the Internal Revenue Service, the U.S. Department of Housing and Urban Development, and any other governmental agencies, relying on information provided by Buyer and Seller; and

i. except as required by law or court order, keep confidential the terms of the Contract and this transaction generally and not disclose information about them to anyone except its employees and agents who need to know the information to perform their assigned duties in connection with this transaction.

2. Loss or Impairment of Earnest Money. Buyer and Seller release Escrow Agent from liability for any loss or impairment of the Earnest Money when deposited in an account of a federally insured financial institution, if the loss or impairment results from the failure,
insolvency, or receivership of the financial institution in which the Earnest Money is deposited.

3. **Return of Earnest Money.** If either Buyer or Seller demands payment of the Earnest Money, Escrow Agent may either require, as a condition of disbursement, that all parties sign a directive to Escrow Agent to disburse the Earnest Money or notify the other party of the demand. If the other party does not object by notice to Escrow Agent within five days, Escrow Agent is authorized to disburse the Earnest Money to the party making the demand. Escrow Agent may, however, reimburse itself for its out-of-pocket expenses for long-distance calls, courier and delivery services, tax certificates, UCC searches, certified copies, the cost to obtain the survey, and other fees incurred in fulfilling its obligations as Escrow Agent and closing agent (collectively, “Escrow Agent Expenses”). If Escrow Agent determines that a dispute concerning the right to receive the Earnest Money is unlikely to be resolved within sixty days, Escrow Agent may interplead the Earnest Money into the registry of a court of competent jurisdiction in the county in which Escrow Agent is located and petition the court to assess its attorney’s fees and court and other costs against the parties.

4. **Termination of Escrow Agent’s Participation.** Buyer and Seller, acting together, may terminate Escrow Agent’s role in this transaction by notice to Escrow Agent and payment of Escrow Agent Expenses. Escrow Agent may resign on ten days’ notice to Buyer and Seller. Within five days after termination or on resignation, Escrow Agent will deliver to Seller all items Escrow Agent obtained from third parties in connection with this transaction, charge Escrow Agent Expenses against the Earnest Money, and disburse the remainder of the Earnest Money to the party jointly designated by Buyer and Seller.

5. **Fee and Expenses.** Escrow Agent’s fee for acting as closing and escrow agent may not exceed the Escrow Agent Fee. In addition to the Escrow Agent Fee, Escrow Agent will be reimbursed for Escrow Agent Expenses. Buyer and Seller will pay the Escrow Agent Fee and Escrow Agent Expenses in accordance with the terms of the Contract. The Escrow
Agent Fee and Escrow Agent Expenses will be paid at closing or after termination or resignation as described above.

6. **Notices.** All notices must be in writing and delivered to Buyer, Seller, their respective attorneys, and Escrow Agent in the manner and at the addresses stated in the Contract. Each party may change its address for notice purposes by not less than ten days’ prior notice to the other parties.

---

[Name and title of seller]
Date:

[Name and title of buyer]
Date:

[Name and title of escrow agent]
Date:
Form 4-3

Letter of Intent

[Date]

[Name and address of seller]

Re: Letter of Intent [describe transaction]

[describe property by address or lot and block number, city, county, state]

[Salutation]

The attached exhibits and this letter of intent (collectively, this “Letter”) outline the business points under which [name of buyer] (“Buyer”) will consider acquiring the property described above (the “Property”) from [name of seller] (“Seller”). Buyer is interested in purchasing the Property on the general terms referenced in this Letter.

1. Contract. No right or obligation of either party, except those specifically set forth in the binding agreements relating to the proposed transaction listed in the attached Exhibit A, will arise until the execution of a real estate sales contract (the “Contract”) incorporating the essential terms of this Letter and other terms and conditions satisfactory to both parties. Except as otherwise agreed by the parties, the Contract will be prepared on the most current form of real estate sales contract published by the State Bar of Texas in its Texas Real Estate Forms Manual. The initial draft of the Contract will be prepared by Seller’s attorney within [number] days after the effective date of this Letter and distributed contemporaneously to all parties by [describe method of delivery].

2. Payment of the Purchase Price. The purchase price will be paid by wire transfer of immediately available funds to the escrow agent at closing.
3. **Title.** Title will be conveyed free and clear of all defects, liens, encumbrances, and easements, except as approved by Buyer during the title review period specified in the Contract.

4. **Effect.** Each party agrees that this Letter is intended only to set forth the discussions of the parties and will not constitute a complete statement of the agreement or be a legally binding or enforceable agreement or commitment on the part of either party with respect to the matters described herein (except with respect to the binding agreements relating to the proposed transaction listed in Exhibit A, which will be fully enforceable and will survive the termination of this Letter, the termination of the Contract, and the closing of any transaction). This Letter is not intended to impose on either party an enforceable duty or obligation to negotiate toward or conclude any such agreement or commitment. Each party acknowledges that, except with respect to the binding agreements relating to the proposed transaction listed in Exhibit A, in no event will any discussions, negotiations, or other communications between the parties regarding this Letter or the terms contained herein rise to the level of an oral or written agreement. The parties have no obligation of good faith and fair dealing. The parties’ respective legal obligations will otherwise arise, if at all, solely from a fully executed Contract.

5. **Counterparts.** If this Letter is executed in multiple counterparts, all counterparts taken together will constitute this Letter.

6. **Exclusive Negotiations.** Until 5:00 P.M. on [date], Seller will negotiate only with Buyer for the sale of the Property.

**Binding/Nonbinding Nature**

SELLER AND BUYER ARE NOT LEGALLY BOUND TO ENTER INTO THE TRANSACTION DESCRIBED HEREIN UNLESS AND UNTIL THE CONTRACT IS EXECUTED BY BUYER. SELLER AND BUYER ARE BOUND TO COMPLY WITH THE PROVISIONS SPECIFICALLY LISTED AS BINDING
AGREEMENTS. SELLER AND BUYER EACH ACKNOWLEDGE RECEIPT OF $10.00 AND OTHER VALUABLE CONSIDERATION, WHICH EACH SUCH PARTY ACCEPTS AS LEGALLY SUFFICIENT TO BIND SUCH PARTY TO PERFORM THE BINDING AGREEMENTS.

If the foregoing meets with your approval, please sign and return the enclosed duplicate copy of this Letter on or before 5:00 P.M. central [standard/daylight saving] time on [date]. An electronic copy of this Letter executed by you will be considered an original. This Letter is effective on the date of the last of the signatures by Seller and Buyer. We look forward to receiving your prompt response.

Sincerely,

[Name of buyer]
[a/an] [individual/partnership/limited partnership/corporation]

Include the following if applicable.

By:

[Name of representative]
[Title]

Agreed to and accepted on [date].

[Name of seller],
[a/an] [individual/partnership/limited partnership/corporation]

Include the following if applicable.
By:

Name of representative

Title

Attach exhibits.
Exhibit A

Nonbinding Terms of Proposed Transaction

Seller:

Address:

Phone:

E-mail:

Type of entity:

Seller’s Attorney:

Law Firm:

Address:

Phone:

E-mail:

Seller’s Sales Agent:

Brokerage Firm:

Address:

Phone:

E-mail:

Buyer:
Address:

Phone:

E-mail:

Type of entity:

Buyer’s Attorney:

Law Firm:

Address:

Phone:

E-mail:

Buyer’s Sales Agent:

Brokerage Firm:

Address:

Phone:

E-mail:

Property: The land commonly known as [describe property] and more fully described in Exhibit B (“Land”) [include the following phrases that are applicable, tailoring punctuation and conjunctions as necessary: , together with improvements to the Land (“Improvements”), the leases associated with the Land and Improvements (“Leases”), and the personal property described in Exhibit B (“Personal Property”)].

Underwriter:

Escrow Agent:
Letter of Intent Form 4-3

Address:

Phone:

E-mail:

**Include if applicable:** Estimated Purchase Price

Cash portion:

Seller-financed portion (principal amount of note):

Third-party-financed portion:

Total purchase price:

Earnest Money

[Initial] Earnest Money:

[Additional Earnest Money:]

**Deadlines and Closing Date:**

1. [Initial] Earnest Money deadline: [date]

2. Delivery of Title Commitment: [[date]/[number] days after the Contract effective date]

3. Delivery of Survey: [[date]/[number] days after the Contract effective date]

4. Delivery of UCC Search: [[date]/[number] days after the Contract effective date]
5. Delivery of legible copies of instruments referenced in the Title Commitment, Survey, and UCC Search: [[date]/[number] days after the Contract effective date]

6. Delivery of Title Objections: [[date]/[number] days after delivery of items 1.–5.]

7. Delivery of Seller’s records as specified in the Contract: [[date]/[number] days after the Contract effective date]

8. End of Inspection Period: [[date]/[number] days after the Contract effective date]

9. Additional Earnest Money Deadline: [[date]/[number] days after the end of the Inspection Period]

[9./10.] Closing Date: [[date]/[number] days after the end of the Inspection Period]

[10./11.] Closing Time: [time]

**Binding Agreements Relating to Proposed Transaction**

1. If the Contract is not finally negotiated, signed by all parties, and tendered to Escrow Agent with the earnest money within [number] days of the effective date of this Letter, this Letter will terminate.

2. Seller agrees to abate all marketing efforts for the Property during the term of this Letter. Any existing signs may remain. Any ordered advertising will be canceled, if cancelable without penalty; otherwise ordered advertising may proceed, but no additional advertising may occur. Brokers and prospective buyers will not be shown the Property and may be given only currently available printed information about the Property prepared by Seller’s Sales Agent.
3. Except as may be required by law or to its own attorney, advisors, and existing or prospective lenders or investors, no party to this Letter nor any affiliate will disclose the existence of this Letter, names of the parties, or the transaction contemplated herein; or issue any press release or make any other disclosure to a nonaffiliated third person concerning the existence of this Letter or the matters contained herein without the written consent of each party.

4. Each party will pay its own expenses related to this Letter and the Contract.

5. Unless Seller agrees otherwise, Buyer is not permitted to enter into the Property for the purpose of inspecting it before the execution of the Contract. If Buyer is permitted by Seller to enter the Property for the purpose of inspecting it before the execution of the Contract, Buyer will indemnify, defend, and hold Seller harmless from and against any losses, damages, costs, expenses, or claims arising in connection with or out of such entry and inspection by Buyer.
Exhibit B

Description of the Land [and Personal Property]

Include legal description of the land.

That certain tract of land more particularly described as [property].

Include one of the following if the transaction involves some personal property.

All personal property associated with the Land and Improvements, except the following: [list exceptions].

Or

The following described personal property: [describe property].
Form 4-4

A notice concerning the purchaser’s three-day right of rescission under a contract to purchase real property must be given if (1) the seller or the seller’s agent solicits the sale at a place other than the seller’s place of business; (2) the purchaser submits the purchase contract to the seller or the seller’s agent at a place other than the seller’s place of business; and (3) the consideration payable under the purchase contract exceeds $100; unless either (1) the purchaser is represented by a licensed attorney; (2) the transaction is negotiated by a licensed real estate broker; or (3) the transaction is negotiated at a place other than the purchaser’s residence by the person who owns the property. Tex. Bus. & Com. Code § 601.002.

The notice of cancellation form must be easily detachable from the contract to which it is attached, must be in the same language as the contract, and must contain the following information and statements in ten-point bold-faced type. Tex. Bus. & Com. Code § 601.053.

Notice of Cancellation

[Date]

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE MERCHANT OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.

IF YOU CANCEL YOU MUST MAKE AVAILABLE TO THE MERCHANT AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE MERCHANT REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE MERCHANT’S EXPENSE AND RISK.

IF YOU DO NOT AGREE TO RETURN THE GOODS TO THE MERCHANT OR IF THE MERCHANT DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CAN-
CELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [name of merchant], AT [address of merchant's place of business] NOT LATER THAN MIDNIGHT OF [date].

I HEREBY CANCEL THIS TRANSACTION.

Dated: ________________________________.

[Name of purchaser]

In addition to giving the notice of cancellation separately, the seller must insert the following at the end of the contract to purchase above the buyer's signature. This must be in a minimum of ten-point bold-faced type.

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

[Name of buyer]
Form 4-5

A seller of residential property that is located in a public improvement district and that consists of not more than one dwelling unit must give the purchaser written notice that it will be obligated to pay assessments for an improvement project. Certain transactions are exempted. The notice must be given before the effective date of the executory contract. Notice may be given separately, as part of the contract, or as part of another notice and must be substantially similar to the prescribed form. If an executory contract is entered into without the notice having been given, the purchaser may, as its exclusive remedy, terminate the contract for any reason no later than the earlier of (1) the seventh day after the date the purchaser receives the notice or (2) the date the transfer occurs as provided by the executory contract. The requirement applies to an executory contract that is binding on a seller and purchaser on or after January 1, 2006. Tex. Prop. Code § 5.014.

Notice of Obligation to Pay Public Improvement District Assessment to [name of municipality or county levying assessment]
Concerning the Property at [street address]

Seller[s]:

Purchaser[s]:

Real Property:

Date:

As a purchaser of this parcel of real property you are obligated to pay an assessment to a municipality or county for an improvement project undertaken by a public improvement district under chapter 372 of the Local Government Code. The assessment may be due annually or in periodic installments. More information concerning the amount of the assessment and the due dates of that assessment may be obtained from the municipality or county levying the assessment.

The amount of the assessments is subject to change. Your failure to pay the assessments could result in a lien on and the foreclosure of your property.
[Name of purchaser]
Form 4-6

This form sets out the mandatory notice under 16 C.F.R. § 460.16. A new home seller must include in every sales contract the type, thickness, and R-value of the insulation that will be installed in each part of the house. The exception to this rule is that if the buyer signs a sales contract before the seller knows what type of insulation will be put in the house, or if there is a change in the contract, the seller can give the buyer a receipt stating this information as soon as the seller finds out the information. This regulation is enforceable by the Federal Trade Commission. The failure of the seller to provide this information does not appear to invalidate the contract or render the sale voidable but may subject the seller to a claim for damages.

Use this form when the information was not available to be included in the sales contract or the relevant information changed after the execution of the sales contract.

Notice Regarding Insulation to Buyer of New Home

Seller:

Address:

Buyer:

Address of Buyer’s new home:

Description of type, thickness, and R-value of the insulation that will be installed in each part of the new house:

[Name of seller]
Date:
Form 4-7

This disclosure is used to warn a buyer about potential risks associated with lead-based paint. The form is based on the notice requirements of 40 C.F.R. § 745.113 and the disclosure form suggested by the Department of Housing and Urban Development; the language should not be altered without a review of the applicable regulations. The heading and text of the notice are required by the regulations to be in bold-faced type.

Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards

[Sales]

Seller’s Name and Address:

Buyer’s Name and Address:

Description of Property:

Lead Warning Statement

Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women.

The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller’s possession and notify the buyer of
any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.

Seller’s Disclosure

(a) Presence of lead-based paint and/or lead-based paint hazards (check (i) or (ii) below):

☐ (i) Known lead-based paint and/or lead-based paint hazards are present in the housing [explain, providing the basis for the determination that lead-based paint and/or lead-based paint hazards exist, its/their location[s] and condition[s], and any additional information about the lead-based paint or lead-based paint hazards (if known)].

☐ (ii) Seller has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

(b) Records and reports available to Seller (check (i) or (ii) below):

☐ (i) Seller has provided Buyer with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing (list documents below).

☐ (ii) Seller has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

Buyer’s Acknowledgment (initial)

_____ (c) Buyer has received copies of all information listed above.
Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards

____ (d) Buyer has received the lead hazard information pamphlet described in 15 U.S.C. section 2686.

____ (e) Buyer has (check (i) or (ii) below):

☐ (i) received a ten-day opportunity (or mutually agreed upon period) to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards; or

☐ (ii) waived the opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.

Agent’s Acknowledgment (initial)

____ (f) Agent has informed Seller of Seller’s obligations under 42 U.S.C. section 4852d and is aware of his/her responsibility to ensure compliance.

Certification of Accuracy

The following parties have reviewed the information above and certify, to the best of their knowledge, that the information they have provided is true and accurate.

__________________________________________________________________________________________________________________________ 
Seller Date 

__________________________________________________________________________________________________________________________ 
Buyer Date 

__________________________________________________________________________________________________________________________ 
Agent Date
Form 4-8

Asbestos Disclosure Notice
[Sales]

Date:

Seller’s Name and Address:

Buyer’s Name and Address:

Description of Property:

THIS ASBESTOS DISCLOSURE NOTICE ("NOTICE") IS A DISCLOSURE OF KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THAT MAY BE DESIRED. THIS NOTICE IS NOT A WARRANTY OF ANY KIND.

Seller’s Disclosure

1. Presence of asbestos-containing or presumed asbestos-containing material (check one):

☐ Known asbestos-containing material is present in the Property (explain).

☐ The Property was constructed before 1981, and presumed asbestos-containing material is present in the Property (explain).
☐ The Property was constructed after 1980, and Seller has no knowledge of asbestos-containing material in the Property.

2. Records and reports available to Buyer (check one):

☐ Seller has provided Buyer with all available records and reports pertaining to asbestos-containing material in the Property (list documents below).

☐ Seller has no records or reports pertaining to asbestos-containing material in the Property.

3. Seller has no knowledge of other facts or records concerning the presence, location, or quantity of asbestos-containing or presumed asbestos-containing material in the property (including any data supporting any rebuttal of the presumption that a material contains asbestos).

Buyer’s Acknowledgment

Buyer has received copies of all information listed above. Buyer is aware of Buyer’s responsibility to ensure compliance with 15 U.S.C. sections 2641 through 2656 and 29 C.F.R. sections 1910.1001 *et seq.* and 1926.1101 *et seq.*

__________________________________________________________ ...
Sellern Date

__________________________________________________________ ...
Buyer Date
Form 4-9

Under Tex. Prop. Code § 5.016, a person may not convey an interest in or enter into a contract to convey an interest in residential real property that will be encumbered by a recorded lien at the time the interest is conveyed unless, on or before the seventh day before the earlier of the effective date of the conveyance or the execution of an executory contract binding the purchaser to purchase the property, an option contract, or other contract, the person provides the purchaser and each lienholder a separate written disclosure statement in at least twelve-point type that provides the information set out in the form below.

A violation of this section does not invalidate a conveyance. Except for certain transactions exempted from the disclosure requirements, if a contract is entered into without the seller providing the notice, the purchaser may terminate the contract for any reason on or before the seventh day after the date the purchaser receives the notice in addition to other remedies provided by this section or other law. Tex. Prop. Code § 5.016(c) exempts a number of transfers from the disclosure requirements, including transfers in which the purchaser obtains a title insurance policy insuring the transfer of title to the real property and transfers to a person who has purchased, conveyed, or entered into contracts to purchase or convey an interest in real property four or more times in the preceding twelve months.

Under Tex. Prop. Code § 5.016(d), a violation of this section is not actionable if the person required to give notice reasonably believes and takes any necessary action to ensure that each lien for which notice was not provided will be released on or before the thirtieth day after the date on which title to the property is transferred.

WARNING: ONE OR MORE RECORDED LIENS HAVE BEEN FILED THAT MAKE A CLAIM AGAINST THIS PROPERTY AS LISTED BELOW. IF A LIEN IS NOT RELEASED AND THE PROPERTY IS CONVEYED WITHOUT THE CONSENT OF THE LIENHOLDER, IT IS POSSIBLE THE LIENHOLDER COULD DEMAND FULL PAYMENT OF THE OUTSTANDING BALANCE OF THE LIEN IMMEDIATELY. YOU MAY WISH TO CONTACT EACH LIENHOLDER FOR FURTHER INFORMATION AND DISCUSS THIS MATTER WITH AN ATTORNEY.

Notice Regarding Sale Subject to a Recorded Lien

This notice is being provided pursuant to section 5.016 of the Texas Property Code.

Property: [identify the property]

Seller:
Form 4-9  Notice Regarding Sale Subject to a Recorded Lien

Seller’s Address:

Buyer:

Buyer’s Address:

[First] Recorded Lien

Lienholder:

Lienholder’s address:

Lienholder’s telephone number:

Amount of debt secured by this lien:

Interest rate:

Required periodic installments:

Account number:

Other terms:

Has lienholder consented to sale by Seller to Purchaser? ____ Yes ____ No

If there is more than one lien, repeat above information for each additional lien and designate as “First Recorded Lien,” “Second Recorded Lien,” etc., as applicable.

[First] Insurance Policy

Insurer:

Insured:
Amount for which property is insured:

Property insured:

If there is more than one insurance policy, repeat above information for each additional policy and designate as "First Insurance Policy," "Second Insurance Policy," etc., as applicable.

Amount of Any Property Taxes Due on Property:

[Name of seller]
Date:

[Name of buyer]
Date:
Form 4-10

If the property contains an underground storage tank or tank system or an aboveground tank or tank system subject to regulation by the Texas Commission on Environmental Quality, the following notice is given by the seller to the purchaser pursuant to 30 Tex. Admin. Code § 334.9.

Storage Tanks Disclosure Provider

Seller:

Seller’s Address:

Buyer:

Buyer’s Address:

Description of Property:

The number of tanks involved is [number].

Attached is a description of each tank (capacity, tank material, and product stored, if applicable).

The designated facility identification number (if the entire facility is being conveyed) is [number].

Include one or both of the following if applicable.

The underground storage tank[s] included in this conveyance [is/are] presumed to be regulated by the Texas Commission on Environmental Quality and may be subject to certain registration, compliance self-certification, construction notification, and other requirements found in chapter 334 of title 30 of the Texas Administrative Code.

And/Or
The aboveground storage tank[s] included in this conveyance [is/are] presumed to be regulated by the Texas Commission on Environmental Quality and may be subject to certain registration, delivery prohibition, installation notification, and other requirements found in chapter 334 of title 30 of the Texas Administrative Code.

[Name of seller]
Date:

[Name of buyer]
Date:
Form 4-11

Pursuant to Tex. Loc. Gov’t Code § 212.155, if the governing body of a municipality has required any person who sells or conveys restricted property located within its jurisdiction to first give written notice to the purchaser of (1) the restrictions and (2) the municipality’s right to enforce compliance with the restrictions, the following written notice must be given to the purchaser on or before the final closing, signed and acknowledged by both seller and purchaser, and recorded in the real property records in the county where the real property is located.

Notice to Purchaser Regarding Restrictive Covenants

STATE OF TEXAS

COUNTY OF

Buyer:

Seller:

Property: [include legal description and street address]

The Property is being purchased by Buyer and is subject to deed restrictions recorded in [recording data] of the Official Public Records of [county] County, Texas. THE RESTRICTIONS LIMIT THE BUYER’S USE OF THE PROPERTY. THE CITY OF [city] IS AUTHORIZED BY STATUTE TO ENFORCE COMPLIANCE WITH CERTAIN DEED RESTRICTIONS. ANY PROVISIONS THAT RESTRICT THE SALE, RENTAL, OR USE OF THE REAL PROPERTY ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN ARE UNENFORCEABLE; however, the inclusion of such provisions does not render the remainder of the deed restrictions invalid.
Notice to Purchaser Regarding Restrictive Covenants

Seller:

[Name of seller]
Date:

Include acknowledgment.

The undersigned hereby acknowledges receipt of the Notice to Purchaser Regarding Restrictive Covenants at or before closing the purchase of the Property.

Buyer:

[Name of buyer]
Date:

Include acknowledgment.
Form 4-12

This form sets out the mandatory notice under Tex. Nat. Res. Code § 33.135. The notice must be placed in a written executory contract for the sale, transfer, or conveyance of real property (other than a mineral, leasehold, or security interest) adjoining and abutting the tidally influenced waters of the State of Texas. Tex. Nat. Res. Code § 33.135(a). If the real property described in this section is sold, transferred, or conveyed without a written executory contract, this notice must be delivered to the grantee for execution and acknowledgment of receipt before the conveyance is recorded. Tex. Nat. Res. Code § 33.135(b). Failure to include this notice in a written executory contract is grounds for the purchaser to terminate the contract and have its earnest money returned. Tex. Nat. Res. Code § 33.135(c). Failure to provide this notice before closing, either in a written executory contract or in a separate written statement, is a deceptive act under Tex. Bus. & Com. Code § 17.46. Tex. Nat. Res. Code § 33.135(d).

Notice to Purchaser Regarding Coastal Area Property

(1) The real property described in and subject to this contract adjoins and shares a common boundary with the tidally influenced submerged lands of the state. The boundary is subject to change and can be determined accurately only by a survey on the ground made by a licensed state land surveyor in accordance with the original grant from the sovereign. The owner of the property described in this contract may gain or lose portions of the tract because of changes in the boundary.

NOTICE REGARDING COASTAL AREA PROPERTY

(2) The seller, transferor, or grantor has no knowledge of any prior fill as it relates to the property described in and subject to this contract.

(3) State law prohibits the use, encumbrance, construction, or placing of any structure in, on, or over state-owned submerged lands below the applicable tide line, without proper permission.

(4) The purchaser or grantee is hereby advised to seek the advice of an attorney or other qualified person as to the legal nature and effect of the facts set forth in this notice on the property described in and subject to this contract. Information regarding the location of the
applicable tide line as to the property described in and subject to this contract may be obtained from the surveying division of the General Land Office in Austin.
Form 4-13

This form sets out the mandatory notice under Tex. Nat. Res. Code § 61.025. The following notice must be placed in a written executory contract for the sale, transfer, or conveyance of real property (other than a mineral, leasehold, or security interest) located seaward of the Gulf Intracoastal Waterway to its southernmost point and then seaward of the longitudinal line also known as 97 degrees, 12', 19" which runs southerly to the international boundary from the intersection of the centerline of the Gulf Intracoastal Waterway and the Brownsville Ship Channel. Tex. Nat. Res. Code § 61.025(a). If the real property described in this section is sold, transferred, or conveyed without a written executory contract, this notice must be delivered to the grantee for execution and acknowledgment of receipt not later than ten calendar days before closing of the transaction. Tex. Nat. Res. Code § 61.025(b). Failure to include this notice in a written executory contract is grounds for the purchaser to terminate the contract and have its earnest money returned. Tex. Nat. Res. Code § 61.025(c). Failure to provide this notice before closing, either in a written executory contract or in a separate written statement, is a deceptive act under Tex. Bus. & Com. Code § 17.46. Tex. Nat. Res. Code § 61.025(d).

Notice to Purchaser of Property Seaward of Gulf Intracoastal Waterway

CONCERNING THE PROPERTY AT________________________________________________________________________________________________________________________

DISCLOSURE NOTICE CONCERNING LEGAL AND ECONOMIC RISKS OF PURCHASING COASTAL REAL PROPERTY NEAR A BEACH

WARNING: THE FOLLOWING NOTICE OF POTENTIAL RISKS OF ECONOMIC LOSS TO YOU AS THE PURCHASER OF COASTAL REAL PROPERTY IS REQUIRED BY STATE LAW.

• READ THIS NOTICE CAREFULLY. DO NOT SIGN THIS CONTRACT UNTIL YOU FULLY UNDERSTAND THE RISKS YOU ARE ASSUMING.

• BY PURCHASING THIS PROPERTY, YOU MAY BE ASSUMING ECONOMIC RISKS OVER AND ABOVE THE RISKS INVOLVED IN PURCHASING INLAND REAL PROPERTY.
• IF YOU OWN A STRUCTURE LOCATED ON COASTAL REAL PROPERTY NEAR A GULF COAST BEACH, IT MAY COME TO BE LOCATED ON THE PUBLIC BEACH BECAUSE OF COASTAL EROSION AND STORM EVENTS.

• AS THE OWNER OF A STRUCTURE LOCATED ON THE PUBLIC BEACH, YOU COULD BE SUED BY THE STATE OF TEXAS AND ORDERED TO REMOVE THE STRUCTURE.

• THE COSTS OF REMOVING A STRUCTURE FROM THE PUBLIC BEACH AND ANY OTHER ECONOMIC LOSS INCURRED BECAUSE OF A REMOVAL ORDER WOULD BE SOLELY YOUR RESPONSIBILITY.

The real property described in this contract is located seaward of the Gulf Intracoastal Waterway to its southernmost point and then seaward of the longitudinal line also known as 97 degrees, 12', 19" which runs southerly to the international boundary from the intersection of the centerline of the Gulf Intracoastal Waterway and the Brownsville Ship Channel. If the property is in close proximity to a beach fronting the Gulf of Mexico, the purchaser is hereby advised that the public has acquired a right of use or easement to or over the area of any public beach by prescription, dedication, or presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.

The extreme seaward boundary of natural vegetation that spreads continuously inland customarily marks the landward boundary of the public easement. If there is no clearly marked natural vegetation line, the landward boundary of the easement is as provided by Sections 61.016 and 61.017, Natural Resources Code.

Much of the Gulf of Mexico coastline is eroding at rates of more than five feet per year. Erosion rates for all Texas Gulf property subject to the open beaches act are available from the Texas General Land Office.
State law prohibits any obstruction, barrier, restraint, or interference with the use of the public easement, including the placement of structures seaward of the landward boundary of the easement. OWNERS OF STRUCTURES ERECTED SEAWARD OF THE VEGETATION LINE (OR OTHER APPLICABLE EASEMENT BOUNDARY) OR THAT BECOME SEAWARD OF THE VEGETATION LINE AS A RESULT OF PROCESSES SUCH AS SHORELINE EROSION ARE SUBJECT TO A LAWSUIT BY THE STATE OF TEXAS TO REMOVE THE STRUCTURES.

The purchaser is hereby notified that the purchaser should:

(1) determine the rate of shoreline erosion in the vicinity of the real property; and

(2) seek the advice of an attorney or other qualified person before executing this contract or instrument of conveyance as to the relevance of these statutes and facts to the value of the property the purchaser is hereby purchasing or contracting to purchase.
Form 4-14

The following is the mandatory notice to be placed in bold-faced type in a contract for the sale and purchase of vacant land pursuant to Tex. Prop. Code § 5.010. This notice requirement does not apply to certain sellers or buyers, Tex. Prop. Code § 5.010(b), (c), or if the contract contains a separate paragraph providing for the payment of any additional ad valorem taxes and interest that become due as a penalty because of the transfer of the property or a subsequent change in use of the property. Tex. Prop. Code § 5.010(d). If the seller fails to include this notice in the contract, the purchaser is entitled to recover from the seller an amount equal to the amount of any additional taxes and interest incurred as a penalty because of the transfer of the land or a subsequent change in use of the land that occurs before the fifth anniversary of the date of the transfer. Tex. Prop. Code § 5.010(e).

NOTICE REGARDING POSSIBLE LIABILITY FOR ADDITIONAL TAXES

If for the current ad valorem tax year the taxable value of the land that is the subject of this contract is determined by a special appraisal method that allows for appraisal of the land at less than its market value, the person to whom the land is transferred may not be allowed to qualify the land for that special appraisal in a subsequent tax year and the land may then be appraised at its full market value. In addition, the transfer of the land or a subsequent change in the use of the land may result in the imposition of an additional tax plus interest as a penalty for the transfer or the change in the use of the land. The taxable value of the land and the applicable method of appraisal for the current tax year is public information and may be obtained from the tax appraisal district established for the county in which the land is located.
Notice Regarding Possible Annexation

If the property that is the subject of this contract is located outside the limits of a municipality, the property may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality. Each municipality maintains a map that depicts its boundaries and extraterritorial jurisdiction. To determine if the property is located within a municipality’s extraterritorial jurisdiction or is likely to be located within a municipality’s extraterritorial jurisdiction, contact all municipalities located in the general proximity of the property for further information.

Dated: ________________________________.

____________________________________
[Name of purchaser]
Form 4-16

This notice must be given to the purchaser of an unimproved property that has no existing water facilities and that is located in a certificated service area of a utility service provider. Tex. Water Code § 13.257. Refer to Tex. Water Code § 13.257(c) for types of sales that are excepted from the notice requirement. The seller must give a prospective purchaser this notice before or at the same time as the execution of the contract. At closing, the purchaser and seller must sign and acknowledge a separate copy of the notice with current information; that copy must be recorded. Tex. Water Code § 13.257(g). Each special utility district keeps a map of its service area; this information is also available from the Texas Commission on Environmental Quality.

Notice for Unimproved Property in a Certificated Service Area of a Utility Service Provider

The real property, described below, that you are about to purchase may be located in a certificated water or sewer service area, which is authorized by law to provide water or sewer service to the properties in the certificated area. If your property is located in a certificated area there may be special costs or charges that you will be required to pay before you can receive water or sewer service. There may be a period required to construct lines or other facilities necessary to provide water or sewer service to your property. You are advised to determine if the property is in a certificated area and contact the utility service provider to determine the cost that you will be required to pay and the period, if any, that is required to provide water or sewer service to your property.

The undersigned purchaser hereby acknowledges receipt of the foregoing notice at or before the execution of a binding contract for the purchase of the real property described in the notice or at closing of purchase of the real property.

[Name of purchaser]
Date:

Insert property description.
No signatures are required if the notice is an addendum to a signed purchase and sale contract. If the notice is separate from the purchase and sale contract, only the purchaser’s signature is required. Both the purchaser and seller must sign the copy executed at the time of closing. Tex. Water Code § 13.257(g).

[Name of seller]
Date:

Except for notices included as an addendum to or paragraph of a purchase contract, the notice must be executed by the seller and purchaser, as indicated.

Include acknowledgments if the notice is signed at the time of closing.
Utility District Notice

Seller[s]:

Purchaser[s]:

The real property, described below, that you are about to purchase is located in the [district] District. The district has taxing authority separate from any other taxing authority and may, subject to voter approval, issue an unlimited amount of bonds and levy an unlimited rate of tax in payment of such bonds. As of [this date/January 1, [year]], the rate of taxes levied by the district on real property located in the district is $[amount] on each $100 of assessed valuation. If the district has not yet levied taxes, the most recent projected rate of tax, as of [this date/January 1, [year]], is $[amount] on each $100 of assessed valuation. The total amount of bonds, excluding refunding bonds and any bonds or any portion of bonds issued that are payable solely from revenues received or expected to be received under a contract with a governmental entity, approved by the voters and which have been or may, at [this date/January 1, [year]], be issued is $[amount], and the aggregate initial principal amounts of all bonds issued for one or more of the specified facilities of the district and payable in whole or in part from property taxes is $[amount].

The district has the authority to adopt and impose a standby fee on property in the district that has water, sanitary sewer, or drainage facilities and services available but not con-
nected and which does not have a house, building, or other improvement located thereon and
does not substantially utilize the utility capacity available to the property. The district may
exercise the authority without holding an election on the matter. As of [this date/January 1,
[year]], the most recent amount of the standby fee is $[amount]. An unpaid standby fee is a
personal obligation of the person that owned the property at the time of imposition and is
secured by a lien on the property. Any person may request a certificate from the district stating
the amount, if any, of unpaid standby fees on a tract of property in the district.

Select one of the following paragraphs if appropriate. Include
the first paragraph if the property is in a district located in
whole or in part in the extraterritorial jurisdiction of one or more
home-rule municipalities and not located within the corporate
boundaries of a municipality as defined by Tex. Water Code
§ 49.452(b). Include the second paragraph if the property is in
a district located in whole or in part within the corporate bound-
aries of a municipality as defined by Tex. Water Code
§ 49.452(c). Do not include either paragraph if the property is
in a district that is not located in whole or in part within the cor-
porate boundaries of a municipality or the extraterritorial jurisdic-
tion of one or more home-rule municipalities as defined by
Tex. Water Code § 49.452(d).

The district is located in whole or in part in the extraterritorial jurisdiction of the city of
[city]. By law, a district located in the extraterritorial jurisdiction of a municipality may be
annexed without the consent of the district or the voters of the district. When a district is
annexed, the district is dissolved.

Or

The district is located in whole or in part within the corporate boundaries of the city of
[city]. The taxpayers of the district are subject to the taxes imposed by the municipality and by
the district until the district is dissolved. By law, a district located within the corporate bound-
daries of a municipality may be dissolved by municipal ordinance without the consent of the
district or the voters of the district.

Continue with the following.
Utility District Notice

The purpose of this district is to provide water, sewer, drainage, or flood control facilities and services within the district through the issuance of bonds payable in whole or in part from property taxes. The cost of these utility facilities is not included in the purchase price of your property, and these utility facilities are owned or to be owned by the district. The legal description of the property you are acquiring is as follows: [legal description].

[Name of seller]
Date:

Purchaser is advised that the information shown on this form is subject to change by the district at any time. The district routinely establishes tax rates during the months of September through December of each year, effective for the year in which the tax rates are approved by the district. Purchaser is advised to contact the district to determine the status of any current or proposed changes to the information shown on this form.

The undersigned purchaser[s] hereby acknowledge[s] receipt of the foregoing notice at or prior to execution of a binding contract for the purchase of the real property described in such notice or at closing of purchase of the real property.

[Name of purchaser]
Date:

Include acknowledgment.
Form 4-18

This form sets out the mandatory notice under Tex. Water Code § 54.016(h)(4). If the real property is located in a water or sanitary sewer district that entered into a contract with a city, other than a city with a population of more than one million in a county of more than two million, that allows the city to set rates in the district after annexation that are different from rates charged to other residents of the city, the seller at or before closing must deliver a separate written notice, executed and acknowledged by the seller, containing the information in this notice. The purchaser must sign the notice to evidence receipt. Tex. Water Code § 49.452(g)–(p) applies to this notice provision, including the purchaser’s right to seek damages if the sale or conveyance of the property is not made in compliance with this statute.

Notice to Purchaser of Property Located in Certain Annexed Water Districts

The real property that is being conveyed is subject to the following [water/sewer/water and sewer] rates and adjustments:

1. the basis on which the monthly [water/sewer/water and sewer] rate is to be charged under the contract stated as a percentage of the [water/sewer/water and sewer] rates of the city is [percent] percent;

2. length of time such rates will be in effect is [time period]; and

3. the time or conditions of annexation by the city implementing such rates are [describe conditions and period of annexation].

__________________________________________________________________________________________________________________________ ...

[Name of seller]
Date:

__________________________________________________________________________________________________________________________ ...

[Name of purchaser]
Date:

Include acknowledgment.
Pursuant to Tex. Loc. Gov’t Code § 232.0033, a seller and subdivider of land located within the area of the alignment of a transportation project, as shown on the final environmental decision document applicable to the future transportation corridor identified in an agreement between the Texas Department of Transportation and the county under Tex. Transp. Code § 201.619, must provide the following conspicuous statement in the contract.

Notice to Purchaser That Property Is Located within the Area of the Alignment of a Transportation Project

Property: [describe property]

THE PROPERTY IS LOCATED WITHIN THE AREA OF THE ALIGNMENT OF A TRANSPORTATION PROJECT AS SHOWN ON A FINAL ENVIRONMENTAL DECISION DOCUMENT THAT IS APPLICABLE TO THE FUTURE TRANSPORTATION CORRIDOR IDENTIFIED IN AN AGREEMENT UNDER SECTION 201.619 OF THE TEXAS TRANSPORTATION CODE.
Notice of Water Level Fluctuations

Form 4-20

A seller of residential or commercial property adjoining an impoundment of water, including a reservoir or lake, constructed and maintained under chapter 11 of the Texas Water Code, that has a storage capacity of at least 5,000 acre-feet at the impoundment’s normal operating level, must give the purchaser written notice in substantially the form prescribed by statute and as set forth below. The notice must be given on or before the effective date of the executory contract. If a contract is entered into without the seller giving the notice, the purchaser may terminate the contract for any reason within seven days after the purchaser receives the notice from the seller or a third party. After the date of the conveyance, the purchaser may bring an action for misrepresentation against the seller if the seller failed to give the notice prior to closing and had actual knowledge that the water level described in the statute fluctuates for various reasons, including the two reasons set out in the notice. The requirement applies to an executory contract entered into on or after September 1, 2015. Tex. Prop. Code § 5.019.

Notice of Water Level Fluctuations

Seller[s]:

Purchaser[s]:

Property: [street address and city or legal description]

The water level of the impoundment of water adjoining the Property fluctuates for various reasons, including as a result of

(1) an entity lawfully exercising its right to use the water stored in the impoundment, or

(2) drought or flood conditions.

[Name of purchaser[s]]
Form 4-21

This form is used by a purchaser of real property to waive the consumer protection rights afforded by the Deceptive Trade Practices–Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.41–.63. The language of the waiver is based on that suggested in the statute and must be in at least ten-point, bold-faced type. See Tex. Bus. & Com. Code § 17.42.

Waiver of Consumer Rights

Date:

Contract

Date:

Seller:

Seller’s Address:

Buyer:

Buyer’s Address:

Property:

WAIVER OF CONSUMER RIGHTS: IN CONNECTION WITH THE FOREGOING EARNEST MONEY CONTRACT, BUYER WAIVES BUYER’S RIGHTS UNDER THE DECEPTIVE TRADE PRACTICES–CONSUMER PROTECTION ACT, SECTION 17.41 ET SEQ., TEXAS BUSINESS & COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF BUYER’S OWN SELECTION, BUYER VOLUNTARILY CONSENTS TO THIS WAIVER.

[Name of buyer]
Form 4-22

This form is based on the form found in Tex. Prop. Code § 5.008. Under section 5.008, a seller of not more than one dwelling unit of residential real property must provide a written notice substantially similar to this form.

Seller’s Disclosure of Property Condition

Seller: _____________________________________________________________________

Property (address and city): __________________________________________________

THIS NOTICE IS A DISCLOSURE OF SELLER’S KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED BY SELLER AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PURCHASER MAY WISH TO OBTAIN. IT IS NOT A WARRANTY OF ANY KIND BY SELLER OR SELLER’S AGENTS.

Seller ___ is ___ is not occupying the Property.

If unoccupied, how long since Seller has occupied the Property? ___________________

1. The Property has the items checked below:

Write Yes (Y), No (N), or Unknown (U).

_____ Range  _____ Oven  _____ Microwave
_____ Dishwasher  _____ Trash Compactor  _____ Disposal
_____ Washer/Dryer Hookups  _____ Window Screens  _____ Rain Gutters
_____ Security System  _____ Fire Detection Equipment  _____ Intercom System
_____ Smoke Detector
Are you (Seller) aware of any of the above items that are not in working condition, that have known defects or that are in need of repair? ___ Yes ___ No ___ Unknown. If yes, then describe. (Attach additional sheets if necessary): ____________________________________
___________________________________________________________________________
___________________________________________________________________________

____ Smoke Detector-Hearing Impaired
____ Carbon Monoxide Alarm
____ Emergency Escape Ladder(s)
____ TV Antenna ___ Cable TV Wiring ___ Satellite Dish
____ Ceiling Fan(s) ___ Attic Fan(s) ___ Exhaust Fan(s)
____ Central A/C ___ Central Heating ___ Wall/Window Air Conditioning
____ Plumbing System ___ Septic System ___ Public Sewer System
____ Patio/Decking ___ Outdoor Grill ___ Fences
____ Pool ___ Sauna ___ Spa ___ Hot Tub
____ Pool Equipment ___ Pool Heater ___ Automatic Lawn Sprinkler System
____ Fireplace(s) & Chimney (Woodburning) ___ Fireplace(s) & Chimney (Mock)
____ Natural Gas Lines ___ Gas Fixtures
____ Liquid Propane Gas: ___ LP Community (Captive) ___ LP on Property
Garage: ___ Attached ___ Not Attached ___ Carport
Garage Door Opener(s): ___ Electronic ___ Control(s)
Water Heater: ___ Gas ___ Electric
Water Supply: ___ City ___ Well ___ MUD ___ Co-op
Roof Type: ___________________________ Age: ____________ (approx)
2. Does the property have working smoke detectors installed in accordance with the smoke detector requirements of chapter 766, Health and Safety Code?*

 ___ Yes ___ No ___ Unknown. If the answer to this question is no or unknown, explain. (Attach additional sheets if necessary): _______________________________

_____________________________________________________________________

_____________________________________________________________________

* Chapter 766 of the Health and Safety Code requires one-family or two-family dwellings to have working smoke detectors installed in accordance with the requirements of the building code in effect in the area in which the dwelling is located, including performance, location, and power source requirements. If you do not know the building code requirements in effect in your area, you may check unknown above or contact your local building official for more information. A buyer may require a seller to install smoke detectors for the hearing impaired if: (1) the buyer or a member of the buyer’s family who will reside in the dwelling is hearing impaired; (2) the buyer gives the seller written evidence of the hearing impairment from a licensed physician; and (3) within ten days after the effective date, the buyer makes a written request for the seller to install smoke detectors for the hearing impaired and specifies the locations for installation. The parties may agree who will bear the cost of installing the smoke detectors and which brand of smoke detectors to install.

3. Are you (Seller) aware of any known defects/malfunctions in any of the following? Write Yes (Y) if you are aware; write No (N) if you are not aware.

 ___ Interior Walls  ___ Ceilings  ___ Floors  
 ___ Exterior Walls  ___ Doors  ___ Windows  
 ___ Roof  ___ Foundation/Slab(s)  ___ Basement  
 ___ Walls/Fences  ___ Driveways  ___ Sidewalks
___ Plumbing/Sewers/
Septs

___ Electrical Systems

___ Lighting Fixtures

___ Other Structural Components (Describe): _______________________________
_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):
_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________

4. Are you (Seller) aware of any of the following conditions?
Write Yes (Y) if you are aware; write No (N) if you are not aware.

___ Active Termites (includes wood-
destroying insects)

___ Previous Structural or Roof Repair

___ Termite or Wood Rot Damage
Needing Repair

___ Hazardous or Toxic Waste

___ Previous Termite Damage

___ Asbestos Components

___ Previous Termite Treatment

___ Urea-Formaldehyde Insulation

___ Previous Flooding

___ Radon Gas

___ Improper Drainage

___ Lead Based Paint

___ Water Penetration

___ Aluminum Wiring

___ Located in 100-Year Floodplain

___ Previous Fires

___ Present Flood Insurance Coverage

___ Unplatted Easements

___ Landfill, Settling, Soil Movement,
Fault Lines

___ Subsurface Structure or Pits

___ Single Blockable Main Drain in
Pool/Hot Tub/Spa*

___ Previous Use of Premises for Man-
ufacture of Methamphetamine

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):
* A single blockable main drain may cause a suction entrapment hazard for an individual.

5. Are you (Seller) aware of any item, equipment, or system in or on the Property that is in need of repair? ___ Yes (if you are aware) ___ No (if you are not aware). If yes, explain. (Attach additional sheets if necessary): _______________________________
   ___________________________________________________________________
   ___________________________________________________________________

6. Are you (Seller) aware of any of the following?
   Write Yes (Y) if you are aware; write No (N) if you are not aware.

   ____ Room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at that time.
   ____ Homeowners’ Association or maintenance fees or assessments.
   ____ Any “common area” (facilities such as pools, tennis courts, walkways, or other areas) co-owned in undivided interest with others.
   ____ Any notices of violations of deed restrictions or governmental ordinances affecting the condition or use of the Property.
   ____ Any lawsuits directly or indirectly affecting the Property.
   ____ Any condition on the Property which materially affects the physical health or safety of an individual.
   ____ Any rainwater harvesting system located on the property that is larger than 500 gallons and that uses a public water supply as an auxiliary water source.
   ____ Any portion of the Property that is located in a groundwater conservation district or a subsidence district.

   If the answer to any of the above is yes, explain. (Attach additional sheets if necessary): _______________________________
   ___________________________________________________________________
7. If the property is located in a coastal area that is seaward of the Gulf Intracoastal Waterway or within 1,000 feet of the mean high tide bordering the Gulf of Mexico, the property may be subject to the Open Beaches Act or the Dune Protection Act (chapter 61 or 63, Natural Resources Code, respectively) and a beachfront construction certificate or dune protection permit may be required for repairs or improvements. Contact the local government with ordinance authority over construction adjacent to public beaches for more information.

8. This property may be located near a military installation and may be affected by high noise or air installation compatible use zones or other operations. Information relating to high noise and compatible use zones is available in the most recent Air Installation Compatible Use Zone Study or Joint Land Use Study prepared for a military installation and may be accessed on the website of the military installation and of the county and any municipality in which the military installation is located.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

Signature of Seller

__________________________________________________________________________________________________________________________ ...

Date

The undersigned purchaser hereby acknowledges receipt of the foregoing notice.

__________________________________________________________________________________________________________________________ ...

Signature of Buyer

__________________________________________________________________________________________________________________________ ...

Date
Access and Due Diligence Agreement

Basic Information

Date:

Seller:

Seller’s Mailing Address:

Buyer:

Buyer’s Mailing Address:

Property:

A. Recitals

A.1. Seller is the owner of the Property.

A.2. Buyer is considering buying the Property from Seller, and Buyer and Seller are currently negotiating the terms of a possible purchase (“Possible Transaction”).

A.3. In connection with the Possible Transaction, Buyer wants a license to enter the Property to examine, inspect, and perform tests on the Property to evaluate the physical and environmental condition of the Property and to perform other tests and inspections related to the Possible Transaction. Seller has agreed to grant Buyer the license to enter the Property for that purpose in accordance with the terms and conditions of this Agreement.
B. Agreement

For valuable consideration, the receipt and sufficiency of which is acknowledged, Buyer and Seller agree as follows:

B.1. Investigation Period. The “Investigation Period” means the period from the date of this Agreement until the earliest of (a) 5:00 P.M. local time where the Property is located on [date]; (b) receipt by Buyer of written notice from Seller terminating this Agreement, which termination may be made at Seller’s sole discretion; or (c) the execution and delivery by Seller and Buyer of a purchase and sale agreement (“Sales Contract”) for the Property.

B.2. Entry onto the Property. Buyer may enter the Property during the Investigation Period to inspect it at Buyer’s cost and risk, subject to the following:

B.2.a. Buyer must deliver evidence to Seller that Buyer has liability insurance for its proposed inspection activities, with coverages and in amounts that are substantially the same as those maintained by Seller or with such lesser coverages and in such lesser amounts as are reasonably satisfactory to Seller.

B.2.b. Buyer may not interfere in any material manner with existing operations or occupants of the Property.

B.2.c. Buyer must notify Seller in advance of Buyer’s plans to conduct tests so that Seller may be present during the tests.

B.2.d. If the Property is physically altered because of Buyer’s inspections, Buyer must return the Property to its preinspection condition promptly after the alteration occurs.
B.2.e. Buyer must deliver to Seller copies of all inspection reports that Buyer prepares or receives from third-party consultants or contractors within three days after their preparation or receipt.

B.2.f. Buyer must abide by any other reasonable entry rules imposed by Seller.

B.3. Environmental Assessment. Buyer has the right to conduct environmental assessments of the Property. Seller will provide, or will designate a person with knowledge of the use and condition of the Property to provide, information requested by Buyer or Buyer’s agent or representative regarding the use and condition of the Property during the period of Seller’s ownership of the Property. Seller will cooperate with Buyer in obtaining and providing to Buyer or its agent or representative information regarding the Property.

B.4. Property Documents. Seller has previously made, or will make, available to Buyer and Buyer’s representatives for their review, certain items and information pertaining to the Property with the exception of any financially privileged documents pertaining to Seller (collectively referred to as the “Property Documents”). The Property Documents have been or will be made available to Buyer without representation or warranty by, or recourse against, Seller. Buyer will not rely on the Property Documents and will independently verify the truth, accuracy, and completeness of any information or items contained therein.

B.5. Buyer’s Indemnity and Release of Seller. Buyer will indemnify, defend, and hold Seller harmless from any loss, attorney’s fees, expenses, or claims arising out of Buyer’s investigation of the Property, except those arising out of the acts or omissions of Seller and those for repair or remediation of existing conditions discovered by Buyer’s inspection. The obligations of Buyer under this provision will survive termination of this Agreement, the execution or termination of the Sales Contract, and closing. Buyer releases Seller and those persons acting on Seller’s behalf from all claims and causes of action (including claims for attorney’s fees and court and other costs) resulting from Buyer’s investigation of the Property.
B.6. **No Waiver.** No waiver of default by any party to this Agreement may be implied from failure to take action by any other party to the Agreement, regardless of whether the default continues or is repeated. No express waiver of a default will affect any other default or cover any other period not specified in the express waiver. A waiver of any default in the performance of any provision contained in this Agreement will not be deemed to be a waiver of any subsequent default in the performance of the same provision or any other provision contained in this Agreement.

B.7. **Assignment.** The license granted to Buyer under the terms of this Agreement is personal to Buyer, and neither this Agreement nor the license may be transferred or assigned by Buyer.

B.8. **Notices.** Any notice required by or permitted under this Agreement must be in writing. Any notice required by this Agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this Agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received, provided that (a) any notice received on a Saturday, Sunday, or holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or holiday and (b) any notice received after 5:00 P.M. local time at the place of delivery on a day that is not a Saturday, Sunday, or holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or holiday. Any address for notice may be changed by not less than ten days’ prior written notice given as provided herein. Copies of each notice must be given by one of these methods to the attorney of the party to whom notice is given.

B.9. **Amendment.** This Agreement may be amended only by an instrument in writing signed by the parties.
B.10. Revocation. The license granted under this Agreement is revocable by Seller, at any time, for any reason or no reason, on receipt by Buyer from Seller of written notice of revocation.

B.11. Business Days; Holidays; Weekends. As used in this Agreement, the term *business day* means any day, other than a Saturday or Sunday, on which banks located in [city, state] are not required or authorized to close. If any notice or action required or permitted by this Agreement falls on a date that is not a business day, the date will be extended to the next business day.

B.12. Entire Agreement. This Agreement is the entire agreement between Seller and Buyer concerning Buyer’s investigations, and no modification or subsequent agreement relative to the subject matter of this Agreement will be binding on either party unless reduced to writing and signed by the party to be bound.

B.13. No Third-Party Beneficiaries. There are no third-party beneficiaries of this Agreement.

B.14. Severability. If a provision in this Agreement is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this Agreement, and this Agreement is to be construed as if the unenforceable provision is not a part of the Agreement.

B.15. Ambiguities Not to Be Construed against Party Who Drafted Agreement. The rule of construction that ambiguities in a document are construed against the party who drafted it does not apply in interpreting this Agreement.

B.16. No Special Relationship. The parties’ relationship is an ordinary commercial relationship, and the parties do not intend to create the relationship of principal and agent, partners, joint venturers, or any other special relationship.
B.17. **Counterparts.** If this Agreement is executed in multiple counterparts, all counterparts taken together constitute this Agreement. Copies of signatures to this Agreement are effective as original signatures.

B.18. **Confidentiality.** This Agreement, this transaction, and all information learned in the course of this transaction will be kept confidential, except to the extent disclosure is required by law or court order or to enable third parties to advise or assist Buyer to investigate the Property or either party to close this transaction. Remedies for violations of this provision are limited to injunctions, and no damages or rescission may be sought or recovered as a result of any such violations.

B.19. **Binding Effect.** This Agreement binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

B.20. **Time.** Time is of the essence with respect to this Agreement.

B.21. **Governing Law.** This Agreement is to be construed and enforced in accordance with the laws of the state in which the Property is located.

B.22. **No Obligation Regarding Possible Transaction.** Notwithstanding the rights granted to Buyer under this Agreement, and notwithstanding any negotiations or other communications between Seller and Buyer, neither Seller nor Buyer has any obligation whatsoever to proceed with the Possible Transaction or otherwise enter into a Sales Contract or any other agreement concerning Seller’s sale or Buyer’s purchase of the Property or any portion thereof, or to otherwise negotiate for or consummate any transaction of any kind concerning the Property or any portion thereof. Neither Seller nor Buyer has any obligations whatsoever regarding the purchase and sale of the Property unless and until Seller and Buyer execute and enter into a binding Sales Contract, which either party may or may not do in its sole discretion.
Access and Due Diligence Agreement

Seller:

[Name of seller]

By ________________________________

Name: 
Title: 

Buyer:

[Name of buyer]

By ________________________________

Name: 
Title: 

© STATE BAR OF TEXAS

Form 4-23
Option to Purchase

[For Use with Real Estate Sales Contract]

Date:

Seller:

Seller’s Address:

Buyer:

Buyer’s Address:

Property:

Option Fee:

Expiration Date:

Contract: The Real Estate Sales Contract attached as Exhibit [exhibit number/letter]

Purchase Price:

Underwriter:

Escrow Agent:

Escrow Agent’s Address:
In consideration of the Option Fee, Seller grants to Buyer the exclusive and irrevocable option to purchase the Property on the following terms and conditions:

1. **Application of Option Fee.** The Option Fee [will/will not] be applied to the Purchase Price.

2. **Exercise of Option.** To exercise the option, Buyer must execute and deliver to Seller the Contract by the Expiration Date. Within three business days of receiving Buyer’s signed Contract, Seller must execute and deliver the Contract to Escrow Agent.

3. **Termination of Option.** If Buyer does not exercise the option by the Expiration Date, the option terminates, Seller retains the Option Fee, and Buyer will execute and deliver to Seller a recordable release of the option.

4. **Seller’s Default.** If Buyer exercises the option but Seller does not timely execute and deliver the Contract, Buyer has all applicable remedies, including specific performance.

Optionor/Seller:

[Name of seller]

Optionee/Buyer:

[Name of buyer]

Include acknowledgments at the election of the parties or if the buyer intends to file this option agreement in the public records.
Memorandum of Option

Form 4-25

Date:

Seller:

Seller’s Address:

Buyer:

Buyer’s Address:

Property:

Expiration Date:

Seller has granted Buyer an option to purchase the Property. The option must be exercised by the Expiration Date.

Optionor/Seller:

[Name of seller]

Optionee/Buyer:

[Name of buyer]

Include acknowledgments.
Right of First Refusal Agreement

Basic Information

Date:

Grantor:

Grantor’s Address:

Grantee:

Grantee’s Address:

Property:

Term:

A. Grant

A.1. Grantor grants to Grantee a right of first offer to acquire the Property.

A.2. During the Term, if Grantor receives an offer for the sale or other transfer of the Property or any portion thereof or interest therein for any form of consideration that Grantor wishes to accept, Grantor agrees to notify Grantee in writing before accepting the offer. The notice will state the identity of the proposed transferee and the complete terms of the proposed transfer. If the proposed consideration for the transfer is other than cash, the notice will also state the cash equivalent reasonably determined by the Grantor for the noncash consideration.

A.3. Grantee will have the right to purchase the Property on the terms set forth in Grantor’s notice by giving written notice to Grantor within [thirty/[number]] days following
the receipt of Grantor’s notice. If Grantee affirmatively exercises such right, the Property will be transferred to Grantee, and Grantee will pay to Grantor the consideration on the terms set forth in the notice from Grantor.

A.4. If Grantee does not affirmatively exercise its right within the [thirty/[number]]-day period, Grantor may transfer the Property to the party and on the terms described in Grantor’s notice to Grantee within the [180/[number]]-day period following the expiration of the [thirty/[number]]-day period. If a transfer is not consummated within the [180/[number]]-day period, Grantor may not transfer the Property without again complying with the provisions of this Agreement. If Grantor wishes to effect a transfer on terms that are less favorable to Grantor than those described in Grantor’s notice, Grantor must repeat the process set forth in this Agreement by giving a new notice to Grantee setting forth the new terms. If Grantor timely consummates a transfer, this Agreement will automatically terminate when the Property is conveyed to the party named in Grantor’s notice to Grantee.

A.5. If an offer received by Grantor calls for delivery of a promissory note or other deferred payment obligation, the promissory note or other deferred payment obligation of Grantee will be deemed equivalent to those offered.

A.6. If any offer provides for noncash consideration, Grantee disputes Grantor’s determination of the value of the noncash consideration set forth in Grantor’s notice, and Grantor and Grantee cannot resolve the dispute within five business days after Grantee gives notice of the dispute to Grantor, the matter will be submitted to binding arbitration in [city], Texas, under the Commercial Arbitration Rules of the American Arbitration Association by a single arbitrator, and the determination of such arbitrator shall be binding on both parties. The [thirty/[number]]-day period for exercise of Grantee’s rights will be tolled during the period the arbitration proceeding is pending.

A.7. The rights granted in this Agreement expire at the end of the Term.
B. Transfers by Gift, Devise, Descent, or Otherwise without Consideration

If the Property is transferred by gift, devise, descent, or another transaction that does not involve the payment of consideration in any form, the provisions of this Agreement will be fully binding on the person acquiring title to the Property in that transaction.

C. Recordation

Grantee may record this Agreement or a memorandum of this Agreement in the real property records of [county] County, Texas. Grantee will, on request, execute and record a release of this Agreement following its expiration or termination.

D. Assignment

Grantee [may/may not] assign its rights under this Agreement.

E. Notices

Any notice required or permitted under this Agreement must be in writing. Any notice required by this Agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this Agreement. Notice may be also given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

__________________________________________________________________________
[Name of grantor]

__________________________________________________________________________
[Name of grantee]
Right of First Offer Agreement

Basic Information

Date:

Grantor:

Grantor’s Address:

Grantee:

Grantee’s Address:

Property:

Term:

A. Grant

A.1. Grantor grants to Grantee a right of first offer to acquire the Property.

A.2. During the Term, if Grantor wishes to sell the Property or any portion thereof or interest therein for any form of consideration, Grantor must give written notice to Grantee stating the complete terms of the proposed transfer, including the consideration, which must be stated as a cash purchase price.

A.3. Grantee will have the right to purchase the Property on the terms set forth in Grantor’s notice by giving written notice to Grantor within [thirty/[number]] days following the receipt of Grantor’s notice. If Grantee affirmatively exercises that right, the Property will
be transferred to Grantee, and Grantee will pay to Grantor the consideration on the terms set forth in the notice from Grantor.

A.4. If Grantee does not affirmatively exercise its right within the [thirty/number]-day period, Grantor may transfer the Property to another party on the terms described in Grantor’s notice to Grantee within the [270/number]-day period following the expiration of the [thirty/number]-day period. If a transfer is not consummated within the [270/number]-day period, Grantor may not transfer the Property without again complying with the provisions of this Agreement. If Grantor wishes to effect a transfer on terms that are less favorable to Grantor than those described in Grantor’s notice, Grantor must repeat the process set forth in this Agreement by giving a new notice to Grantee setting forth the new terms. If Grantor timely consummated a transfer, this Agreement will automatically terminate when the Property is conveyed to another party.

A.5. The rights granted in this Agreement expire at the end of the Term.

B. Transfers by Gift, Devise, Descent, or Otherwise without Consideration

If the Property is transferred by gift, devise, descent, or another transaction that does not involve the payment of consideration in any form, the provisions of this Agreement will be fully binding on the person acquiring title to the Property in that transaction.

C. Recordation

Grantee may record this Agreement or a memorandum of this Agreement in the real property records of [county] County, Texas. Grantee will, on request, execute and record a release of this Agreement following its expiration or termination.

D. Assignment

Grantee [may/may not] assign its rights under this Agreement.
E. Notices

Any notice required or permitted under this Agreement must be in writing. Any notice required by this Agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this Agreement. Notice may be also given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

[Name of grantor]

[Name of grantee]
# Chapter 5

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§ 5.1 General Considerations for Deeds

Form 5-1 in this chapter, a general warranty deed, conveys to a grantee a fee simple estate in real property with a covenant of general warranty, subject to the reservations and exceptions stated in the deed.

The traditional deed clauses include the granting clause, the habendum clause, and the warranty clause. The customary granting clause includes the grant of the property with its related rights and appurtenances and begins with “grants, sells, and conveys.” The customary habendum clause defines the extent of property ownership to be held by the grantee and begins with “to have and to hold.” The customary warranty clause describes the warranty of title made by the grantor and begins with “Grantor binds.”

Two implied covenants, often called “warranties,” are given by stating that the deed “grants” or “conveys.” By using either of those words, the grantor covenants that—

1. before the execution of the conveyance, the grantor has not conveyed the estate or any interest in the estate to a person other than the grantee; and
2. at the time of the execution of the conveyance, the estate is free from encumbrances.


Taxes, assessments, and liens on real property are included in the term encumbrance. Tex. Prop. Code § 5.024.

The general warranty of title obligates the grantor to indemnify the grantee against any loss resulting from a title defect or from any encumbrances that arose before the conveyance. The grantor warrants that he will restore the purchase price to the grantee if the property is lost. City of Beaumont v. Moore, 202 S.W.2d 448, 453 (Tex. 1947). However, the express covenant of warranty and the implied covenants are limited if exceptions, reservations, and encumbrances are excepted from those warranties by the terms of the deed. A reliable title examination is important to determine if title defects or encumbrances exist.

A deed must identify a grantor and a grantee, contain operative words or words of grant showing the intent of the grantor to convey title to a real property interest to the grantee, and contain an adequate description of the property that is sufficient to identify the subject matter of the grant. Harlan v. Vetter, 732 S.W.2d 390 (Tex. App.—Eastland 1987, writ ref’d n.r.e.). A description in a deed must furnish within itself or by reference to some other existing writing the means by which the land to be conveyed may be identified with reasonable certainty. Morrow v. Shotwell, 477 S.W.2d 538 (Tex. 1972). See section 3.7 in this manual for a discussion of property descriptions.

§ 5.1:1 Statutory Requirements

Although no particular form of warranty deed is required by statute, the Texas Property Code suggests a form and states that any form substantially the same “conveys a fee simple estate in real property with a covenant of general warranty.” Tex. Prop. Code § 5.022. The conveyance and warranty clauses in form 5-1 in this chapter are substantially the same as the statutory lan-
A deed does not have to include a warranty, and the parties may insert any clause or use any form not in contravention of law. Tex. Prop. Code § 5.022.

A deed must be in writing and must be subscribed and delivered by the grantor. Tex. Prop. Code § 5.021. A corporation may convey real property by a deed with or without its seal (subject to any approval required by the Texas Business Organizations Code or the governing documents of the corporation). Tex. Bus. Orgs. Code § 10.251. An unrecorded deed is binding on a party to the instrument, the party’s heirs, and a subsequent purchaser who does not pay a valuable consideration or who has notice of the unrecorded deed, but it is void as to a creditor or subsequent purchaser for value without notice. Tex. Prop. Code § 13.001. If a party to a deed is an individual, the deed must contain the confidentiality rights notice required by Tex. Prop. Code § 11.008(c). See section 3.16 in this manual.

§ 5.1:2 Characterization of Marital Property

Texas follows the community system of property rights of spouses. Under the inception of title doctrine, the character of property, whether separate or community, is fixed at the time of acquisition. Henry S. Miller Co. v. Evans, 452 S.W.2d 426, 430 (Tex. 1970).

Separate property consists of the property owned or claimed by a spouse before marriage; the property acquired by the spouse during marriage by gift, devise, or descent; and the recovery for personal injuries sustained by the spouse during the marriage, except any recovery for loss of earning capacity during marriage. Tex. Fam. Code § 3.001. Spouses may also set aside all or part of their community property as separate property by partition or exchange agreement. See Tex. Const. art. XVI, § 15; Tex. Fam. Code §§ 4.102–.106. Although such property may undergo changes or mutations, as long as it can be traced and properly identified it will remain separate property. McKinley v. McKinley, 496 S.W.2d 540 (Tex. 1973).

Community property consists of the property, other than separate property, acquired by either spouse during marriage. Tex. Fam. Code § 3.002.

Property possessed by either spouse during or on dissolution of marriage is presumed to be community property unless there is clear and convincing evidence that it is separate property. Tex. Fam. Code § 3.003. The presumption of community property may be rebutted and a separate-property presumption may arise if (1) one spouse is the grantor and the other spouse is the grantee (Story v. Marshall, 24 Tex. 305, 308 (1859)), (2) one spouse furnishes separate-property consideration and title is taken in the name of the other spouse (Smith v. Strahan, 16 Tex. 314 (1856)), or (3) the instrument of conveyance contains a “separate property recital” (for example, a statement that the property is conveyed to a spouse as that spouse’s separate property) (Henry S. Miller Co., 452 S.W.2d at 431).

Control of marital property is a separate matter from ownership; it relates to who may sell and convey marital property. A spouse has sole control of his or her own separate property. Tex. Fam. Code § 3.101. However, if the property is homestead, both spouses must execute the conveyance. Tex. Const. art. XVI, § 50. The general rules governing control of community property are statutory. See Tex. Fam. Code § 3.102. Third parties are entitled to rely on certain evidence concerning control. See Tex. Fam. Code § 3.104. Rules of marital property liability are also governed by statute. See Tex. Fam. Code § 3.202.
§ 5.2 General Warranty Deed

§ 5.2:1 General Information

See chapter 3 in this manual for general information about designations of parties, addresses, and property descriptions.

§ 5.2:2 Consideration—Cash Sale

If the parties wish to show the actual amount of the consideration, they may use a description like the one in clause 5-6-6 in this chapter. If the parties prefer not to show the amount of cash paid in a document that will become a public record, the deed may recite as consideration “cash” or a nominal amount and “other consideration.” Suitable descriptions for this purpose are set out in clauses 5-6-4 and 5-6-5. Note, however, that the fictional recitation of a nominal amount may create rights in the grantee or other consequences that the parties do not intend. *See 1464–Eight, Ltd. v. Joppich*, 154 S.W.3d 101 (Tex. 2004).

§ 5.2:3 Consideration—Assumption of Note

If the grantee assumes a note secured by one or more liens, the consideration description in the warranty deed should contain a recitation of any actual or nominal cash paid, a promise to assume and pay the unpaid principal and earned interest of the note, a promise to abide by all terms in all instruments securing the note, and an indemnity to protect the grantor from a breach by the grantee. For an example of such a clause, see clause 5-6-2 in this chapter.

Clause 5-6-2 can be adapted to fit any existing lien. This clause assigns to the grantee any escrow fund for payment of taxes and insurance. Because insurance is often not assumed, an assignment of it to the grantee might prevent the grantor from receiving unearned premiums on cancellation. The clause also states the unpaid principal balance. If the parties do not want to state the unpaid principal balance, the recitation of that balance should be omitted. Most deeds with assumptions provide for a vendor’s lien and a deed of trust to secure assumption. It is important for the grantee to accept a deed with an assumption by signing either the deed or a separate acceptance document because the promises to pay the note and to perform the obligations under the deed of trust and the indemnity benefiting the grantor are contractual obligations of the grantee.

If the grantee assumes a note and the grantor wants to secure payment of the note with both a vendor’s lien in the deed and a deed of trust to secure assumption, the deed should provide for the vendor’s lien in the reservations description and refer to the deed of trust to secure assumption at the end of the deed. See clause 5-9-23. The deed should recite the assumption of the note in the consideration description. Of course, if only a vendor’s lien is retained, references to the deed of trust to secure assumption should be omitted.

§ 5.2:4 Consideration—Subject to Note That Grantee Does Not Assume

If the consideration is cash but the property is encumbered by a lien securing a note that the grantee does not assume, the deed should show that the conveyance is subject to that encumbrance. In this instance the consideration description in the deed will recite the cash consideration, and the exceptions description should show that the conveyance is subject to one or more liens and that the grantee does not assume the debt. See clause 5-8-39 in this chapter.
§ 5.2:5 Consideration—Separate Property of Grantee

If the property is conveyed as the grantee’s separate property, that fact should be recited in the deed. There are two opportunities to characterize the property as separate. First, the description of consideration may state that it was paid from the grantee’s separate property. See clauses 5-6-11 and 5-6-12 in this chapter. Second, the parties should insert a reference to the separate nature of the property in the space provided for miscellaneous clauses following the conveyance and warranty clause. For an example, see clause 5-9-16.

§ 5.2:6 Reservations from Conveyance


If the grantor wishes to reserve a property right from the conveyance, the reservation should be described under that heading in the deed. A reservation in favor of a third party is inoperative. Little v. Linder, 651 S.W.2d 895, 900–901 (Tex. App.—Tyler 1983, writ ref’d n.r.e.).

Examples of common reservations are found in form 5-7 in this chapter.

§ 5.2:7 Exceptions to Conveyance and Warranty

All encumbrances affecting the property, whether recorded or not, must be excepted to, or the grantor will breach the general warranty clause immediately on execution of the warranty deed. The items may be excepted to in broad, general terms or specifically itemized. The broad exceptions are more commonly preferred by sellers and the specific exceptions by buyers.

If specific exceptions are used, those suggested in form 5-8 in this chapter may be appropriate, depending on the condition of title. If the parties have agreed not to examine title, the broadest possible exception will be appropriate. See clauses 5-8-1 and 5-8-2.

Properly used, an exception excludes an existing outstanding interest from the conveyance. Donnell v. Otts, 230 S.W. 864, 865 (Tex. Civ. App.—Fort Worth 1921, no writ). Exceptions should be drafted so as not to validate an instrument that is no longer in effect. Morgan v. Fox, 536 S.W.2d 644, 649–50 (Tex. Civ. App.—Corpus Christi 1976, writ ref’d n.r.e.).

§ 5.3 General Warranty Deed with Vendor’s Lien

The warranty deed with vendor’s lien is designed for use anytime a portion of the purchase price is financed. This usually occurs when the note is to be executed either in favor of the grantor or a third-party mortgagee financing the grantee’s purchase of the property. Other circumstances in which use of a warranty deed with vendor’s lien is appropriate include the assumption of an existing first-lien note together with execution of a new second-lien note to the grantor or a third party, or execution of new first- and second-lien notes. See form 5-2 in this chapter.
§ 5.3:1 General Considerations

Anytime the entire purchase price is not paid to the grantor of real property, an implied vendor’s lien arises in favor of the grantor, whether stated in the deed or not. *Briscoe v. Bronaugh*, 1 Tex. 326, 330 (1846); *Delley v. Unknown Stockholders of the Brotherly & Sisterly Club of Christ, Inc.*, 509 S.W.2d 709, 714 (Tex. Civ. App.—Tyler 1974, writ ref’d n.r.e.). A bona fide purchaser for value and without notice of the implied vendor’s lien, however, takes title free from the implied lien. *Smith v. Price*, 230 S.W. 836, 838 (Tex. Civ. App.—Austin 1921, no writ). Implied vendor’s liens may arise in the following instances:


3. Exchange. An implied vendor’s lien may arise in the land conveyed and for the benefit of the party who received exchange property with a defective title. *White v. Street*, 2 S.W. 529, 531 (Tex. 1886); *Price*, 230 S.W. at 838.

4. Spreading. If a grantor conveys two tracts of land and receives the full purchase price for one but takes a note for the other, the grantor is entitled to an implied vendor’s lien on both tracts. *Bielss v. Moeller*, 83 S.W.2d 1098, 1101 (Tex. Civ. App.—Austin 1935, no writ). Similarly, if one of the two tracts is encumbered by a lien that is assumed, the holder of the assumed debt is entitled to an implied vendor’s lien on both tracts. *Fidelity Union Fire Insurance Co. v. Cain*, 28 S.W.2d 833, 836 (Tex. Civ. App.—Dallas 1930, no writ).

Although an express vendor’s lien may be reserved in documents other than the deed, reserving it in the deed has the advantage of its being recorded for notice purposes. *See Simms v. Espindola*, 310 S.W.2d 364, 366–67 (Tex. Civ. App.—San Antonio 1958, writ ref’d n.r.e.). Texas courts have consistently held that a deed expressly retaining a vendor’s lien is an executory contract as it applies to the grantor and grantee and those in privity with them, but it is executory only to the extent that superior title remains in the grantor and will be vested automatically in the grantee on payment of the purchase money. *See Zapata v. Torres*, 464 S.W.2d 926, 928–29 (Tex. Civ. App.—Dallas 1971, no writ). In all other respects affecting the parties and strangers to the transaction, the deed is an executed contract rather than an executory one. *See Babb v. McGee*, 507 S.W.2d 821, 823 (Tex. Civ. App.—Dallas 1974, writ ref’d n.r.e.).

The phrase *vendor’s lien and superior title* is the conventional means of expressing the intention of the parties to make rescission available to the vendor’s lien holder.

§ 5.3:2 Execution of Note to Grantor or Third Party

If the grantee in the deed gives the grantor a note for consideration, both a note and a deed of trust are ordinarily required. The note should contain a security clause such as clauses 6-5-1 through 6-5-4 in this manual. The deed of trust should contain a vendor’s lien clause, such as clause 8-3-1.

The same documents are required when the note is to a third party, and the note should also have a security clause like that suggested for a note payable to the grantor. The deed of trust, however, should instead have a clause like clause 8-3-2. In this case, the vendor’s lien is reserved in the deed and transferred to the third-party lender.
§ 5.3:3 Execution of First-Lien Note and Second-Lien Note

Two separate notes and two deeds of trust are necessary if the grantee in the deed is to execute a first-lien note payable to the grantor or a third party and a second-lien note payable to the grantor or a third party. Each note is secured by a deed of trust in which each respective payee is the beneficiary. Each of the four documents should be identified as “first-lien” or “second-lien,” both in its title and in additional language.

§ 5.3:4 Assumption of First-Lien Note and Execution of Second-Lien Note

The grantee’s assumption of a first-lien note is ordinarily accompanied by a deed of trust to secure assumption. The simultaneous execution of a second-lien note requires a note payable to the grantor or a third party and a deed of trust naming the grantor or the third party as beneficiary. These two documents should be identified as second-lien instruments both in their titles and in additional language. See the discussion at sections 5.2:3 above and 5.3:5 below and sections 8.6 and 8.7 in this manual.

§ 5.3:5 Consideration and Miscellaneous Clauses

Clauses 5-6-1, 5-6-2, 5-6-8, 5-6-13, and 5-6-14 in this chapter describe a variety of financing choices if the consideration involves a note, an assumption, or both.

Execution of Note to Grantor: A common transaction involving the warranty deed with vendor’s lien is one in which the grantee executes a note in favor of the grantor. See clause 5-6-13. In addition to the deed provisions, the note should contain a security clause, such as clauses 6-5-1 through 6-5-4 in this manual. The deed of trust should contain a clause like clause 8-3-1.

Execution of Note to Third Party: If the note is in favor of a third party financing the grantee’s purchase, the warranty deed with vendor’s lien should contain both a consideration clause like clause 5-6-13 and another clause noting that the lien is retained in favor of the third party. The second clause should appear in the space provided for additional clauses. See clause 5-9-8. Also, the note should contain a security clause like clauses 6-5-1 through 6-5-4, and the deed of trust should contain a clause like clause 8-3-2.

Execution of First-Lien Note to Third Party and Second-Lien Note to Grantor: If the grantee executes a first-lien note to a third party and a second-lien note to the grantor, appropriate clauses must be added to the consideration description and to the clause that retains the lien, as suggested at clause 5-6-8 and clause 5-9-9.

Assumption of First-Lien Note and Execution of Second-Lien Note to Grantor: If the grantee assumes an existing first-lien note and executes a second-lien note to the grantor, the grantor should provide that the vendor’s lien secures both the second-lien note and the assumption. Clause 5-6-1 and clause 5-9-10 provide for this. When used with the second-lien clause in the note, which appears as clauses 6-6-1 and 6-6-2, they authorize maturity of the second-lien note if the grantee defaults on the note assumed. If the grantor is not released from liability for the assumed debt, the assumption is generally also secured by a deed of trust to secure assumption, form 8-2.

Assumption of First-Lien Note and Execution of Second-Lien Note to Third Party: If the grantee assumes an existing first-lien note and executes a second-lien note to a third party, the deed should provide that the vendor’s lien secures both the second-lien note and the assumption. For this use clause 5-6-1 and clause 5-9-11. The assumption is generally also secured by a deed of trust to secure assumption, form 8-2.
§ 5.4 Special Warranty Deed

By converting the general warranty to a special warranty, the grantor warrants to defend the title conveyed to the grantee only to the extent that claims are made by, through, or under the grantor. The special warranty covers only title defects caused by the grantor, not those caused by the grantor’s predecessors in title. Title insurance coverage for covenants of warranty on the insured’s conveyance of title is available under an owner policy of title insurance; however, this coverage is limited to title defects that are covered by both the covenants of warranty and the title insurance policy. Because the owner policy purchased on acquisition of property covers only title defects caused before the purchase, and the special warranty warrants only against title defects caused after the purchase, the title insurance coverage for covenants of warranty provides no benefit under these circumstances.

See form 5-3 in this chapter for a special warranty deed.

§ 5.5 Deed without Warranty

A covenant of warranty is not required in a conveyance. Tex. Prop. Code § 5.022(b). The deed without warranty passes the grantor’s title to the grantee with an express exclusion of warranties. This deed relieves the grantor of any warranty responsibility for title defects yet provides the grantee a true deed, as opposed to a mere quitclaim. See form 5-4 in this chapter.

§ 5.6 Quitclaim

A quitclaim conveys only the right, title, and interest that the grantor has in the property at the time the instrument is executed and delivered. It will not convey “after-acquired” title—that is, title acquired after the date of the execution and delivery of the quitclaim deed. There is no recourse by the grantee or any subsequent owner of the property against the grantor. See form 5-5 in this chapter for an example of a quitclaim.

A quitclaim gives notice to the grantee that title to the property may not be clear, so the grantee is not a bona fide purchaser for value. Thus, if the grantor has title to the property but will not warrant title, a deed without warranty is preferable to a quitclaim. An adverse possessor cannot rely on a quitclaim as a basis for claiming title to property under the Texas five-year limitations statute, Tex. Civ. Prac. & Rem. Code § 16.025; Porter v. Wilson, 389 S.W.2d 650 (Tex. 1965).

§ 5.7 Bill of Sale

§ 5.7:1 Purpose and Effect

Some types of personal property are subject to statutory requirements for a bill of sale on transfer of title. A nonexclusive list includes (1) livestock (Tex. Agric. Code § 146.001), (2) trees or timber (Tex. Nat. Res. Code §§ 151.001–.006), and (3) used pipeline and oil and gas equipment (Tex. Nat. Res. Code §§ 112.011–.012).

For other types of property, recording is optional but useful for notifying third parties of the buyer’s rights under a contract for sale. See Tex. Bus. & Com. Code § 2.107(c) (contract for sale of goods to be severed from realty).

The sale of a motor vehicle cannot occur unless the owner designated on the title submits a transfer of ownership of the title. Tex. Transp. Code § 501.071.

§ 5.7:2 Instructions for Completing Forms

The bill of sale, form 5-16 in this chapter, may be used to transfer title to most personal property. This form makes an express warranty of title, but that warranty and implied warranties may be excluded.

The blanket bill of sale, form 5-15, is used to ensure that the buyer has acquired ownership of the personal property assets that may be involved in a transaction if a specific listing of items is impractical.

If a blanket bill of sale is used, it is important that the seller specifically identify as excluded property anything that will not be transferred.

Generally, the description of the property should clearly identify the personal property sold and, if possible, should include a specific description, make, model, and identifying number.

See the discussion at section 5.12:2 below about the possibility of including the bill of sale in the deed itself.

§ 5.7:3 Warranties

The sale of goods creates three implied warranties under the Texas Uniform Commercial Code:

1. Warranty of Title. The seller warrants that at the time of conveyance the title conveyed is good, that its transfer is lawful, and that the title is free from encumbrances other than those known to the buyer. Tex. Bus. & Com. Code § 2.312. In addition to the implied warranty of title, the bill of sale forms (forms 5-15 and 5-16 in this chapter) contain an express warranty of title.

2. Warranty of Merchantability. If the seller is a merchant of goods of the kind sold, the sale creates an implied warranty of merchantability for the goods. Tex. Bus. & Com. Code § 2.314(a). The UCC defines minimum standards of merchantability. Course of dealing or usage may imply other minimum standards.

3. Warranty of Fitness. If the seller has reason to know that the buyer is relying on the seller’s skill or judgment in furnishing goods suitable for a particular purpose, a warranty of fitness for that purpose arises. Tex. Bus. & Com. Code § 2.315.

These warranties may be excluded or modified through revisions to the bill of sale. Any exclusion is subject to the provisions of Tex. Bus. & Com. Code § 2.316.

§ 5.8 Correction Deed

Correction deeds are generally used to accomplish amicably what would otherwise be done through a suit for reformation. Reformation is the equitable power of courts to correct a written instrument that due to mutual mistake fails to embody the actual agreement reached by the parties. National Resort Communities, Inc. v. Cain, 526 S.W.2d 510, 513–14 (Tex. 1975). Reformation will not go beyond the original agreement. Southwest Savings Ass’n v. Dunagan, 392 S.W.2d 761, 768 (Tex. Civ. App.—Dallas 1965, writ ref’d n.r.e.).

As between the parties, a correction deed generally relates back to the date of the original incorrect deed. Parker, 353 S.W.2d at 956; Buccaneer’s Cove, Inc. v. Mainland Bank, 831 S.W.2d 582, 584 (Tex. App.—Corpus Christi 1992, no writ). However, bankruptcy of an intervening bona fide purchaser for value will prevent the relation back. See In re Jones, 37 B.R. 969 (Bankr. N.D. Tex. 1984).

The consideration for the correction deed is the correction. Tatum v. Blackstock, 418 S.W.2d 269, 274 (Tex. Civ. App.—Waco 1967, writ ref’d n.r.e.). Although the correction deed is considered a replacement for the original deed, the original deed will be used to determine the intention of the parties; further, the original deed may continue to be controlling with respect to matters outside of the stated purpose of the correction deed. Parker, 353 S.W.2d at 956.

The right to a correction deed and the right to reformation are subject to a four-year limitations period. Barker v. Coastal Builders, Inc., 271 S.W.2d 798, 804 (Tex. 1954). Further, certain technical defects in instruments will be cured by statute unless suit is brought within two years of recording. Tex. Civ. Prac. & Rem. Code § 16.033.

While a correction deed replaces and is a substitute for the original instrument, a correction deed is not effective as to a bona fide purchaser. Tex. Prop. Code § 5.030(b), (c). A title search is suggested to determine whether any intervening bona fide purchasers exist.

Instruments that correct a conveyance of real property should comply with sections 5.027 through 5.031 of the Texas Property Code. Nonmaterial corrections are subject to section 5.028, and material corrections are subject to section 5.029.

Instruments that correct a material error must be, and instruments that correct a nonmaterial error may be, executed by each party to the conveyance or, if applicable, the parties’ heirs, successors, or assigns. Tex. Prop. Code § 5.029(a). These instruments must be recorded. Tex. Prop. Code §§ 5.028(d)(1), 5.029(b)(2). Clause 5-9-5 may be inserted as the last paragraph in a restated deed executed by the original parties to the conveyance, or by their heirs, successors, or assigns, to correct a material or nonmaterial error.

A person who has personal knowledge of the relevant facts is authorized to execute a correction instrument to make a nonmaterial change that resulted from a clerical error, without the joinder of the original parties to the conveyance or their heirs, successors, or assigns. These changes include correction of an inaccurate or incorrect element in a legal description, including a distance, angle, direction, bearing, or chord, a reference to a plat or other plat information, and other matters set forth in the statute; an addition, correction, or clarification of a party’s name or marital status; the date on which the conveyance was executed; the recording data for an instrument referenced in the correction instrument; or a fact relating to the acknowledgment or authentication of the original conveyance. Tex. Prop. Code § 5.028(a). A correction instrument executed by a person with knowledge of the relevant facts may also provide an acknowledgment or authentication that was not included in the original conveyance.
A person who has personal knowledge of the relevant facts is authorized to execute a correction instrument to make a nonmaterial change that resulted from an inadvertent error, without the joinder of the original parties to the conveyance or their heirs, successors, or assigns. These changes include the addition, correction, or clarification of a legal description prepared in connection with the preparation of the original instrument but inadvertently omitted or an omitted call in a metes-and-bounds description that completes the legal description of the property. Tex. Prop. Code § 5.028(a–1).

The person executing the correction instrument must disclose in the instrument the basis for his knowledge of the relevant facts; send a copy of the correction instrument and notice by first class mail, e-mail, or other reasonable means to each party to the original conveyance and, if applicable, the parties’ heirs, successors, and assigns; and record the correction instrument and evidence of notice. Tex. Prop. Code § 5.028(d)(2). Form 5-24 in this chapter is a form for making a nonmaterial correction by a person with knowledge of relevant facts.

In addition to nonmaterial corrections, including the corrections described by section 5.028 of the Property Code, the parties to the original transaction or their successors or assigns may execute a correction instrument to make a material correction to the recorded original instrument of conveyance. These material changes include adding a buyer’s disclaimer of an interest in the property, a mortgagee’s consent to or subordination to a recorded document, or land to a conveyance that correctly conveys other land; removing land from a conveyance that correctly conveys other land; and correcting a description of a lot or unit number or letter of property that is inaccurately identified as another lot or unit number or letter. Tex. Prop. Code § 5.029.

A correction instrument that complies with section 5.028 or 5.029 of the Property Code is (1) effective as of the effective date of the conveyance, (2) prima facie evidence of the facts stated in the correction instrument, and (3) notice to a subsequent buyer of the facts stated in the correction instrument. Tex. Prop. Code § 5.030.

Title companies may require a jurat as a prerequisite to acceptance.

See clause 5-9-5 and form 5-24 for correction deed language.

§ 5.9 Gift Deed


If the grantor desires to make a gift, the commonly understood terminology to evidence the donative interest, although not true consideration, is a recitation of “love and affection” as the consideration. However, other words and phrases that accomplish the same purpose are appropriate, especially when “love and affection” are not the grantor’s motivation to make the gift. See clauses 5-6-9 and 5-6-10 in this chapter. Further, the deed should be titled “Gift Deed.”

An essential characteristic of a gift is the absence of consideration paid by the donee to the donor. A deed by gift that otherwise satisfies the requirements for an effective conveyance will vest title in the grantee to the same extent as a deed with valuable consideration. Woodworth v. Cortez, 660 S.W.2d 561, 564 (Tex. App.—San Antonio 1983, writ ref’d n.r.e.).

A gift is presumed if a parent purchases property in the name of a child. Woodworth, 660 S.W.2d at 564.
§ 5.10 Partition Deed

A partition is the act of dividing the undivided interests in property held by joint owners so each owns full title to a separate tract. The term joint owner includes ownership arrangements also sometimes known as tenants in common, cotenants, or joint tenants. Partitions may be either voluntary or involuntary. A voluntary partition is accomplished by a written instrument or deed. Houston Oil Co. of Texas v. Kirkindall, 145 S.W.2d 1074, 1077 (Tex. 1941); Chandler v. Hartt, 467 S.W.2d 629, 634 (Tex. Civ. App.—Tyler 1971, writ ref’d n.r.e.). An involuntary partition arises when a cotenant exercises the statutory right to compel a partition. See Tex. Prop. Code §§ 23.001—.004. If property is partitioned involuntarily, a nonexclusive access easement may be required in limited circumstances. See Tex. Prop. Code § 23.006. An express agreement among joint owners not to partition is enforceable. Lichtenstein v. Lichtenstein Building Corp., 442 S.W.2d 765, 769 (Tex. Civ. App.—Corpus Christi 1969, no writ).

Form 5-23 in this chapter is a partition deed for effectuating a voluntary partition. Often partition deeds are executed by family members who have inherited the co-owned properties. In this situation, a special warranty of title ordinarily will be preferred by the parties. Often no title search is obtained, and a party usually will not want to be responsible for warranting title to the land partitioned to the other family members (except as to that party’s own acts). Accordingly, form 5-23 contains a special warranty of title. If a general warranty of title or deed without warranty is desired, form 5-23 may be adapted to provide for this. If no title search is performed in connection with a partition deed, the other parties may be unaware that one party’s acts have given rise to a lien, such as a federal tax lien or child support lien. Knowledge of the existence of a lien before the partition deed is executed is desirable so that the lien may be addressed, as this is preferable to a claim for breach of warranty of title, whether special or general.

Partitions are not subject to the statute of frauds, making oral partitions enforceable (Houston Oil Co. of Texas, 145 S.W.2d at 1077), and partitions do not alter the character of property as either separate or community (Westhoff v. Reitz, 554 S.W.2d 1 (Tex. Civ. App.—Fort Worth 1977, writ ref’d n.r.e.).

Owelty is the difference that is paid by one joint owner to another or a lien that arises for the purpose of equalizing the partition. In instances in which one joint owner is to receive owelty from another, see the discussion of owelty of partition in section 5.13:5 below.

If suit is filed to foreclose a tax lien, joint owners are entitled to partition their property and have the taxes apportioned pro rata. Tex. Tax Code § 33.46.

§ 5.11 Transfer on Death Deed

The Texas Real Property Transfer on Death Act authorizes an individual to execute and record a transfer on death deed to make a revocable transfer of the transferor’s interest in real property to one or more designated beneficiaries, including alternate beneficiaries, effective at the transferor’s death. See Tex. Est. Code ch. 114.

§ 5.11:1 Purpose and Effect

A transfer on death deed transfers a transferor’s interest in real property to designated beneficiaries effective at the transferor’s death. Tex. Est. Code § 114.051. As a transfer on death deed is nontestamentary, probate proceedings are not necessary to transfer the transferor’s interest in the described real property to the designated beneficiaries. Tex. Est. Code § 114.053.
During the transferor’s lifetime, a transfer on death deed does not affect any right, title, or interest of the transferor in the property, vest any legal or equitable title in a designated beneficiary, or subject the property to the claims of creditors of any designated beneficiary. Notwithstanding the recordation of a transfer on death deed, the transferor retains the right to transfer or encumber the property, any present or future homestead rights, and any present or future ad valorem tax exemptions to which the transferor is entitled. During the transferor’s lifetime, a transfer on death deed does not affect the rights of creditors of the transferor, secured or unsecured, and does not trigger any “due on sale” clause. Upon the death of the transferor a secured creditor’s rights are subject to the Texas Estates Code. A transfer on death deed does not affect the eligibility for public assistance of either the transferor or any designated beneficiary. Tex. Est. Code § 114.101.

At the death of the transferor, the transferor’s interest in the property is transferred to the designated beneficiaries in accordance with the deed. Tex. Est. Code § 114.103(a). A transfer under a transfer on death deed lapses as to a designated beneficiary that disclaims in the manner provided in chapter 122 of the Estates Code. Tex. Est. Code § 114.105. A transfer also lapses as to a designated beneficiary that does not survive the transferor by 120 hours. Lapsed transfers of concurrent interests pass in accordance with subchapter D of chapter 255 of the Estates Code. Except where chapter 255 applies, concurrent interests are transferred in equal, undivided interests with no right of survivorship, subject to the transferor’s option to provide alternative disposition of lapsed transfers. Tex. Est. Code § 114.103(a).

Even if the transfer on death deed provides otherwise, a transfer on death deed transfers title to a beneficiary without warranty of title. Tex. Est. Code § 114.103(d). A beneficiary under a transfer on death deed takes title to the property subject to all conveyances, liens, encumbrances and other rights enforceable against the property at the transferor’s death. Tex. Est. Code § 114.104. Although not considered a probate asset, claims against the transferor’s estate, expenses of administration, estate taxes, allowances in lieu of exempt property, and family allowances are enforceable against property transferred by a transfer on death deed. Tex. Est. Code § 114.106.

§ 5.11:2 Requirements Generally; Exceptions

A transfer on death deed must state that the transfer occurs at the transferor’s death, be properly executed by the transferor, be properly recorded before the transferor’s death, and contain the essential elements and formalities of deeds, except consideration, notice, delivery, or acceptance. Tex. Est. Code §§ 114.055, 114.056. No statutorily required notice or disclosure need be given in connection with a transfer on death deed. Tex. Est. Code § 114.101(6).

§ 5.11:3 Transferor Considerations

A transferor must have capacity to contract to make or revoke a transfer on death deed. Tex. Est. Code § 114.054(a). A transfer on death deed cannot be created under a power of attorney. Tex. Est. Code § 114.054(b).

§ 5.11:4 Proper Recordation

To be effective, a transfer on death deed must be recorded before the transferor’s death in the county where the property is located. Tex. Est. Code § 114.003. Likewise, an instrument revoking a transfer on death deed must be recorded before the transferor’s death. Tex. Est. Code § 114.057(a).
§ 5.11:5  Caution—Existing Rights of Survivorship

If a transferor is a joint owner with right of survivorship, a transfer on death deed will not be effective unless the transferor is the surviving joint owner. Tex. Est. Code § 114.103(b). A transfer on death deed made by joint owners with the right of survivorship can be revoked only by all living joint owners. Tex. Est. Code § 114.057(e).

§ 5.11:6  Revocation Generally

Even if the transfer on death deed provides otherwise, a transfer on death deed is revocable. Tex. Est. Code § 114.052. Revocation, in whole or in part, is effective upon the proper recordation before the transferor’s death of a subsequent, inconsistent transfer on death deed, a subsequent instrument of revocation, a divorce decree dissolving the marital relationship between the transferor and a designated beneficiary, or a subsequent conveyance by the transferor. If the transfer on death deed is made by more than one transferor, a revocation is only effective as to the interest of the revoking transferor and does not affect the interests of the non-revoking transferors. Tex. Est. Code § 114.057.

§ 5.11:7  Revocation—Subsequent Transfer on Death Deed

A prior transfer on death deed is revoked on the recordation of a subsequently acknowledged transfer on death deed as to the interests that are expressly stated or are inconsistent with the subsequent deed. Tex. Est. Code § 114.057(a). Form 5-25 in this chapter provides optional clauses for revoking all or part of a prior transfer on death deed. Alternatively, form 5-26 or form 5-27 can be used to document the revocation of the prior transfer on death deed in whole or in part.

§ 5.11:8  Revocation—Subsequent Instrument of Revocation

A prior transfer on death deed is revoked upon the recordation of a subsequently acknowledged instrument of revocation, other than a will, that expressly revokes the prior deed, as to the beneficiaries and property designated in the instrument. Tex. Est. Code § 114.057(a). A subsequent will made by the transferor does not revoke nor supersede a transfer on death deed. Tex. Est. Code § 114.057(b).

Form 5-26 or form 5-27 in this chapter can be used to revoke a prior transfer on death deed in whole or in part.

§ 5.11:9  Revocation—Divorce

The recordation of a notice of a final decree of divorce dissolving the marital relationship between a transferor and a designated beneficiary revokes a transfer on death deed as to the divorced, designated beneficiary. Tex. Est. Code § 114.057(c).

§ 5.11:10  Revocation—Subsequent Conveyance; Protection of Purchasers

A subsequent, valid conveyance by the transferor during the transferor’s lifetime renders a prior transfer on death deed void as to any interest in the property conveyed if the conveyancing instrument is properly recorded before the death of the transferor. Tex. Est. Code § 114.102.

Form 5-26 or form 5-27 in this chapter, as the circumstances dictate, will document the revocation of a prior transfer on death deed.
§ 5.11:11 Instructions for Completing Form

Form 5-25 in this chapter can be used to transfer to one or more designated beneficiaries, including alternative beneficiaries, the transferor’s interest in real property effective at death of the transferor.

Although the transferor can rely upon the presumed anti-lapse provisions in chapter 114 of the Texas Estates Code, if the transferor intends to transfer the transferor’s community property interest in property to a surviving spouse, or to the transferor’s children if the transferor’s spouse predeceases the transferor, it is recommended that the transferor’s spouse be designated as the primary beneficiary and the children designated as the alternate beneficiaries.

Caution should be employed in selecting the alternative clauses for disposition of the property where a named primary beneficiary does not survive the transferor as the alternative clause selected will determine whether the deceased primary beneficiary’s share will pass to the other primary beneficiaries, the descendants of the deceased primary beneficiary, or named alternative beneficiaries. Alternative clauses are provided for the disposition of the property to the descendants of a deceased beneficiary or to the other named beneficiaries.

As consideration is not required for the validity of a transfer on death deed, and to avoid uncertainty about whether consideration was exchanged, references to recitations and confessions of consideration are intentionally omitted in form 5-25.

As there are no warranties of title under a transfer on death deed and, at the death of the transferor, title passes subject to all present and subsequent conveyances, liens, and other encumbrances, references to exceptions to conveyance and warranties are intentionally omitted in form 5-25.

Any interest that the transferor intends to reserve from the transfer on death deed should be properly described in the heading “Reservations from Transfer.” See section 5.2:6 above for a discussion of reservations. Examples of common reservations are found in form 5-7.

Form 5-26 revokes a prior transfer on death deed in its entirety.

Form 5-27, depending on the options clause selected, partially revokes a prior transfer on death deed as to the property described either to all beneficiaries or only as to specifically named beneficiaries.

§ 5.12 Additional Clauses

Provisions other than the consideration clause, property description, reservations, and exceptions may be called for in some deeds. These clauses may be located in several different places in the deed. Use of some of these provisions is discussed in this section, and sample language is found in form 5-9 in this chapter.

§ 5.12:1 Waiver of Implied Liens

The implied vendor’s lien should be negated if its existence is not intended by the parties. If the grantor who receives the full price for one parcel is to waive the implied lien on that parcel, the waiver in clause 5-9-24 in this chapter may be used. If an existing lien affects only a portion of the property conveyed by an assumption deed, the deed should contain an express waiver to avoid spreading the lien. Clause 5-9-25 is an example of an appropriate waiver for this purpose. If the parties exchanging property wish to waive the implied lien, the waiver in clause 5-6-7 may be used in the description of the consideration.
§ 5.12:2  Bill of Sale Combined

Many kinds of personal property, including items used in operating the improvements that can be removed without materially damaging the improvements, are often transferred as part of the sale of real property.

Personal property is not included in the real property description and thus is not transferred by the deed. Instead, personal property is transferred by bill of sale. The personal property transfer can be accomplished in a separate bill of sale or by including the bill of sale in the deed itself. A combined instrument has the benefit of reducing the number of documents to be signed at closing.

To add the personal property transfer to the deed, the drafter may use the clauses provided. See clauses 5-9-12 and 5-9-13 in this chapter.

§ 5.12:3  “As Is” Conveyance

If the conveyance is on an “as is” basis, the parties may evidence the basis of the bargain in the deed. See clause 5-9-1 in this chapter.

For a separate disclaimer form, see form 26-33 in this manual.

§ 5.12:4  Fee Simple Determinable

A fee simple determinable exists if a fee simple estate will terminate automatically and revert to the grantor on the occurrence of a stated event.

The phrase “as long as” has been recognized as evidencing a fee simple determinable estate. See Clark v. Perez, 679 S.W.2d 710, 712 (Tex. App.—San Antonio 1984, no writ). In addition, it is prudent practice to state an intent to create a fee simple determinable because of the presumption that a conveyance is a fee simple absolute (see Tex. Prop. Code § 5.001(a)) and the rule of interpretation construing provisions as covenants rather than conditions. Schwarz-Jordan, Inc. v. Delisle Construction Co., 569 S.W.2d 878, 881 (Tex. 1978). See clause 5-9-7 in this chapter.

In some cases the event that would cause the fee simple determinable condition to be satisfied is not evident from an inspection of the property, which creates uncertainty concerning title. In those situations, it is suggested that the condition language include a provision for recording a document that establishes with certainty the satisfaction of the condition. For example, the suggested clause at 5-9-6 includes a provision allowing an affidavit to serve as evidence of the satisfaction of the condition, unless contradicted by another affidavit.

§ 5.12:5  Strips and Gores

For public policy reasons, a deed may be construed as including a small parcel of land in the conveyance of the larger tract if it is shown that the small parcel to be included (1) is small in comparison to the land conveyed, (2) is adjacent to or surrounded by the land conveyed, (3) belonged to the grantor at the time of the conveyance, and (4) was of no benefit or importance to the grantor. Alkas v. United Savings Ass’n of Texas, 672 S.W.2d 852, 857 (Tex. App.—Corpus Christi 1984, writ ref’d n.r.e.). This doctrine is called the “strip and gore doctrine.” Including a strips-and-gores provision in the deed is intended to
ensure that the principle is applied in the transaction without the necessity of supplying proof of these elements. See clause 5-9-17 in this chapter for an example.

Because of the strip and gore doctrine, a conveyance of land bounded by a public highway carries with it the fee to the center of the road as part and parcel of the grant, even if the deed describes the abutting land by metes and bounds extending only to the edge of the highway. *State v. Williams*, 335 S.W.2d 834, 836 (Tex. 1960); *Krenek v. Texstar North America, Inc.*, 787 S.W.2d 566, 568–69 (Tex. App.—Corpus Christi 1990, writ denied). The doctrine does not apply if the grantor owns land on both sides of the strip. *Rio Bravo Oil Co. v. Weed*, 50 S.W.2d 1080, 1086 (Tex. 1932). Nor does the doctrine apply if the strip is larger and more valuable than the conveyed tract. *Angelo v. Biscamp*, 441 S.W.2d 524, 527 (Tex. 1969).

The strips-and-gores provision should be included in a deed conveyance form rather than a quitclaim to avoid the concerns about quitclaims stated in the commentary at section 5.6 above; however, the warranties should be eliminated in case no strips or gores exist.

When using the strips-and-gores provision, the attorney should review other provisions of the deed that describe the property, because the strips and gores are discussed separately from the property. One suggestion is to add “and all strips and gores and appurtenances thereto” to the references to the property, other than in the warranty clause. Another option is to include strips and gores as a defined term within the definition of the property, then except the strips and gores out of the warranty in the express exclusion of warranties provisions.

§ 5.12:6 Wraparound Lien

If the seller agrees to continue to service an existing lien debt while the buyer executes a new note that is not reduced by the amount of the preexisting lien debt (commonly known as a wraparound transaction), the deed should be written to take exception to the preexisting lien to avoid breaching the warranty concerning encumbrances. The buyer should take title “subject to,” and without assuming, the preexisting lien debt.

See clause 5-9-26 in this chapter. See also section 6.4:2 in this manual and sections 8.3 through 8.5:3.

§ 5.12:7 Transfer of Escrow and Insurance Policy

Lenders often establish an escrow for the payment of taxes and insurance relating to the property securing the loan. The escrow arrangement generally seeks to ensure that sufficient funds exist in the escrow to pay all real property ad valorem taxes when they come due and to pay the annual hazard insurance premium on its anniversary date.

If real property is transferred with the assumption of an existing lien debt or subject to a preexisting lien debt, regardless of whether the insurance and taxes are being prorated to the date of closing, it is customary for the seller to transfer the entire escrow fund to the buyer. It is generally considered simpler to prorate the escrow balance to the date of closing through the closing settlement statement, rather than have the buyer send money to the lender and expect the lender to reimburse the seller for that exact amount out of the escrow. The transfer of the escrow fund is usually included in the deed, although this is not required. Additionally, some lenders require the signing of a separate transfer form before the escrow will be transferred to the buyer. The more cautious approach would be to include the transfer both in the deed and in a separate document.

The transfer of escrow often includes a transfer of the insurance policy to the buyer, if the seller has agreed that the policy will be transferred. If the buyer will not assume the existing coverage, the seller should keep the policy in order to be entitled to the
refund of unearned premiums when the buyer’s replacement policy is substituted for the seller’s policy coverage. Several aspects of insurance are regulated by statute, such as the fee for substitution of coverage and the kind of insurance binder a mortgage company must accept. The statutes governing prohibited practices relating to property insurance are found in chapter 549 of the Texas Insurance Code. See Tex. Ins. Code ch. 549. Unless the drafting attorney knows the agreement concerning the transfer of the insurance policy, it is suggested the deed include either nothing concerning the insurance or a statement that any transfer of insurance will be handled between the buyer and seller by separate instrument.

Form 5-17 in this chapter is provided to accomplish the transfer of escrow by separate instrument. Clause 5-9-22 may be used to incorporate the transfer of escrow in the deed.

§ 5.12:8 Assumption of Liability Agreements for VA-Guaranteed Loans

If a loan guaranteed by the Department of Veterans Affairs (VA) is assumed, the VA has a number of requirements for the new loan. See 38 U.S.C. § 3714; 38 C.F.R. §§ 36.4300–4393; U.S. Dep’t of Veterans Affairs, Veterans Benefits Administration, Lender’s Handbook: VA Pamphlet 26-7, available at http://benefits.va.gov/warms/pam26_7.asp. Clause 5-9-2 in this chapter is based on the sample indemnity liability assumption clause in chapter 9 of VA Pamphlet 26-7.

§ 5.12:9 Restrictive Covenants

To be enforceable, restrictive covenants imposed by grant must satisfy certain requirements: (1) there must be privity of estate between the parties to the contract; (2) the restrictive covenants must relate to something in existence, or assignees must be named if they are to be bound by the restrictive covenants; (3) the restrictive covenants must touch or concern the land (that is, enhance or benefit it) (see Homsey v. University Gardens Racquet Club, 730 S.W.2d 763, 764 (Tex. App.—El Paso 1987, writ ref’d n.r.e.)); and (4) the original contracting parties must intend that the restrictive covenant run with the land. Billington v. Riffe, 492 S.W.2d 343, 346 (Tex. Civ. App.—Amarillo 1973, no writ). Further, the restrictive covenant must furnish adequate notice to the property owner of the specific restriction sought to be enforced. Davis v. Huey, 620 S.W.2d 561, 566 (Tex. 1981).

The restrictive covenants should make clear which lands are benefited by the covenants and that the owners thereby have standing to enforce the restrictive covenants. See clauses 5-9-14 and 5-9-15 in this chapter.

§ 5.13 Additional Documents

§ 5.13:1 Acceptance of Deed

Acceptance is necessary for a deed to be effective. Robert Burns Concrete Contractors, Inc. v. Norman, 561 S.W.2d 614, 618 (Tex. Civ. App.—Tyler 1978, writ ref’d n.r.e.). Traditionally, the grantee’s acceptance is implied. Martin v. Uvalde Savings & Loan Ass’n, 773 S.W.2d 808 (Tex. App.—San Antonio 1989, no writ). However, the parties may want written confirmation of the grantee’s acceptance of the deed as to matters of form, substance, or both. Evidence of the grantee’s acceptance may be needed to enforce the grantor’s obligations under a deed, such as the promise to pay and the indemnity in the assumption or warranty deed. Confirmation can best be achieved by the grantee’s signature on the deed, although a separate instrument may be used. See form 5-10 in this chapter.
§ 5.13:2 Deed in Lieu of Foreclosure

The term deed in lieu of foreclosure (or deed in lieu) describes a conveyance in which the consideration given by the grantee typically is the cancellation of the debt owed by the borrower, the release of the borrower from liability on the secured debt, and, in some cases, the release and discharge of the liens securing the debt. The deed in lieu does not have the same effect on title as a trustee’s deed in a nonjudicial foreclosure because the deed in lieu does not relate back to the date the deed of trust was filed for record to extinguish exceptions or encumbrances filed after the deed of trust. Instead, the grantee takes the property subject to whatever encumbrances and other exceptions have been imposed on the property before the deed in lieu is recorded, as is the case with any other deed. Flag-Redfern Oil Co. v. Humble Exploration Co., 744 S.W.2d 6, 9 (Tex. 1987).

If a holder of a debt secured by a deed of trust accepts title by a deed in lieu and later discovers that an encumbrance that was unknown to the holder and not disclosed by the debtor existed before the deed in lieu, the holder has four years to void the deed in lieu; further, the lien is restored to its former priority, and the holder may proceed with a foreclosure under the deed of trust. See Tex. Prop. Code § 51.006.

See form 5-13 in this chapter for an example of a deed in lieu of foreclosure.

§ 5.13:3 Trustee’s Deed in Nonjudicial Foreclosure

For commentary and a form, see section 14.6:4 and form 14-15 in this manual.

§ 5.13:4 Administration or Guardianship Deed


§ 5.13:5 Owelty of Partition Deed and Agreement

Owelty results from an unequal partition between joint owners of real property whether by court decree or contract. Because the tract partitioned does not lend itself to an equal division, the difference in value between the partitioned tracts is adjusted by payment from one joint owner to the other. This difference is known as owelty. Because owelty payments are in the nature of purchase money, a lien to secure a payment arises. Such a lien is a purchase-money lien and is valid against the homestead. Sayers v. Pyland, 161 S.W.2d 769, 772 (Tex. 1942).

In transactions in which one joint owner simply buys all of the interest of a fellow joint owner, the issue is less clear. Some decisions have determined that such a sale does not involve a true partition; therefore a lien securing the purchase may not encumber the entirety of the homestead. In re Shults, 97 B.R. 874 (Bankr. N.D. Tex. 1989). The Texas Constitution and the Texas Property Code provide that the homestead may be encumbered by “an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding.” Tex. Const. art. XVI, § 50(a)(3); Tex. Prop. Code § 41.001(b)(4). Even after this constitutional amendment, there has been question about
whether the entirety of the homestead may be encumbered by an owelty lien in the absence of an actual partition in kind. Opinion predominates in favor of the validity of these liens to the extent that such liens are generally insurable encumbrances.

An owelty of partition transaction that is not based on a court order should be documented by both a deed and a separate written partition agreement (not by a purchase and sale agreement).

The owelty of partition deed, form 5-11 in this chapter, should refer either to the court order or to the separate agreement on which it is based. See form 5-12 for an owelty of partition agreement.

§ 5.13:6 Survivorship Agreement for Community and Noncommunity Property

Rights of survivorship will not be inferred from a joint tenancy in property that is not the community property of the tenants. Tex. Est. Code § 101.002. However, the joint tenants may agree in writing to implement rights of survivorship. Tex. Est. Code § 111.001. Spouses may agree between themselves that all or part of their community property, then existing or to be acquired, will be owned with rights of survivorship. Tex. Est. Code § 112.051.

Rights of survivorship in community property are treated differently from rights of survivorship in other property. See Tex. Est. Code §§ 111.002, 112.052. However, whether the property is community or not, the agreement must be in writing. In the case of community property, both spouses must sign the agreement. Tex. Est. Code § 112.052. For property that is not community, it is suggested that all joint tenants sign the writing for it to qualify as an agreement that satisfies the statute. See Tex. Est. Code § 111.001(a). The phrases with right of survivorship, will become the property of the survivor, will vest in and belong to the surviving spouse, or will pass to the surviving spouse are suggested for inclusion in the agreement.

Rights of survivorship do not affect the community status of property or the rights of the spouses concerning management, control, and disposition, unless the agreement so provides. Tex. Est. Code § 112.151. On the death of a spouse, a transfer resulting from the right of survivorship is not considered a testamentary transfer. Tex. Est. Code § 112.052. An agreement between spouses may be revoked in accordance with the agreement’s terms. If no provision is made for revocation, the agreement may be revoked by a written instrument signed by both spouses or by a written instrument signed by one spouse and delivered to the other spouse. Tex. Est. Code § 112.054(b). The disposition of property by one or both spouses will also revoke the agreement as to that property if the disposition is not inconsistent with the terms of the agreement and applicable law. Tex. Est. Code § 112.054(c). Although an agreement between spouses creating rights of survivorship is effective without court adjudication, the surviving spouse may obtain such an adjudication by application to the court. See Tex. Est. Code §§ 112.053, 112.101. The agreement between spouses and any revocation should be recorded, and a copy provided to the personal representative of the deceased spouse's estate, to avoid the acquisition of good title by a buyer without actual notice of the agreement or the revocation under Tex. Est. Code §§ 112.201–.208. Community property subject to the sole or joint management, control, and disposition of a spouse during marriage continues to be subject to the liabilities of that spouse on death, regardless of the right of survivorship. See Tex. Est. Code §§ 112.251–.253.

See form 5-18 in this chapter for a survivorship agreement and form 5-19 for a survivorship agreement for community property.

§ 5.13:7 Community Interest Special Warranty Deed

The Texas Constitution and the Texas Family Code provide a method of converting title of real and personal property from separate to community property. See Tex. Const. art. XVI, § 15; Tex. Fam. Code §§ 4.201–.206. Before January 1, 2000, the
effective date of these provisions, separate property could not be converted to community property because Texas is an inception of title state. The primary purpose of the community interest special warranty deed is to allow a surviving spouse, at the time of the other spouse’s death, to obtain a nontaxable increase in the basis of the property for federal estate tax purposes. According to the Internal Revenue Code, all community property receives an increase in basis to the current market value at the death of the first spouse. See 26 U.S.C. § 1014(b)(6). Strict compliance with the provisions of the Family Code, including the use of bold-faced type, capital letters, or underlined warnings that must appear in the document, is necessary to convert the property to community property. See Tex. Fam. Code §§ 4.201–.206.

There are implications in this type of transaction for divorce, property management rights, and creditor claims, as described in section 4.205 of the Family Code. A separate agreement may be used to address personal-property or family-law issues. The form in this manual deals only with creating an effective conveyance of real property rights. See form 5-20 in this chapter for a community interest special warranty deed.

§ 5.13:8 Assignment and Assumption of Leases

The right to receive rent passes with title to real property, and the seller’s tenant becomes the buyer’s tenant as a matter of law. Arredondo v. Mora, 340 S.W.2d 322, 325 (Tex. Civ. App.—El Paso 1960, writ ref’d n.r.e.). Nevertheless, parties to a real estate sales contract often provide for a separate assignment and assumption agreement in which the seller assigns its rights in leases affecting the property and the buyer assumes the landlord’s obligations under some or all of those leases. The assignment and assumption often contains indemnities by the parties covering their respective periods of responsibility for the landlord’s obligations under the leases, including those for tenant improvements and brokerage commissions. The assignment and assumption of leases can be modified to include a general or special warranty of title. See form 5-21 in this chapter for an assignment and assumption of leases and form 5-22 for a notice of transfer of security deposit.

§ 5.14 General Considerations for Minerals

§ 5.14:1 Generally

Texas mineral law is complex and extensive, and a comprehensive review is beyond the scope of this manual. This commentary is intended to identify common conveyancing issues that arise in transactions in which the primary focus is the surface estate, not the mineral estate. Attorneys who are not experienced in mineral law are urged to exercise caution and seek appropriate counsel when mineral law issues arise.

In Texas, the mineral estate may be severed from the surface estate. The mineral estate is the dominant estate and has five essential attributes: the right to explore and develop (ingress and egress); the right to lease (the executive right); the right to receive bonus payments; the right to receive delay rentals; and the right to receive royalty. Day & Co. v. Texland Petroleum, Inc., 786 S.W.2d 667 (Tex. 1990); Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986). The mineral estate, and each of its five separate attributes, may be held in undivided interests.

Grants and reservations in Texas are commonly styled “oil, gas, and other minerals” or “all minerals in and under the land.” Although the meanings of “oil” and “gas” are usually clear, adjudication has been required to determine what minerals are included in a conveyance of “minerals.” The Supreme Court of Texas has held that “a severance of minerals in an oil, gas and other minerals clause includes all substances within the ordinary and natural meaning of the word, whether their presence or value is known at the time of severance.” Moser v. U.S. Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984). The Moser decision con-
firmed the court’s previous holdings that, as a matter of law, certain substances belong to the surface estate: building stone, limestone, caliche, surface shale, water, sand, gravel, and near-surface lignite, iron, and coal. *Moser*, 676 S.W.2d at 102.

According to the common-law “greatest possible estate” rule, a conveyance will pass all of the estate owned by the grantor at the time of the conveyance unless the instrument states reservations that limit the estate being conveyed. *Cockrell v. Texas Gulf Sulphur Co.*, 299 S.W.2d 672, 675 (Tex. 1956). Thus, a conveyance without a specific reservation of the minerals will convey the grantor’s entire mineral estate. *Harris v. Currie*, 176 S.W.2d 302, 304 (Tex. 1943). A result of the “greatest possible estate” rule is found in the *Duhig* rule, which provides that an outstanding right in the mineral estate will be charged to the grantor’s mineral estate reservation, unless a contrary intent is stated in the instrument. *See Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878, 880 (Tex. 1940).

§ 5.14:2 Royalty

Royalty is the nonpossessory right to receive a cost-free share of production. It may be reserved in a lease or severed from the fee in a grant or reservation in a deed. An “overriding royalty” or “override” is carved out of the lessee’s interest in the leasehold estate and, absent fraud, breach of fiduciary duty, or similar wrongdoing, terminates when the lease from which it was created terminates.

A royalty clause must be drafted carefully. For example, each of the following may have a different result: an undivided 1/8 royalty; an undivided 1/8 of the royalty; and an undivided 1/8 in a 1/8 royalty. *See, e.g., Winslow v. Acker*, 781 S.W.2d 322, 326–27 (Tex. App.—San Antonio 1989, writ denied); *Ray v. Truitt*, 751 S.W.2d 205, 207 (Tex. App.—El Paso 1988, no writ); *Tiller v. Tiller*, 685 S.W.2d 456, 458 (Tex. App.—Austin 1985, no writ); *Lane v. Elkins*, 441 S.W.2d 871, 874–75 (Tex. Civ. App.—Eastland 1969, writ ref’d n.r.e.).

§ 5.14:3 Surface Use

The right to develop the mineral estate includes the right to use the surface to the extent reasonably necessary for development purposes. *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 810 (Tex. 1972).

The surface owner whose land is to be developed for mineral purposes should be aware of the line of Texas cases concerning surface damages that includes *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971), *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980), and *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99 (Tex. 1984). In *Moser*, the Supreme Court of Texas confirmed that the mineral owner has the right to use the surface to develop the minerals, but within certain guidelines. For instruments executed before June 8, 1983, the mineral owner is liable for destruction of the surface only if the destruction is negligently inflicted, regardless of how the mineral is described in the severance. For instruments executed on or after June 8, 1983, however, the negligence rule applies only to minerals that are specifically conveyed or named in the instrument. If the mineral is not specifically conveyed or named in the instrument, the mineral owner must compensate the surface owner for surface destruction, whether the result of negligence or not. *Moser*, 676 S.W.2d at 103. In addition, the mineral owner must accommodate the surface owner’s use of the land to the extent described in *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971), and *Sun Oil Co.*, 483 S.W.2d at 810–11.

The surface owner may want to protect the surface by contractual restrictions on mineral operations. Such protections may include limitations on areas that may be used for mineral operations, such as designation of drill sites and pipeline and access
easements; alternatively, the surface owner may contract with the mineral owner for a complete prohibition of use of the surface by the mineral owner (a surface-use waiver by the mineral owner).

§ 5.14:4 Existing Mineral Lease

There are special drafting considerations if the land being conveyed is subject to an existing mineral lease. For example, the grantor and the grantee should include in the deed their agreement on how to allocate the benefits of an undisputed existing lease between them.

§ 5.14:5 Life Tenant’s Right to Consume Royalty

Whether the life tenant, as the owner of a life estate, is entitled to consume the royalty from mineral production on the property depends on the circumstances. If, at the inception of the life estate, there exists either mineral production or a mineral lease, the “open mine” doctrine entitles the life tenant to consume the royalties. *Thompson v. Thompson*, 236 S.W.2d 779, 786–87 (Tex. 1951); *Youngman v. Shular*, 281 S.W.2d 373, 375 (Tex. Civ. App.—San Antonio 1955), *aff’d*, 288 S.W.2d 495 (Tex. 1956). Otherwise, the life tenant is not entitled to consume the royalty and must account for it to the remainderman. *Swayne v. Lone Acre Oil Co.*, 86 S.W. 740, 742 (Tex. 1905).

§ 5.14:6 Special Problem Areas

Although a discussion of all areas of concern encountered with mineral interests is beyond the scope of this manual, special consideration should be given to—

• land subject to the Texas Relinquishment Act, where the minerals are owned by the state of Texas and the surface owner acts as the agent for the state in leasing them (*see* Tex. Nat. Res. Code §§ 52.171–.190);

• exploration by the owners of the right to develop the minerals without executing a mineral lease;

• discrimination by the owner of the executive right (right to lease) among the owners of the right to royalty, the right to delay rentals, and the right to bonus payments;

• ownership of mineral rights by more than one party; and

• severance of the mineral estate, limited by depth of the minerals or duration of the severance.

See clauses 5-7-8 through 5-7-14 in this chapter for reservation of minerals and clauses 5-8-34 through 5-8-36 for exceptions of minerals.

§ 5.15 General Considerations for Other Forms of Real Property

§ 5.15:1 Timber

The right to harvest growing timber with the accompanying ingress and egress rights together constitutes an interest in real property, which must be conveyed by deed. *Burkitt v. Wynne*, 132 S.W. 816 (Tex. Civ. App. 1910, writ ref’d). See clause 5-9-18 in this chapter.
§ 5.15:2  Easements

An easement is an interest in real property. *Settegast v. Foley Bros. Dry Goods Co.*, 270 S.W. 1014, 1016 (Tex. 1925). It gives the holder the right to use another’s land for a specific purpose. *Lakeside Launches, Inc. v. Austin Yacht Club, Inc.*, 750 S.W.2d 868, 871 (Tex. App.—Austin 1988, writ denied). See clauses 5-7-1 through 5-7-4 and 5-8-14 through 5-8-25 in this chapter.

§ 5.15:3  Condominiums

A description of a condominium unit constitutes a sufficient legal description of the unit and all rights, obligations, and interests appurtenant to the unit if the description contains (1) the name of the condominium; (2) the recording data for the declaration, including any amendments, plats, and plans; (3) the county in which the condominium is located; and (4) the identifying number of the unit. Tex. Prop. Code § 82.054. This requirement from the Texas Uniform Condominium Act (Texas Property Code chapter 82) applies to all condominiums. Tex. Prop. Code § 82.002(c).

Some pre-1994 condominium regimes describe apartments by reference to a unit number and building letter. See Tex. Prop. Code § 81.102(a)(2). It is suggested that condominiums operating under the prior Condominium Act (Texas Property Code chapter 81) continue to include the building letter for description. As a practical matter, if condominiums recorded before January 1, 1994, use identifying numbers for apartments that are repeated in each of the buildings (for example, each building includes apartments 1 through 10), a reference to the building letter will be needed to distinguish between like-numbered apartments. See clause 5-8-13 in this chapter for an exception for use in a condominium deed and clause 5-9-3 for a condominium deed property description. See also chapter 24 in this manual for additional information on condominiums.

§ 5.15:4  Townhouse and Planned Unit Development Properties

The traditional townhouse project and planned unit developments (PUD) are similar in that both involve privately owned building sites with the common area owned by a separate association (usually a nonprofit corporation) whose members are the owners of the building sites. Easements are provided for access and utilities over the common area in both types of projects.

The description for a typical townhouse or lot within a PUD need not refer specifically to the common area if, as is customary, the common area is owned by the separate community association and ownership of the townhouses or lots in the PUD necessarily includes membership in the association and a pro rata ownership interest in the common area.

Deeds for either townhouses or PUD properties should except to the association restrictive covenants and the assessment lien. See clause 5-9-20 in this chapter for a property description and clause 5-9-21 for exceptions typical of a townhouse deed.

Townhouses generally involve building sites that are the outline or footprint of the separately owned townhouse unit’s perimeter walls, whereas PUDs usually involve one conventional city lot per unit, including a yard and other city lot features. Because townhouses are usually more limited in space, the concept of limited common area is popular for townhouses. Limited common area involves limited access areas, such as screened patios, that are part of the common area but that usually no other owners may trespass on.
§ 5.15:5 Timeshare

A “timeshare estate” is an arrangement under which the purchaser receives the right to occupy a timeshare property and an estate interest in the real property. Tex. Prop. Code § 221.002(24). Once the timeshare plan is established, each timeshare interest may be separately conveyed or encumbered, and the title is recordable. Tex. Prop. Code § 221.012.

§ 5.15:6 Manufactured Housing

The Texas Department of Housing and Community Affairs (TDHCA) administers manufactured housing according to the Texas Manufactured Housing Standards Act. Tex. Occ. Code ch. 1201. Forms pertaining to manufactured housing can be obtained from the TDHCA. Regulations have been promulgated to administer and enforce the Act in title 10, chapter 80, of the Texas Administrative Code. Ownership of a manufactured home is evidenced by the filing of a statement of ownership issued by the TDHCA. Tex. Occ. Code §§ 1201.003(30)(A), 1201.205. At the sale or transfer of manufactured home, ownership does not pass or vest until a completed application for the issuance of a statement of ownership is filed with the TDHCA. Tex. Occ. Code § 1201.206(e).

A process exists that allows the owner of a manufactured home to elect to treat the home as real estate, making it a part of the real property. See Tex. Occ. Code §§ 1201.2055, 1201.2075, 1201.222; Tex. Prop. Code § 2.001(b).

The TDHCA is required to make available to the public through the department’s website searchable and downloadable records regarding the ownership, liens, and installation of manufactured homes. Tex. Occ. Code §§ 1201.010, 1201.207(b).

The Texas Certificate of Title Act (Tex. Transp. Code ch. 501) governs “house trailers.” The Act does not contain a mechanism for converting house trailers to real estate by affixing them to the real estate. House trailers are generally defined as trailers designed for human habitation, and they are treated differently from manufactured housing. See Tex. Transp. Code § 501.002(9); Tex. Occ. Code § 1201.003(12), (18), (20).

If the owner of the manufactured home has elected to treat the home as real property, a copy of the statement of ownership must be recorded in the real property records of the county where the manufactured home is located. Tex. Occ. Code § 1201.222; Tex. Prop. Code § 2.001(b).

Texas statutes address when a manufactured home is personal property and when it is real property. See Tex. Occ. Code § 1201.222; Tex. Prop. Code § 2.001(b). Ordinarily, a manufactured home is personal property. However, if the statement of ownership issued by the TDHCA reflects that the owner had elected to treat the home as real property and a certified copy of the statement of ownership has been recorded in the real property records of the county where the home is located, the manufactured home will be real property. Property Code chapter 63 clarifies the status of a lien on a manufactured home when it converts to real property. See Tex. Prop. Code ch. 63.
Additional Resources


Form 5-1

General Warranty Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

Consideration:

See form 5-6 in this chapter for consideration clauses.

Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12.

Reservations from Conveyance:

State “None” or, to create reservations of title, include the appropriate clauses from form 5-7.

Exceptions to Conveyance and Warranty:

State “None” or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.
Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee’s heirs, successors, and assigns forever. Grantor binds Grantor and Grantor’s heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.

If the conveyance includes personal property, include clause 5-9-13.

If appropriate, include additional clauses like those suggested in form 5-9.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

If the deed imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.
Warranty Deed with Vendor’s Lien

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

Consideration:

See form 5-6 in this chapter for consideration clauses.

Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12.

Reservations from Conveyance:

State “None” or, to create reservations of title, include the appropriate clauses from form 5-7.

Exceptions to Conveyance and Warranty:

State “None” or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.
Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee’s heirs, successors, and assigns forever. Grantor binds Grantor and Grantor’s heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.

The vendor’s lien against and superior title to the Property are retained until each note described is fully paid according to its terms, at which time this deed will become absolute.

If the conveyance includes personal property, include clause 5-9-13.

If appropriate, include additional clauses like those suggested in form 5-9.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

If the deed imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.
Form 5-3

Special Warranty Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

Consideration:

See form 5-6 in this chapter for consideration clauses.

Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12.

Reservations from Conveyance:

State “None” or, to create reservations of title, include the appropriate clauses from form 5-7.

Exceptions to Conveyance and Warranty:

State “None” or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.
Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee’s heirs, successors, and assigns forever. Grantor binds Grantor and Grantor’s heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof when the claim is by, through, or under Grantor but not otherwise, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.

If the conveyance includes personal property, include clause 5-9-13.

If appropriate, include additional clauses like those suggested in form 5-9.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

If the deed imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.
Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

Consideration:

See form 5-6 in this chapter for consideration clauses.

Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12.

Reservations from Conveyance:

State “None” or, to create reservations of title, include the appropriate clauses from form 5-7.

Exceptions to Conveyance:

State “None” or, to create exceptions to conveyance, include the appropriate clauses from form 5-8.
Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee’s heirs, successors, and assigns forever, without express or implied warranty. All warranties that might arise by common law as well as the warranties in section 5.023 of the Texas Property Code (or its successor) are excluded.

Include the following paragraph if applicable.

This conveyance is intended to include any property interests obtained by after-acquired title.

If the conveyance includes personal property, include clause 5-9-13, omitting the warranty in the first paragraph.

If appropriate, include additional clauses like those suggested in form 5-9.

Continue with the following.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

If the deed imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.
Quitclaim

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

Consideration:

See form 5-6 in this chapter for consideration clauses.

Property (including any improvements):

For the Consideration, Grantor quitclaims to Grantee all of Grantor’s right, title, and interest in and to the Property, to have and to hold it to Grantee and Grantee’s heirs, successors, and assigns forever. Neither Grantor nor Grantor’s heirs, successors, or assigns will have, claim, or demand any right or title to the Property or any part of it.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]
If the quitclaim imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.
Form 5-6

Consideration Clauses

**Assumption of First-Lien Note and Execution of Second-Lien Note to Grantor or Third Party**

**Clause 5-6-1**

Use the following with the warranty deed with vendor’s lien; also use clause 5-9-10 in this chapter if the second-lien note is payable to the grantor or clause 5-9-11 if the second-lien note is payable to a third party.

**Include if applicable:** Cash and [Grantee’s assumption and agreement to pay, according to the terms of the first-lien note, the unpaid principal and earned interest of [amount] DOLLARS ($[amount]) with interest from [date] on the first-lien note, and a second-lien note of even date executed by Grantee. The first-lien note is dated [date], is executed by [name], and is payable to the order of [name] in the principal amount of [amount] DOLLARS ($[amount]). The first-lien note is secured by the first and superior vendor’s lien against, and superior title to, the Property retained in a deed dated [date] and recorded in [recording data] of the real property records of [county] County, Texas. The first-lien note is also secured by a first-lien deed of trust of even date to [name], trustee, recorded in [recording data] of the real property records of [county] County, Texas. As further consideration Grantee promises to keep and perform all the covenants and obligations of the grantor[s] named in that deed of trust and to indemnify, defend, and hold Grantor harmless from any loss, attorney’s fees, expenses, or claims attributable to breach or default of any provision of this assumption by Grantee. The second-lien note is payable to the order of [Grantor/[name of third party]] in the principal amount of **
[amount] DOLLARS ($[amount]). The second-lien note is secured by a second and inferior vendor’s lien against, and superior title to, the Property retained in this deed [include if applicable: for the benefit of [name of third party]] and is also secured by a second-lien deed of trust of even date from Grantee to [name], trustee.

Assumption of Note Secured by Vendor’s Lien and Deed of Trust

Clause 5-6-2

[Include if applicable: Cash and] Grantee’s assumption of and agreement to pay, according to the note’s terms, the unpaid principal and earned interest of [amount] DOLLARS ($[amount]) on the note in the original principal sum of [amount] DOLLARS ($[amount]) dated [date], executed by [name], and payable to the order of [name]. The note is secured by an express vendor’s lien and superior title retained in a deed dated [date], recorded in [recording data] of the real property records of [county] County, Texas, and additionally secured by a deed of trust dated [date], from [name] to [name], trustee, recorded in [recording data] of the real property records of [county] County, Texas. As further consideration Grantee promises to keep and perform all the covenants and obligations of the grantor[s] named in that deed of trust and to indemnify, defend, and hold Grantor harmless from any loss, attorney’s fees, expenses, or claims attributable to a breach or default of any provision of this assumption by Grantee. Grantor assigns to Grantee any funds on deposit for payment of taxes and insurance premiums.
Capital Contribution

Clause 5-6-3

Use the following if the property is serving as a contribution to a legal entity.

[[Number] shares/[describe other ownership interest]] in [name of legal entity] [include if applicable: with a value of $[amount]]. The Property is conveyed to Grantee for the purpose of contributing to the capital of [name of entity].

Cash

Clause 5-6-4

Cash and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged.

Or

Clause 5-6-5

[amount] DOLLARS ($[amount]) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged.

Or

Clause 5-6-6

[amount] DOLLARS ($[amount]).
Exchange of Property

Clause 5-6-7

[Part cash and the/The] exchange of property, title to which is accepted by Grantor the same as if the consideration represented by the exchange were paid in cash. [Include if applicable: There is no lien, either expressed or implied, created by the exchange of property. Any such lien is waived and released by Grantor.]

First-Lien Note to Third Party and Second-Lien Note to Grantor

Clause 5-6-8

Use the following in the warranty deed with vendor’s lien with clause 5-9-9.

[Cash and two/Two] notes of even date executed by Grantee and referred to as the first-lien note and the second-lien note. The first-lien note is payable to the order of [name of third party] in the principal amount of [amount] DOLLARS ($[amount]). The first-lien note is secured by the first and superior vendor’s lien against, and superior title to, the Property retained in this deed in favor of [name of third party] and is also secured by a first-lien deed of trust of even date from Grantee to [name], trustee. The second-lien note is payable to the order of Grantor in the principal amount of [amount] DOLLARS ($[amount]). The second-lien note is secured by a second and inferior vendor’s lien against, and superior title to, the Property retained in this deed and is also secured by a second-lien deed of trust of even date from Grantee to [name], trustee.
**Gift**

**Clause 5-6-9**

Love of, and affection for, Grantee.

Or

**Clause 5-6-10**

Grantor’s intention to make a gift as a charitable contribution under applicable income tax laws and regulations.

**Grantee’s Separate Property**

**Clause 5-6-11**

Cash and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, paid from Grantee’s separate property.

Or

**Clause 5-6-12**

[describe consideration] and other good and valuable consideration paid from Grantee’s separate property.

**Note to Grantor or Third Party**

**Clause 5-6-13**

Use the following in the warranty deed with vendor’s lien; also use clause 5-9-8 if the note is executed in favor of a third party.

[Cash and a/A] note of even date executed by Grantee and payable to the order of [Grantor/[name of third party]] in the principal amount of [amount]
DOLLARS ([$amount]). The note is secured by a first and superior vendor’s lien and superior title retained in this deed [include if applicable: in favor of [name of third party]] and by a first-lien deed of trust of even date from Grantee to [name], trustee.

Wraparound Lien [Deed Subject to]

Clause 5-6-14

Use the following with clauses 5-8-51 and 5-9-26.

[Cash and a/A] wraparound note (“Wraparound Lien Debt”) of even date in the principal amount of [amount] DOLLARS ([$amount]) executed by Grantee, payable to the order of Grantor. The note is secured by a vendor’s lien retained in this deed and by a deed of trust of even date from Grantee to [name], trustee (collectively, the “Wraparound Lien”).
Form 5-7

If no reservations are to be made, as is most often the case, the word “None” should be inserted in the deed; otherwise, use a specific reservation such as one of those set forth below.

Reservations from Conveyance

Easement

Clause 5-7-1

For Grantor and Grantor’s heirs, successors, and assigns forever, a reservation of the free, uninterrupted, and perpetual use of, and a separate right to maintain, a nonexclusive easement over the passageway described in this paragraph and located on the Property. This easement is located [describe, e.g., along the entire northern boundary of the Property as it exists at this time and is fifty feet in width].

Easement—Access

Clause 5-7-2

Include the following defined terms.

Dominant Estate Property (including any improvements):

Easement Property: [Describe by metes and bounds the property serving as the easement, and include a drawing as an exhibit, if available.]

Easement Purpose: To provide free and uninterrupted pedestrian and vehicular ingress and egress to and from the Dominant Estate Property, and portions thereof, to and from [describe public thoroughfare].
Clause 5-7-3

Include the following under reservations from conveyance.

For Grantor and Grantor’s heirs, successors, and assigns, in common with Grantee and Grantee’s heirs, successors, and assigns, a reservation of an easement over, on, and across the Easement Property for the Easement Purpose and for the benefit of the Dominant Estate Property, and portions thereof, together with all and singular the rights and appurtenances thereto in any way belonging, in accordance with the terms and conditions set forth below.

Clause 5-7-4

Include the following at the end of the deed, immediately above the last paragraph, which states: “When the context requires, singular nouns and pronouns include the plural.”

The following terms and conditions apply to the easement:

1. **Character of Easement.** The easement is appurtenant to and runs with the Dominant Estate Property and all portions of it, whether or not the easement is referenced in any conveyance of the Dominant Estate Property or any portion of it. The easement binds and inures to the benefit of Grantor and Grantee and their respective heirs, successors, and assigns.

2. **Duration of Easement.** The easement is [perpetual/[state limitation]]).

3. **Exclusiveness of Easement.** The easement is nonexclusive, and Grantor reserves for Grantor and Grantor’s heirs, successors, and assigns the right to convey the easement or other rights or easements to others.

4. **Secondary Easement.** In addition, the holder of the easement has the right to use as much of the surface of the property adjacent to the Easement
Property as may be reasonably necessary to construct and maintain a road reasonably suited for the Easement Purpose. However, the holder must promptly restore any adjacent property to its previous physical condition if changed by the use of the rights granted by this secondary easement.

5. **Maintenance.** Improvement and maintenance of the Easement Property will be at the sole expense of the holder of the easement. The holder has the right to eliminate any encroachments into the Easement Property. The holder of the easement will maintain the Easement Property in a neat and clean condition.

6. **Grantee’s Rights.** Grantee and Grantee’s heirs, successors, and assigns have the right to use the surface of the Easement Property for all purposes that do not unreasonably interfere with or interrupt the use of the easement.

7. **Indemnity by Easement Holder.** The holder of the easement agrees to indemnify, defend, and hold Grantee and Grantee’s successors in interest harmless from any loss, attorney’s fees, court and other costs, expenses, or claims attributable to breach or default of any provision of this easement by the holder.

**Life Estate**

**Clause 5-7-5**

For Grantor and Grantor’s assigns, a reservation of the full possession, benefit, and use of the Property for the remainder of the life of Grantor, as a life estate.
Life Estate with Power of Sale

Clause 5-7-6

For Grantor and Grantor’s assigns, a reservation of the full possession, benefit, and use of the Property for the remainder of the life of Grantor, as a life estate. Grantor retains complete power, without the joinder of any person, to mortgage, sell, and convey the Property and to spend any proceeds; to exchange it for other property; to lease the surface and subsurface of the Property; to execute and deliver oil, gas, and other mineral leases for any term of years and for a term based on the continuing production of oil, gas, or other minerals from the Property, ending either before or after Grantor’s death; and to invest and reinvest all proceeds from the sale or other disposition of the Property. This life estate carries with it the right to possess and consume all bonuses, delay rentals, royalties, and other benefits payable on any mortgage, sale, or conveyance under oil, gas, and other mineral leases covering the Property at the inception of this life estate without any duty to the remainderman and without liability for waste.

Life Estate with Right to Consume Corpus

Clause 5-7-7

For Grantor and Grantor’s assigns, a reservation of the full possession, benefit, and use of the Property for the remainder of the life of Grantor, including the right to consume the corpus, whether by sale, conveyance, mortgage, mineral lease, or otherwise, without any duty to the remainderman and without liability for waste.
Reservations from Conveyance

Mineral Estate—Entirety

Clause 5-7-8

For Grantor and Grantor’s heirs, successors, and assigns forever, a reservation of all oil, gas, and other minerals in and under and that may be produced from the Property. If the mineral estate is subject to existing production or an existing lease, this reservation includes the production, the lease, and all benefits from it.

Mineral Estate—Fraction of Entirety

Clause 5-7-9

For Grantor and Grantor’s heirs, successors, and assigns forever, a reservation of an undivided [fraction] of all oil, gas, and other minerals in and under and that may be produced from the Property.

Mineral Estate—Term Mineral Interest

Clause 5-7-10

For Grantor and Grantor’s heirs, successors, and assigns for the limited term described, a reservation of all oil, gas, and other minerals in and under and that may be produced from the Property [include specific terms plus production tail, e.g., for a term of [number] years from this date, at which time this reservation will automatically terminate; except, however, if oil, gas, or other minerals are being produced from the Property at the end of the term of years, the term will extend for as long thereafter as oil, gas, or other minerals are being produced in paying quantities from the Property or land pooled with it].
Mineral Estate—Royalty

Clause 5-7-11

For Grantor and Grantor’s heirs, successors, and assigns forever, a reservation of an undivided [\textit{fraction}] of the royalty under any oil, gas, and mineral lease now or hereafter covering the Property or any portion of it; and the right to receive as a royalty an undivided [\textit{fraction (ordinarily should not exceed one-fourth)}] \textbf{include one of the following}: of all oil, gas, or other minerals now or hereafter produced from the Property without an oil, gas, or mineral lease/royalty on the oil, gas, and other minerals in and under and that may be produced from the Property.

Mineral Estate—Prohibition against Exploration by Minerals’ Owner

Clause 5-7-12

As long as Grantor or Grantor’s heirs, successors, and assigns own a fraction of the royalty that is severed from the ownership of the minerals, Grantee and Grantee’s heirs, successors, and assigns are prohibited from exploring for, developing, or producing the oil, gas, and other minerals in and under, and that may be produced from, the Property; instead, these activities may be conducted only by a bona fide unrelated party, through a lease providing for a royalty equal to or greater than the customary royalty prevailing in the area at the time of the lease.
Mineral Estate—Waiver of Surface Rights

Clause 5-7-13

Grantor waives the right of ingress and egress to and from the surface of the Property relating to the portion of the mineral estate owned by Grantor.

Nothing herein, however, restricts or prohibits the pooling or unitization of the portion of the mineral estate owned by Grantor with land other than the Property; or the exploration or production of the oil, gas, and other minerals by means of wells that are drilled or mines that open on land other than the Property but enter or bottom under the Property, provided that these operations in no manner interfere with the surface or subsurface support of any improvements constructed or to be constructed on the Property.

Mineral Estate—Waiver of Surface Rights; Reservation of Drill Site

Clause 5-7-14

Drill Site:

Access Routes:

Include the following under reservations from conveyance.

For Grantor and Grantor’s heirs, successors, and assigns forever, a reservation of a perpetual, exclusive easement in and to the free and uninterrupted use of the Drill Site to explore and produce the oil, gas, and other minerals in and under and that may be produced from the Property, together with access to and from the Drill Site over the Access Routes. Grantor waives the right to
explore and develop from the surface of the Property the portion of the mineral estate owned by Grantor, other than on or from the Drill Site.
Exceptions to Conveyance and Warranty

Broad Exceptions

Clause 5-8-1

Liens described as part of the Consideration and any other liens described in this deed as being either assumed or subject to which title is taken; validly existing easements, rights-of-way, and prescriptive rights, whether of record or not; all presently recorded and validly existing restrictions, reservations, covenants, conditions, oil and gas leases, mineral interests, and water interests outstanding in persons other than Grantor, and other instruments, other than conveyances of the surface fee estate, that affect the Property; validly existing rights of adjoining owners in any walls and fences situated on a common boundary; any discrepancies, conflicts, or shortages in area or boundary lines; any encroachments or overlapping of improvements; all rights, obligations, and other matters arising from and existing by reason of the [county] County [specify water improvement or other applicable governmental district, agency, authority, etc.]; and taxes for [current year], which Grantee assumes and agrees to pay [, and subsequent assessments for that and prior years due to change in land usage, ownership, or both, the payment of which Grantee assumes/but not subsequent assessments for that and prior years due to change in land usage, ownership, or both, the payment of which Grantor assumes].

Or
Clause 5-8-2

Liens described as part of the Consideration and any other liens described in this deed as being either assumed or subject to which title is taken; validly existing easements, rights-of-way, and prescriptive rights, whether of record or not; all presently recorded and validly existing instruments, other than conveyances of the surface fee estate, that affect the Property; and taxes for [current year], which Grantee assumes and agrees to pay [, and subsequent assessments for that and prior years due to change in land usage, ownership, or both, the payment of which Grantee assumes] but not subsequent assessments for that and prior years due to change in land usage, ownership, or both, the payment of which Grantor assumes].

Clause 5-8-3

The following paragraph follows the exceptions called for by TREC no. 20-13 Rev. 11/15, "One to Four Family Residential Contract (Resale)," in conjunction with the title insurance forms, and it should be used when the contract for the transaction so provides. Always compare the contract and title insurance forms to confirm that changes have not been made since this clause was published.

Liens described as part of the Consideration and any other liens described in this deed as being either assumed by Grantee or subject to which title is taken by Grantee; validly existing restrictive covenants common to the platted subdivision in which the Property is located; standby fees, taxes, and assessments by any taxing authority for the year [the first year for which taxes are not paid as part of the closing] and subsequent years, and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership; validly existing utility easements created by the dedication deed or plat of the subdivision in which the Property is located; [describe
validly existing reservations or exceptions approved in writing by the grantee and other matters waived by the grantee under the terms of the contract and described in schedule B of the owner policy of title insurance issued to the grantee as part of the transaction; if they are numerous or lengthy, reference to an exhibit is appropriate], recorded in [recording data] of the real property records of [county] County, Texas; any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements; homestead or community property or survivorship rights, if any, of any spouse of Grantee; and any validly existing titles or rights asserted by anyone, including but not limited to persons, the public, corporations, governments, or other entities, to (1) tidelands or lands comprising the shores or beds of navigable or perennial rivers and streams, lakes, bays, gulfs, or oceans, (2) lands beyond the line of the harbor or bulkhead lines as established or changed by any government, (3) filled-in lands or artificial islands, (4) water rights, including riparian rights, or (5) the area extending from the line of mean low tide to the line of vegetation or the right of access to that area or easement along and across that area.

Specific Exceptions

To create specific exceptions, include each of the following that applies. This is typically done with an introductory phrase such as “To the extent they validly exist:” followed by numbered paragraphs.

Abstract of Judgment

Clause 5-8-4

Abstract of judgment dated [date], styled “[style of judgment],” filed for record, recorded in [recording data] of the real property records of [county]
County, Texas, in the amount of $[amount], plus costs, interest, and attorney’s fees.

Access Restrictions on Subdivision Plat

Clause 5-8-5

Limited, restricted, or nonaccess restrictions as shown on subdivision plat recorded in [recording data] of the real property records of [county] County, Texas.

Access Unavailable

Clause 5-8-6

Failure of the Property to have rights of ingress to and egress from a public thoroughfare.

Or

Clause 5-8-7

Failure of the Property to have the right of access to [specify thoroughfare].

Accretion

Clause 5-8-8

The rights of adjoining land owners in and to that part of the Property that may constitute accretion.
Areas and Boundaries

Clause 5-8-9

Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions or any overlapping of improvements.

Assignment of Lien

Clause 5-8-10

The note and deed of trust assigned to [name] by assignment of lien dated [date], recorded in [recording data] of the real property records of [county] County, Texas.

Building Setback Line

Clause 5-8-11

Building setback line [number] feet wide along [describe] property line as shown on [include if applicable: subdivision] plat recorded in [recording data] of the real property records of [county] County, Texas.

Cemetery

Clause 5-8-12

The dedication of a portion of the Property to and for use as a cemetery; the easements, privileges, and licenses existing in plot owners and their relatives in and to the cemetery portion, including the rights of burial, upkeep, ornamentation, and visitation; and the regulations and rules as established and amended by all cemetery owners covering the cemetery portion.
Implied easement for ingress and egress across the Property to and from the cemetery tract.

**Condominiums**

**Clause 5-8-13**

See also clause 5-8-31.

Terms, conditions, covenants, options, restrictions, bylaws, and easements contained in the declaration of condominium and bylaws executed by [name], dated [date], recorded in [recording data] of the real property records of [county] County, Texas, as the same have been amended, supplemented, and restated in the real property records of [county] County, Texas.

**Contract for Deed**

**Clause 5-8-14**

Terms of [include if applicable: unrecorded] contract for deed between [name] and [name], dated [date] [include if applicable: , recorded in [recording data] of the real property records of [county] County, Texas].

**Cotenant Rights**

**Clause 5-8-15**

Rights and claims of and against any and all cotenants in the Property such as partition, owelty, and contribution.
**Deed of Trust**

**Clause 5-8-16**

Deed of trust dated [date], executed by [name] to [name], trustee, recorded in [recording data] of the real property records of [county] County, Texas, securing the payment of a note of even date in the principal amount of $[amount].

**Deed of Trust to Secure Assumption**

**Clause 5-8-17**

Deed of trust to secure assumption dated [date], executed by [name] to [name], trustee, recorded in [recording data] of the real property records of [county] County, Texas, securing the assumption of the $[amount] note described in the deed of trust recorded in [recording data] of the real property records of [county] County, Texas.

**Easement—Aerial**

**Clause 5-8-18**

An unobstructed aerial easement [number] feet wide from a plane [number] feet above the ground upward, along the property line[s], shown on subdivision plat recorded in [recording data] of the real property records of [county] County, Texas.
Easement—Common Area Utility

Clause 5-8-19

Easements affecting common areas for utility [include if applicable: or other] purposes such as public utilities and drainage, as shown on subdivision plat recorded in [recording data] of the real property records of [county] County, Texas.

Easement—Flood Control

Clause 5-8-20

[County] County flood control drainage easement, as shown on subdivision plat recorded in [recording data] of the real property records of [county] County, Texas.

Easement—Pipeline

Clause 5-8-21

Pipeline easement granted [across a specified area/as a blanket easement] to [name], executed by [name], in instrument dated [date], recorded in [recording data] of the real property records of [county] County, Texas.

Easement—Reciprocal

Clause 5-8-22

Reciprocal easement for [specify] in instrument dated [date] and recorded in [recording data] of the real property records of [county] County, Texas.
Exceptions to Conveyance and Warranty

**Easement—Specific**

**Clause 5-8-23**

[Type] easement to [name], dated [date], executed by [name], recorded in [recording data] of the real property records of [county] County, Texas.

**Easement—Zero Lot Line on Subdivision Plat**

**Clause 5-8-24**

Easement [number] feet wide along side lot line[s] for encroachments caused by settling and overhang of adjacent structures and for construction, maintenance, and repair, as shown on subdivision plat recorded in [recording data] of the real property records of [county] County, Texas.

**Easements—Unrecorded**

**Clause 5-8-25**

Visible and apparent easements on or across the Property.

**Electric Service Agreements**

**Clause 5-8-26**

[Name of authority] agreement for underground extension of electrical service dated [date], recorded in [recording data] of the real property records of [county] County, Texas.
Financing Statement (County Records)

Clause 5-8-27

UCC1 financing statement executed by [name], debtor, to [name], secured party, recorded in [recording data] of the [specify] records of [county] County, Texas, on [date].

General Restrictions

Clause 5-8-28

Restrictions recorded in [recording data] of the real property records of [county] County, Texas.

Lease Agreement

Clause 5-8-29

[Unrecorded lease/Lease] agreement between [name], as lessor, and [name], as lessee, dated [date] [include if applicable: , recorded in [recording data] of the real property records of [county] County, Texas] [include if applicable: and assigned to [name] by instrument dated [date], recorded in [recording data] of the real property records of [county] County, Texas].

Loan Modification

Clause 5-8-30

The note and deed of trust modified by a modification agreement dated [date], executed by [name], owner, and [name], lender, recorded in [recording data] of the real property records of [county] County, Texas.
Maintenance Assessment Exception (Property Owners Association)

Clause 5-8-31

[Annual assessments/Current maintenance charges] for the year [year] and subsequent years not yet due and payable, secured by an inchoate lien, as set forth in the instrument dated [date] and recorded in [recording data] of the real property records of [county] County, Texas.

Mechanic’s Lien by Affidavit

Clause 5-8-32

Claim of mechanic’s lien by affidavit dated [date], executed by [name], recorded in [recording data] of the real property records of [county] County, Texas, claiming a lien in the amount of $[amount].

Mechanic’s Lien Contract with Deed-of-Trust Provision

Clause 5-8-33

Mechanic’s lien contract dated [date], executed by [name] to [name], securing [name], payee, in the payment of one note of even date in the original principal amount of $[amount], with a deed of trust to [name], trustee, incorporated therein, and assigned to [name] by assignment incorporated therein, recorded in [recording data] of the real property records of [county] County, Texas.

See also clause 5-8-13.
Mineral Estate or Royalty Conveyed or Reserved

Clause 5-8-34

A [mineral estate/right to royalty], together with all related rights, express or implied, as described in instrument executed by [name] to [name], dated [date], recorded in [recording data] of the real property records of [county] County, Texas [include if applicable: , as modified by waiver of surface rights in instrument dated [date], executed by [name], and recorded in [recording data] of the real property records of [county] County, Texas].

Mineral Lease

Clause 5-8-35

Oil, gas, or mineral lease dated [date], between [name] and [name], recorded in [recording data] of the real property records of [county] County, Texas.

Mineral Reservation by Predecessor

Clause 5-8-36

Reservation by [name] of the subsurface mineral estate, including oil, gas, and other minerals in and under the Property, including all easements owned or held by any lessee or mineral owner on, over, or across the Property for the purpose of producing or transporting any of the minerals together with the right of ingress and egress, in a deed recorded in [recording data] of the real property records of [county] County, Texas.
Notice of Assessment

Clause 5-8-37

Notice of assessment by [city of \[city\]/[county] County, Texas.] for [purpose] in the amount of \$[amount], and related charges, dated \[date\], recorded in \[recording data\] of the real property records of [county] County, Texas.

Party Wall

Clause 5-8-38

Party wall agreement dated \[date\] between \[name\] and \[name\], recorded in \[recording data\] of the real property records of [county] County, Texas.

Property Encumbered by Lien Securing Note That Grantee Does Not Assume

Clause 5-8-39

A lien securing a promissory note in the original principal amount of \[amount\] DOLLARS \($[amount]\), described in and secured by a deed of trust recorded in \[recording data\] of the real property records of [county] County, Texas. Grantee does not assume payment of the note or liability under any instrument securing the note.

Reinstatement of Accelerated Loan

Clause 5-8-40

The note and deed of trust reinstated by reinstatement agreement dated \[date\], executed by \[name\], owner, and \[name\], lender, recorded in \[recording data\] of the real property records of [county] County, Texas.
Riparian Rights

Clause 5-8-41

Any title or rights asserted by anyone, including but not limited to persons, the public, corporations, governments, or other entities, to any portions of the Property that may be within the bed of [specify].

River Exception

Clause 5-8-42

Past and future action of the [name of river] by means of accretion, erosion, or avulsion.

Roadway

Clause 5-8-43

Any portion of the Property within the limits or boundaries of any public or private roadway or highway.

Taxes

Clause 5-8-44

Standby fees, taxes, and assessments by any taxing authority for the year [year] and subsequent years, and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership.

Or
Exceptions to Conveyance and Warranty

Clause 5-8-45

Taxes for [current year], which Grantee assumes and agrees to pay, [and subsequent assessments for that and prior years due to change in land usage, ownership, or both, the payment of which Grantee assumes] but not subsequent assessments for that and prior years due to change in land usage, ownership, or both, the payment of which Grantor assumes].

Tax Lien—Federal

Clause 5-8-46

Federal tax lien against [name], recorded in [recording data] of the real property records of [county] County, Texas, in the amount of $[amount], plus penalty and interest.

Tax Lien—State

Clause 5-8-47

State tax lien against [name], recorded in [recording data] of the real property records of [county] County, Texas, in the amount of $[amount], plus penalty and interest.

Tenant Possession Rights

Clause 5-8-48

Rights of tenants in possession under unrecorded leases.
Tideland

Clause 5-8-49

Any titles or rights asserted by anyone, including but not limited to persons, the public, corporations, governments, or other entities, to (1) tidelands or lands comprising the shores or beds of navigable or perennial rivers and streams, lakes, bays, gulfs, or oceans, (2) lands beyond the line of the harbor or bulkhead lines as established or changed by any government, (3) filled-in lands or artificial islands, (4) water rights, including riparian rights, or (5) the area extending from the line of mean low tide to the line of vegetation or the right of access to that area or easement along and across that area.

Title Insurance Concurrent Exceptions

Clause 5-8-50

Use the following clause to avoid warranty liability that is not covered by the owner policy of title insurance issued to the grantee.

Any law, ordinance, or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting, or relating to—

1. the occupancy, use, or enjoyment of the Property;

2. the character, dimensions, or location of any improvement now or hereafter erected on the Property;

3. a separation in ownership or a change in the dimensions or area of the Property or any parcel of which the Property is or was a part; or
4. environmental protection or the effect of any violation of these laws, ordinances, or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien, or encumbrance resulting from a violation or alleged violation affecting the Property has been recorded in the public records on or before this date.

Any governmental police power, except to the extent that a notice of the exercise thereof or a notice of defect, lien, or encumbrance resulting from a violation or alleged violation affecting the Property has been recorded in the public records on or before this date.

Rights of eminent domain unless notice of its exercise has been recorded in the public records on or before this date, but not excluding any taking that has occurred before this date that would be binding on the rights of a purchaser for value without knowledge.

The refusal of any person to purchase, lease, or lend money on the estate or property interest conveyed by this deed because of unmarketability of title.

Any claim that arises out of the transaction vesting in Grantee the estate or interest conveyed by this deed, by reason of the operation of federal bankruptcy, state insolvency, or other state or federal creditors’ rights laws that is based on either (1) the transaction creating the estate or interest conveyed by this deed being deemed a fraudulent conveyance or fraudulent transfer or a voidable distribution or voidable dividend, (2) the subordination or recharacterization of the estate or interest conveyed by this deed as a result of the application of the doctrine of equitable subordination, or (3) the transaction creating the estate or property interest conveyed by this deed being deemed a preferential transfer.
Vendor’s Lien and Deed of Trust

Clause 5-8-51

Vendor’s lien and superior title retained in deed dated [date], executed by [name] to [name], recorded in [recording data] of the real property records of [county] County, Texas, securing the payment of a note of even date in the principal amount of $[amount], additionally secured by a deed of trust of even date to [name], trustee, recorded in [recording data] of the real property records of [county] County, Texas.
Form 5-9

Additional Clauses for Deeds

“As Is” Conveyance

Clause 5-9-1

GRANTEE IS TAKING THE PROPERTY IN AN ARM’S-LENGTH AGREEMENT BETWEEN THE PARTIES. THE CONSIDERATION WAS BARGAINED ON THE BASIS OF AN “AS IS, WHERE IS” TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS OR EXPRESS OR IMPLIED WARRANTIES [include if applicable: ], EXCEPT THOSE CONTAINED IN THE PURCHASE CONTRACT, THIS DEED, AND THE OTHER CLOSING DOCUMENTS]. GRANTEE HAS NOT RELIED ON ANY INFORMATION OTHER THAN GRANTEE’S INSPECTION [include if applicable: ] AND THE REPRESENTATIONS AND WARRANTIES EXPRESSLY CONTAINED IN THE PURCHASE CONTRACT, THIS DEED, AND THE OTHER CLOSING DOCUMENTS].

Include the following if the grantor retains no liability for environmental matters after conveyance.

GRANTEE RELEASES GRANTOR FROM LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY, INCLUDING LIABILITY (1) UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA), THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), THE TEXAS SOLID WASTE DISPOSAL ACT, AND THE TEXAS WATER CODE; OR (2) ARISING AS THE RESULT OF THEORIES OF PRODUCT
LIABILITY AND STRICT LIABILITY, OR UNDER NEW LAWS OR CHANGES TO EXISTING LAWS ENACTED AFTER THE EFFECTIVE DATE OF THE PURCHASE CONTRACT THAT WOULD OTHERWISE IMPOSE ON GRANTORS IN THIS TYPE OF TRANSACTION NEW LIABILITIES FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY. [Include if applicable: THIS RELEASE APPLIES EVEN WHEN THE ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY RESULT FROM GRANTOR’S OWN NEGLIGENCE OR THE NEGLIGENCE OF GRANTOR’S REPRESENTATIVE.]

Assumption of Liability for VA-Guaranteed Loans

Clause 5-9-2

As part of the Consideration for this conveyance Grantee herein expressly assumes and agrees to pay the balance owing on the promissory note dated [date], in the original principal amount of $[amount], secured by and fully described in the deed of trust of the same date recorded in [recording data] of the real property records of [county] County, Texas. Grantee hereby agrees to assume all of the obligations of [name of the veteran and spouse if applicable] under the terms of the instruments creating that loan. Grantee further agrees to indemnify the Department of Veterans Affairs to the extent of any claim payment arising from the guaranty or insurance of the indebtedness created by such instruments. This agreement of assumption is evidenced by Grantee’s acceptance of this deed.
Condominium Deed—Property Description

Clause 5-9-3

Unit [identifying number] [include if applicable: building [building letter]], [name of condominium], a condominium regime located in [county] County, Texas, according to the [title of declaration], including any amendments, plats, and plans, dated [date], recorded [recording data for declaration, including any amendments, plats, and plans] (collectively, the “Declaration”), together with the appurtenant common elements described in the Declaration.

 Clause 5-9-4 reserved

Correction Deed—New Document

Clause 5-9-5

An instrument correcting a material error should comply with the requirements of Tex. Prop. Code § 5.029. The correction instrument can be a restatement of the deed titled “Correction Instrument,” and the instrument must be executed by each party to the deed or, if applicable, the parties’ heirs, successors, or assigns. The following paragraph should be included at the end of the restated text from the deed.

This deed is made as a correction deed in substitution of the deed titled “[title of original deed]” (“Corrected Deed”) dated [date] and recorded in [recording data] of the real property records of [county] County, Texas, to correct the following incorrect information: [state the incorrect information and the correction[s], e.g., the legal description incorrectly stated the acreage as “32 acres,” when it should have stated the acreage as “23 acres”]. Other than the stated correction, this deed is intended to restate in all respects the Corrected Deed, and the effective date of this correction deed relates back to the effective date of the Corrected Deed.
**Fee Simple Determinable**

**Clause 5-9-6**

Include the following defined term.

Fee Simple Determinable Condition: [State the condition that will prevent reversion, e.g., The Property will be used as a motel with between fifty and one hundred separate operating motel rooms for a minimum of five years from the date of conveyance. An affidavit stating that the condition has been fulfilled, filed during the first six months of the sixth year, if not contradicted by a recorded statement filed within the same six months, is conclusive evidence that the condition has been satisfied, and Grantee and third parties may rely on it.]

**Clause 5-9-7**

Include the following provision with the granting provision of the deed in place of the word “forever.”

for as long as the Fee Simple Determinable Condition is satisfied, and if the Fee Simple Determinable Condition is not satisfied, the Property will automatically revert to and be owned by Grantor without the necessity of any further act on the part of Grantor, it being Grantor’s intent to convey a fee simple determinable estate to Grantee.

*For Use with Warranty Deed with Vendor’s Lien*

**Clause 5-9-8**

Use the following with clause 5-6-13 in this chapter if the payee is a third party.

[Name of third party], at Grantee’s request, has paid in cash to Grantor that portion of the purchase price of the Property that is evidenced by the note. The first and superior vendor’s lien against and superior title to the Property
are retained for the benefit of [name of third party] and are transferred to [name of third party] without recourse against Grantor.

Clause 5-9-9

[Name of third party], at Grantee’s request, has paid in cash to Grantor that portion of the purchase price of the Property that is evidenced by the first-lien note. The first and superior vendor’s lien against and superior title to the Property are retained for the benefit of [name of third party] and are transferred to [name of third party] without recourse on Grantor to secure the first-lien note. The second and inferior vendor’s lien against and superior title to the Property are retained for the benefit of Grantor to secure the second-lien note. Grantor agrees that this second and inferior vendor’s lien against and superior title to the Property are and will remain subordinate and inferior to all liens securing the first-lien note, regardless of the frequency or manner of renewal, extension, or alteration of any part of the first-lien note or the liens securing it.

Clause 5-9-10

The second and inferior vendor’s lien against and superior title to the Property are retained for the benefit of Grantor to secure both Grantee’s assumption of the first-lien note and payment of the second-lien note to Grantor. Grantee’s assumption of the first-lien note is also secured by a deed of trust to secure assumption of even date, from Grantee to [name], trustee. If Grantee defaults in payment of the assumed note or the second-lien note or in observance of any covenant or condition of any instrument securing their pay-
ment, Grantor will have the right to foreclose the vendor’s lien reserved in this deed. Grantor assigns to Grantee all funds on deposit for payment of taxes and insurance premiums.

**Clause 5-9-11**

Use the following with clause 5-6-1 if the second-lien note is payable to a third party.

The first and superior vendor’s lien against and superior title to the Property are retained in this deed for the benefit of the holders of the first-lien note and the second-lien note, to secure both Grantee’s assumption of the first-lien note and payment of the second-lien note. Grantee’s assumption of the first-lien note is also secured by a deed of trust to secure assumption of even date, from Grantee to [name], trustee. The inferior vendor’s lien is transferred to [name of third party] without recourse on Grantor. If Grantee defaults in payment of the assumed note or the second-lien note or in observance of any covenant or condition of any instrument securing their payment, both Grantor and [name of third party] will have the independent right to foreclose the vendor’s lien. However, as between the two parties holding the vendor’s lien retained in this deed, the rights, title, and interest of [name of third party] are subordinate to the rights, title, and interest of Grantor. Cancellation of the assumed note and release of the liens securing it will release the liens securing the assumption, including the vendor’s lien and deed of trust to secure assumption, without specific reference to them or the joinder of Grantor. Grantor assigns to Grantee all funds on deposit for payment of taxes and insurance premiums.
Personal Property

Clause 5-9-12

Include the following defined term.

Personal Property: The property constituting personal property located in or on and used in the enjoyment of the Property [include if applicable: , including the items identified on the attached Personal Property Schedule, incorporated in this deed by reference].

Clause 5-9-13

Include the following paragraph after the granting, habendum, and warranty clauses.

For the same Consideration, Grantor sells, transfers, and delivers the Personal Property to Grantee and warrants and agrees to defend title to the Personal Property to Grantee and Grantee’s successors and assigns against all lawful claims. Title in the Personal Property passes at the time this deed is delivered.

Include the following if applicable.

THE PERSONAL PROPERTY TRANSFERRED TO GRANTEE IS SOLD, TRANSFERRED, AND DELIVERED “AS IS” AND “WITH ALL FAULTS”; FURTHER, GRANTOR EXCLUDES ALL WARRANTIES AND REPRESENTATIONS, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

Restrictive Covenants

Clause 5-9-14

Include the following defined terms.
Affected Property Owners: [e.g., All the owners of land in the Ranchette
Estates Subdivision, as shown by plat recorded in [recording data] of the
real property records of [county] County, Texas.]

Restrictions: [State enumerated restrictions.]

Clause 5-9-15

Include the following paragraph after the granting, habendum,
and warranty clauses.

Grantor, as the fee simple owner of the Property, establishes the Restrictions as covenants, conditions, and restrictions, whether mandatory, prohibitive, permissive, or administrative, to regulate the structural integrity, appearance, and uses of the Property and the improvements placed on it.

Grantor and Grantee stipulate that (1) the Restrictions touch and concern the Property; (2) privity of estate exists by reason of the ownership of the Property; (3) notice is given by filing this instrument in the real property records of the county in which the Property is situated; and (4) the Restrictions are reasonable, their purposes being for the common benefit of Grantor, Grantee, and the Affected Property Owners, who are affected by the structural integrity, appearance, and uses of the Property. The Restrictions run with the land making up the Property, are binding on Grantee and Grantee’s successors and assigns forever, and inure to the benefit of Grantor, Grantee, Affected Property Owners, and their successors and assigns forever.

Separate Property

Clause 5-9-16

Grantor grants and conveys the Property to Grantee as separate property.
Strips and Gores

Clause 5-9-17

Grantor, for the same Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance [include if applicable: and Warranty], grants, sells, and conveys to Grantee, without express or implied warranty, the strips or gores, if any, between the Property and abutting properties and land lying in or under any public thoroughfare, opened or proposed, abutting or adjacent to the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee’’s heirs, successors, and assigns forever. All warranties that might arise by common law as well as the warranties in section 5.023 of the Texas Property Code (or its successor) are excluded as to the property conveyed by this paragraph.

Timber Deed—Property Description

Clause 5-9-18

Easement for the purpose of cutting and removing timber from the Property created by easement agreement dated [date], between [name] and [name], recorded in [recording data] of the real property records of [county] County, Texas.

Townhouse Deed

Clause 5-9-19

Include the following defined term.

Building Site:
Clause 5-9-20

Building Site number [identifying number] in lot [number], block [number], [subdivision name], a subdivision recorded in volume [number], page [number], Map Records, [county] County, Texas, together with the easements, undivided interest in common area, and other rights, title, and interest that are appurtenant to ownership of the townhouse Property under the terms of the [describe declaration], as amended from time to time [include if applicable: , and the plat of the subdivision].

Clause 5-9-21

1. The rights of other townhouse owners within the common building of which this townhouse is a part, including reasonable rights of access for maintenance and repair in and to all structural elements that comprise any part of the overall structural unit of the building and all utility lines and facilities that comprise any part of the utility service to the entire building.

2. The rights given to, and obligations imposed on, each Building Site owner under the terms of the [describe declaration], as amended from time to time, such as assessments for maintenance of the common area secured by an inchoate lien against the townhouses, all of which are covenants running with the land and binding on any townhouse owner.
Transfer of Escrow and Insurance Policy

Clause 5-9-22

Include the following to incorporate the transfer of escrow in the deed.

Grantor assigns to Grantee all funds held in escrow for payment of taxes and insurance premiums. If the casualty insurance policy is to be assigned to Grantee, the transfer will be handled by separate instrument.

Vendor’s Lien and Deed of Trust to Secure Assumption

Clause 5-9-23

Use the following with clause 5-6-2.

The first and superior vendor’s lien against and superior title to the Property are retained in this deed to secure Grantee’s assumption of the note. Grantee’s assumption of the note is also secured by a deed of trust to secure assumption of even date, from Grantee to [name], trustee. If default occurs in payment of the assumed note or in observance of any covenant or condition of any instrument securing the assumed note, Grantor and the holder of the assumed note each have the independent right to foreclose the vendor’s lien. However, as between the two holders of the vendor’s lien, Grantor’s rights, title, and interest are subordinate to the rights, title, and interest of the holder of the assumed note. Cancellation of the assumed note and release of the liens securing it will release the liens securing the assumption, including the vendor’s lien and deed of trust to secure assumption, without specific reference to them or the joinder of Grantor.
Waiver of Implied Liens

Clause 5-9-24

Grantor has been paid in full for [describe property, e.g., Parcel One], and any lien, expressed or implied, in favor of Grantor against [describe property, e.g., Parcel One] is waived. Grantor’s liens are against [describe property, e.g., Parcel Two] only.

Clause 5-9-25

Grantor waives any expressed or implied lien on [describe property, e.g., Parcel One] arising by reason of Grantee’s assumption of the note in the original principal amount of [amount] DOLLARS ($[amount]).

Wraparound Lien [Deed Subject to]

Clause 5-9-26

This conveyance is made subject to the prior lien (“Underlying Lien”) of a deed of trust recorded in [recording data] of the real property records of [county] County, Texas, to [name], trustee, which secures payment of a promissory note (“Underlying Lien Debt”) in the principal amount of [amount] DOLLARS ($[amount]). Grantee in this deed does not assume payment of that Underlying Lien Debt. As further consideration Grantor promises to keep and perform all the covenants and obligations of the grantor named in the Underlying Lien deed of trust and to indemnify, defend, and hold Grantee harmless against any damages caused by Grantor’s breach of its obligations under the
Underlying Lien Debt and related documents, as long as Grantee is not in default on the Wraparound Lien Debt and documents relating to it.
Grantee’s Acceptance of Deed

[Name], Grantee, accepts the attached deed and consents to its form and substance. Grantee acknowledges that the terms of the deed conform with Grantee’s intent and that they will control in the event of any conflict with the contract Grantee signed regarding the Property described in the deed.

Include the following for an assumption transaction.

Grantee agrees to the obligations imposed on Grantee by the terms of the deed.

Continue with the following.

[Name of grantee]
Date:
Form 5-11

The owelty lien created in this form is against the entire property, including the share owned by the grantee before the partition.

Owelty of Partition Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

Consideration: [Cash and a/A] note of even date executed by Grantee and payable to the order of [name of third party or grantor] in the principal amount of [amount] DOLLARS ($[amount]). The note is secured by a first and superior vendor’s lien, an owelty lien, and superior title retained in this deed in favor of [name of third party or grantor] and by a first-lien deed of trust of even date from Grantee to [name], trustee.

Property (including any improvements): [Describe the entire property being partitioned.]

Property Portion Conveyed (including any improvements): [Describe the property being conveyed by this deed.]

Reservations from Conveyance:
Exceptions to Conveyance and Warranty:

State “None” or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.

Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee’s heirs, successors, and assigns forever. Grantor binds Grantor and Grantor’s heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.

The vendor’s lien and owelty lien against, and superior title to, the Property are retained until the note described is fully paid according to its terms, at which time this deed becomes absolute.

Include the following if applicable.

[Name of third party], at Grantee’s request, has paid in cash to Grantor that portion of the purchase price of the Property Portion Conveyed that is evidenced by the note described. The vendor’s lien, owelty lien, and superior title to the Property are retained for the benefit of, and are transferred to, [name of third party] without recourse on Grantor.
Owelty Recitals

For transactions as a consequence of divorce, choose the first alternative paragraph below. For transactions based on a separate agreement between the parties, choose the second alternative paragraph.

First. A divorce was granted terminating the marriage between Grantor and Grantee by divorce decree dated [date], rendered in Cause No. [number] in the [designation] Court of [county] County, Texas. An order partitioning the Property was entered [date] in the same cause and Court.

Or

First. Grantor and Grantee have agreed to the transfer of ownership and owelty of partition effected by this deed by separate Owelty of Partition Agreement dated [date], between Grantor and Grantee, as cotenants of the Property.

Second. Grantor and Grantee, owning the Property as tenants in common, desire to effect a partition of the Property in order that Grantee own 100 percent of the Property in fee simple. [Include if applicable: Grantee has arranged to borrow the amount of $[amount] from [name of lender] ("Lender"), in order to acquire the Property Portion Conveyed in fee simple. Lender is willing to advance that amount provided that the indebtedness is secured by a first and superior vendor’s lien, owelty lien, superior title, and a deed-of-trust lien, all on the full fee simple title in and to 100 percent of the Property.]

Third. The Property is not susceptible to partition in kind and, for Grantee to acquire the full fee simple title in and to the Property Portion Conveyed, it is necessary to fix a lien on the entirety of the Property in the amount of $[amount]. The lien represents an owelty of partition and the necessary adjustment between the parties to carry out the purposes of the partition. Grantee acknowledges that the vendor’s lien, owelty lien or owelty of partition, and
superior title are superior to Grantee’s rights to use and occupy the Property as Grantee’s homestead or otherwise as fully and completely as if the liens or owelty of partition were fixed and judicially decreed in a partition suit between Grantor and Grantee.

Grantee joins in the execution of this deed and binds Grantee’s heirs, successors, and assigns in acceptance of the delivery of the deed. Grantee stipulates to [Grantor and Grantor’s/ Lender and Grantor and each of their respective] heirs, successors, and assigns the following: (1) the truth and correctness of the Recitals and the validity of the vendor’s lien, owelty lien, superior title, and deed-of-trust lien securing the payment of the indebtedness, on the entirety of the full fee simple title to the Property; (2) the vendor’s lien, owelty lien, superior title, and deed-of-trust lien are prior and superior to any right of use, occupancy, and homestead that Grantee may have or claim in and to the Property; [and] (3) the whole fee simple title to the Property is vested in Grantee under this deed [include if applicable: ; and (4) Lender has advanced funds to Grantee in reliance on the stipulations and representations made and the facts stated in this deed].

[Name of grantor]

[Name of grantee]

Include acknowledgments.
Owelty of Partition Agreement

Form 5-12

This form may be used with the owelty of partition deed in fixing a lien on homestead property if appropriate under Tex. Prop. Code § 41.001(b)(4).

Owelty of Partition Agreement

Date:

Selling Cotenant: [include address]

Purchasing Cotenant: [include address]

Property:

Consideration: Cash and the mutual covenants and agreements between the parties, the receipt and sufficiency of which are acknowledged and stipulated.

Selling Cotenant and Purchasing Cotenant are the owners, as tenants in common, of the Property. By this agreement, Selling Cotenant and Purchasing Cotenant (collectively, the “Parties”) evidence an owelty of partition by written agreement, including the creation of a debt of the Purchasing Cotenant in favor of the Selling Cotenant [include if applicable: as the result of the division or award of a family homestead in a divorce proceeding].

The Parties stipulate that the Property is not susceptible to partition in kind and, for Purchasing Cotenant to acquire the full fee simple title in the Property, it is necessary to fix a lien on the entirety of the Property in the amount of $[amount].

To effectuate this agreement, Selling Cotenant will execute an owelty of partition deed to Purchasing Cotenant in which a vendor’s lien and owelty lien in the above amount are reserved, and Purchasing Cotenant will execute a promissory note in the above amount
secured by a vendor’s lien, superior title, an owelty lien, and a deed-of-trust lien describing the entirety of the Property.

[Name of selling cotenant]

[Name of purchasing cotenant]

Include acknowledgments.
Form 5-13

Deed in Lieu of Foreclosure

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

Note:

Deed of Trust:

Consideration: [amount] DOLLARS ($[amount]), the receipt and sufficiency of which are hereby acknowledged, and further the release of Grantor from all liability for the indebtedness and obligations under the Note and Deed of Trust, except that no release is given of any liens or warranties of title and further except that the indebtedness under the Note is not canceled or extinguished.

Property (including any improvements):

Exceptions to Conveyance and Warranty: The liens described in this deed and the exceptions to conveyance and warranty in the Deed of Trust.
Grantor, for the Consideration and subject to the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee’s heirs, successors, and assigns forever. Grantor binds Grantor and Grantor’s heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Exceptions to Conveyance and Warranty.

Conveyance in Lieu of Foreclosure

This deed and the conveyances being made are executed, delivered, and accepted in lieu of foreclosure and will be interpreted and construed the same as a foreclosure of the liens and as an absolute conveyance to Grantee of all right, title, and interest in and to the Property, including specifically but without limitation any equity or rights of redemption of Grantor in or to the Property.

Continuing Nature of Lien

Notwithstanding the release of Grantor from all liability for the indebtedness and obligations under the Note and Deed of Trust, the indebtedness has not been canceled or extinguished and the Property continues to be subject to the performance of the obligations under the Deed of Trust. The Deed of Trust lien is not released or relinquished in any manner, and the indebtedness, obligations, and lien will remain valid and continuous and in full force and effect, unless and until the indebtedness, obligations, and liens are expressly released by written instrument executed and delivered by the holder thereof, at the holder’s sole discretion.
Nonmerger

Neither Grantor nor Grantee intend that there be, and there will never be, a merger of the Deed of Trust lien with the fee simple title or any other interest of Grantee in the Property by virtue of this conveyance, and the parties expressly provide that any interest in the Deed of Trust lien and fee simple title will be and remain at all times separate and distinct.

[Name of grantor]

[Name of grantee]

Include acknowledgments.
Form 5-14

[Administration/Guardianship] Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor: The estate of [name of deceased or ward], [deceased/an incapacitated person].

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

Consideration:

Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12 in this chapter.

Reservations from Conveyance:

State “None” or, to create reservations of title, include the appropriate clauses from form 5-7.

Exceptions to Conveyance and Warranty:

State “None” or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.

By an order of the [designation] Court of [county] County, Texas, made on [date], directing the sale of the Property belonging to Grantor, which estate was then and is now pending in that court, I, [name], [executor/guardian] of the estate of [name of deceased or ward],...
ward], [deceased/an incapacitated person], sold on [date], by private sale in [city], [county] County, Texas, the Property to Grantee for the Consideration.

The report of the sale was filed on [date] and made to the Court, and the sale was confirmed by the decree of the Court by its Order Confirming Sale of Real Property, which is attached and incorporated herein by reference as Exhibit A.

Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee’s heirs, successors, and assigns forever. Grantor binds Grantor and Grantor’s heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.

If the conveyance includes personal property, include clause 5-9-13.

If appropriate, include additional clauses like those suggested in form 5-9.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

If the deed imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.
Form 5-15

Blanket Bill of Sale

Date:

Seller:

Seller’s Mailing Address:

Buyer:

Buyer’s Mailing Address:

Real Property (including improvements):

Transferred Properties:

All items of personal property, both tangible and intangible (excluding cash), affixed or attached to, or placed or situated on, or used or acquired in any way whatever in connection with the completion and comfortable use, enjoyment, occupancy, or operation of the Real Property, including, without limitation, the following:

1. All equipment, furniture, building supplies, appliances, and fixtures owned by Seller and located in or on or used in connection with the Real Property or the operations thereon.

2. All of Seller’s interest in all use, occupancy, building, and operating permits, if any, and all licenses and approvals issued from time to time with respect to the Real Property or the Transferred Properties.
3. All of Seller’s interest in all management, maintenance, service, supply, employment, and vending machine contracts, if any, relating to the Real Property or the Transferred Properties.

4. All of Seller’s interest in and to all existing and assignable guarantees and warranties, express or implied, if any, issued in connection with the construction, alteration, and repair of the Real Property and the purchase, installation, and repair of the Transferred Properties, to the extent that such guarantees and warranties are known to and in the possession of Seller.

5. All rights Seller may have to use the trade name, or any similar name, it being understood that Seller covenants not to use the name.

6. All rights Seller may have, if any, to any trademarks, promotional material, tenant data, telephone numbers and listings, post office boxes, all master keys and keys to common areas, all goodwill, if any, and all other rights, privileges, and appurtenances owned by Seller and in any way related to or used in connection with the existing business operation of the Real Property.

7. All funds or reserve accounts deposited with any lienholder of the Real Property as an escrow fund or impound for the payment of taxes, assessments, and premiums for insurance pertaining to the Real Property.

8. All of Seller’s right, title, and interest in and to the hazard insurance policy carried by Seller on the Transferred Properties.

Include the following if applicable.

9. All items identified on the itemized properties schedule attached and incorporated herein by reference as Exhibit [exhibit number/letter].
Exceptions to Transfer and Warranty:

[The Existing Lien and those/Those] exceptions contained in the warranty deed of even date conveying the Real Property from Seller to Buyer.

Trade Name:

Excluded Properties:

Consideration:

[Existing Lien:]

Seller is conveying the Real Property to Buyer by warranty deed. As part of this transaction, Seller desires to transfer all the Transferred Properties to Buyer.

For the Consideration, Seller transfers to Buyer the Transferred Properties, save and except the Excluded Properties, and subject to the Exceptions to Transfer and Warranty.

As a material part of the Consideration for this sale, Seller and Buyer agree that Buyer is taking the Transferred Properties “AS IS” and that there are no representations, disclosures, or express or implied warranties except those contained in the purchase contract and this bill of sale. Buyer has not relied on any information other than Buyer’s inspection and the representations and warranties expressly contained in the purchase contract and this bill of sale.

To have and to hold the Transferred Properties to Buyer and Buyer’s heirs, successors, and assigns forever. Seller binds Seller and Seller’s heirs and successors to warrant and forever defend all and singular the Transferred Properties to Buyer and Buyer’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any
part thereof when the claim is by, through, or under Seller but not otherwise, subject to the Exceptions to Transfer and Warranty.

Seller appoints Buyer and Buyer’s heirs, successors, and assigns as Seller’s agent and attorney-in-fact to act for Seller in any lawful way in the exercise of the claims and litigation powers described in section 752.110 of the Texas Estates Code, or its successor, as amended, with respect to the Transferred Properties or the properties intended to be transferred by this bill of sale. This is a special power coupled with an interest and is irrevocable.

Seller agrees to execute and deliver any additional documents and to perform any additional acts reasonably necessary or appropriate to carry out the intent of this bill of sale in transferring the Transferred Properties to Buyer.

When the context requires, singular nouns and pronouns include the plural.

[Name of seller]

[Name of buyer]

Include acknowledgments. If applicable, attach the properties schedule as an exhibit.
Bill of Sale

Date:

Seller:

Seller’s Mailing Address:

Buyer:

Buyer’s Mailing Address:

Consideration:

Transferred Properties:

Reservations from Transfer:

Exceptions to Transfer and Warranty:

Seller, for the Consideration and subject to the Reservations from Transfer and the Exceptions to Transfer and Warranty, sells, transfers, and delivers the Transferred Properties to Buyer, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Buyer and Buyer’s heirs, successors, and assigns forever. Seller binds Seller and Seller’s heirs and successors to warrant and forever defend all and singular the Transferred Properties to Buyer and Buyer’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof when the claim is by, through, or under Seller but not otherwise, except as to the Reservations from Transfer and the Exceptions to Transfer and Warranty.
As a material part of the Consideration for this sale, Seller and Buyer agree that Buyer is taking the Transferred Properties “AS IS” and that there are no representations, disclosures, or express or implied warranties except those contained in the purchase contract and this bill of sale. Buyer has not relied on any information other than Buyer’s inspection and the representations and warranties expressly contained in the purchase contract and this bill of sale.

When the context requires, singular nouns and pronouns include the plural.

[Name of seller]

[Name of buyer]

Include acknowledgments.
Form 5-17

Transfer of Escrow Funds [and Hazard Insurance Policy]

Date:

Loan: Loan Number [number] held by [name] (“Lender”), under Seller’s name as the current debtor.

Seller:

Seller’s Mailing Address:

Buyer:

Buyer’s Mailing Address:

For the sale consideration, Seller assigns and transfers to Buyer all the accumulated escrow deposits made under the provisions of the deed of trust securing the Loan [include if applicable: along with all of Seller’s interest in and to the existing hazard insurance policy covering the improvements located on the real property securing the Loan. Seller authorizes and directs Lender and the hazard insurer to endorse and transfer the existing policy from Seller to Buyer].

__________________________________________________________________________________________________________________________ ...

__________________________________________________________________________________________________________________________

[Name of seller]
Form 5-18

A joint tenancy may be created by written agreement of property owners in compliance with statutory requirements. See Tex. Est. Code § 111.001. This agreement may be used to evidence a joint tenancy with right of survivorship. Caution: This form should not be used between spouses regarding community property. See form 5-19 in this chapter.

Survivorship Agreement

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Owners:

Property:

Owners own the Property jointly and for valuable consideration agree with each other as follows:

1. If no severance occurs before the death of [either/any] Owner, then on the death of [either/any] Owner, the interest of the joint Owner who dies will survive to the surviving joint Owner[s].

2. Owners will after this date own the Property in the same manner as joint tenants with right of survivorship.

3. This agreement may be revoked, and the joint tenancy of Owners in the Property may be severed, only by a written instrument signed by all Owners.

4. This agreement is binding on Owners and Owners’ respective heirs and successors.
Survivorship Agreement

[Name of owner]

[Name of owner]

Include acknowledgments.
Form 5-19

This form is used to create a right of survivorship in community property as provided for by Tex. Est. Code §§ 112.051–.054. See the section titled “Community Property with Right of Survivorship” in chapter 2 of this manual. When using this form, the attorney should review any wills or other estate planning instruments to avoid unintentional effects on the family’s estate plan.

Survivorship Agreement for Community Property

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Spouses:

Property:

Spouses own the Property jointly and for valuable consideration agree with each other as follows:

1. As long as the Property remains community property, on the death of either Spouse, the Property interest of the Spouse who dies will become the Property of the surviving Spouse and will not descend to or be vested in the heirs or devisees of the deceased Spouse.

2. Spouses will after this date own the Property in the same manner as joint tenants with right of survivorship.

3. This agreement may be revoked, and the joint tenancy of the Spouses may be severed, only by a written instrument signed by both Spouses [include if applicable: or by a written instrument signed by one Spouse and delivered to the other Spouse].
Survivorship Agreement for Community Property

__________________________________________________________________________________________________________________________

[Name of spouse A]

__________________________________________________________________________________________________________________________

[Name of spouse B]

Include acknowledgments.
Form 5-20

Note that an agreement to convert separate property to community property is enforceable without consideration. Tex. Fam. Code § 4.203.

Community Interest Special Warranty Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor: [name exactly as shown on prior deed]

Grantor’s Mailing Address:

Grantee: [names of grantor and grantor’s spouse], a married couple

Grantee’s Mailing Address:

Consideration:

See form 5-6 in this chapter for consideration clauses.

Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12.

Exceptions to Conveyance and Warranty:

State "None" or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.

The following statements or substantially similar words must be prominently displayed in bold-faced type, capital letters, or underlined.
This instrument changes separate property to community property. This may have adverse consequences during marriage and on termination of the marriage by death or divorce. For example:

Exposure to creditors. If you sign this agreement, all or part of the separate property being converted to community property may become subject to the liabilities of your spouse. If you do not sign this agreement, your separate property is generally not subject to the liabilities of your spouse unless you are personally liable under another rule of law.

Loss of management rights. If you sign this agreement, all or part of the separate property being converted to community property may become subject to either the joint management, control, and disposition of you and your spouse or the sole management, control, and disposition of your spouse alone. In that event, you will lose your management rights over the property. If you do not sign this agreement, you will generally retain those rights.

Loss of property ownership. If you sign this agreement and your marriage is subsequently terminated by the death of either spouse or by divorce, all or part of the separate property being converted to community property may become the sole property of your spouse or your spouse’s heirs. If you do not sign this agreement, you generally cannot be deprived of ownership of your separate property on termination of your marriage, whether by death or divorce.

Grantor, for the Consideration [include if applicable: and subject to the Exceptions to Conveyance and Warranty], grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, with the intent that the Property be converted to community property, to have and to hold it to Grantee and Grantee’s heirs, executors, administrators, and assigns against every person whomsoever law-
Community Interest Special Warranty Deed

fully claiming or to claim the same or any part thereof, by, through, or under Grantor, but not otherwise.

When the context requires, singular nouns and pronouns include the plural.

This deed must include signature lines for both spouses.

Include acknowledgments.
Form 5-21

Assignment and Assumption of Leases

Date:

Assignor:

Assignor’s Mailing Address:

Assignee:

Assignee’s Mailing Address:

Property (including any improvements):

Leases: All agreements under which any portion of the Property is used or occupied by anyone, other than Assignor, including those described as follows: [describe leases or reference attached rent roll].

Assumed Leases: The Leases described as follows: [describe assumed leases or reference attached exhibit].

Consideration:

Assignor is conveying the Property to Assignee by warranty deed dated this date.

Assignor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty in the warranty deed, to the extent they affect the Leases, assigns to Assignee all of Assignor’s right, title, and interest in and to the Leases. Assignor binds Assignor and Assignor’s heirs and successors to warrant and forever defend all and singular the Leases to Assignee and Assignee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof [include}
if applicable: when the claim is by, through, or under Assignor but not otherwise], except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty in the warranty deed, to the extent they affect the Leases.

Assignee assumes and agrees to perform the landlord’s obligations under the Assumed Leases arising after this date. The obligation to repay security and prepaid rental deposits to tenants under the Assumed Leases is limited to the amount of cash delivered or credited by Assignor to Assignee with respect to security and prepaid rental deposits. Assignee will indemnify, defend, and hold Assignor harmless from any loss, attorney’s fees, expenses, or claims arising out of or related to Assignee’s failure to perform any of the obligations of the landlord under the Assumed Leases after this date.

Assignor will indemnify, defend, and hold Assignee harmless from any loss, attorney’s fees, expenses, or claims arising out of or related to Assignor’s failure to perform any of the obligations of the landlord under the Leases before this date.

When the context requires, singular nouns and pronouns include the plural.

[Name of assignor]

[Name of assignee]

Include acknowledgments. Attach exhibits.
Form 5-22

This form is to be used to notify a residential or commercial tenant that its security deposit has been transferred to a new owner in connection with a sale of the property, thereby releasing the former owner from liability to the tenant for the security deposit. See Tex. Prop. Code §§ 92.105, 93.007.

Notice of Transfer of Security Deposit

Date:

Lease

Date:

Former Landlord:

Tenant:

Tenant’s Address:

Premises:

Security Deposit: $[amount]

New Landlord:

New Landlord’s Address:

Former Landlord sold the [Premises/the property in which the Premises are located] to New Landlord and assigned the Lease to New Landlord. Former Landlord also transferred or credited the Security Deposit to New Landlord. New Landlord has received the Security Deposit or a credit for the amount of the Security Deposit and is liable for the return of the Security Deposit.
All rent and other amounts payable by Tenant under the Lease after Tenant’s receipt of this letter should be paid to or for the account of New Landlord at New Landlord’s Address.

[Name of new landlord]

[Name of former landlord]
Form 5-23

Partition Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

First Party:

First Party’s Mailing Address:

Second Party:

Second Party’s Mailing Address:

Consideration: The partition effected hereby.

Partition of Share Number One

Share Number One Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12 in this chapter.

Reservations from Share Number One Conveyance:

State “None” or, to create reservations of title, include the appropriate clauses from form 5-7.

Exceptions to Share Number One Conveyance and Warranty:

State “None” or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.
First Party shall have and possess in severalty the Share Number One Property, and Second Party, for the Consideration and subject to the Reservations from Share Number One Conveyance and the Exceptions to Share Number One Conveyance and Warranty, grants and conveys to First Party the Share Number One Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to First Party and First Party’s heirs, successors, and assigns forever. Second Party binds Second Party and Second Party’s heirs and successors to warrant and forever defend all and singular the Share Number One Property to First Party and First Party’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Share Number One Conveyance and the Exceptions to Share Number One Conveyance and Warranty.

Select one of the following.

First Party releases Second Party from any claim or lien for owelty.

Or

Inequality in the value of the shares partitioned hereby is being equalized by adjustment in the division of cash or other property from the estate of [name], deceased, in accordance with an agreement between First Party and Second Party; accordingly no lien on any of the property partitioned hereby arises.

Continue with the following.

Partition of Share Number Two

Share Number Two Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12.

Reservations from Share Number Two Conveyance:
Exceptions to Share Number Two Conveyance and Warranty:

Second Party shall have and possess in severalty the Share Number Two Property, and First Party, for the Consideration and subject to the Reservations from Share Number Two Conveyance and the Exceptions to Share Number Two Conveyance and Warranty, grants and conveys to Second Party the Share Number Two Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Second Party and Second Party’s heirs, successors, and assigns forever. First Party binds First Party and First Party’s heirs and successors to warrant and forever defend all and singular the Share Number Two Property to Second Party and Second Party’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Share Number Two Conveyance and the Exceptions to Share Number Two Conveyance and Warranty.

Select one of the following.

Second Party releases First Party from any claim or lien for owelty.

Or

Inequality in the value of the shares partitioned hereby is being equalized by adjustment in the division of cash or other property from the estate of [name], deceased, in accordance with an agreement between First Party and Second Party; accordingly no lien on any of the property partitioned hereby arises.

Continue with the following.

When the context requires, singular nouns and pronouns include the plural.
[Name of first party]

[Name of second party]

Include acknowledgments.
Correction Instrument [Nonmaterial Correction] Form 5-24

Corrction Instrument
[Nonmaterial Correction]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Person Executing Correction Instrument:

Mailing Address of Person Executing Correction Instrument:

Conveyance Being Corrected

Date:

Grantor:

Grantee:

Recording information:

Error Being Corrected:

Correction:

Facts Relevant to the Correction:

Basis for Personal Knowledge of Facts Relevant to the Correction:

Person Executing Correction Instrument changes the Conveyance by this Correction Instrument.
Person Executing Correction Instrument has personal knowledge of the Facts Relevant to the Correction.

I certify that I have given notice of this Correction Instrument to each party to the original instrument in accordance with provisions of section 5.028(d)(2) of the Texas Property Code.

Attach copies of transmittal letters and proof of mailing, copies of e-mails, or copies of other reasonable means of giving notice.

[Name]

Include acknowledgments.
Form 5-25

Revocable Transfer on Death Deed

This form is provided pursuant to the Texas Real Property Transfer on Death Act enacted as chapter 114 of the Texas Estates Code to transfer to one or more designated beneficiaries, including alternative beneficiaries, the transferor’s interest in real property effective at death of the transferor. To be effective, this deed must be properly recorded before the death of the transferor.

Revocable Transfer on Death Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Transferor:

Transferor’s Mailing Address:

Designated Beneficiary

Primary Beneficiary:

Primary Beneficiary’s Mailing Address:

Designated Alternate Beneficiary

Alternate Beneficiary:

Alternate Beneficiary’s Mailing Address:

Prior Transfer on Death Deed

Include the following if applicable.

Include the following if a prior transfer on death deed is being revoked in whole or in part.
Date:

Transferor:

Primary Beneficiary:

Alternate Beneficiary:

Recording Information:

Continue with the following.

Property (including any improvements):

Reservations from Transfer:

State "None" or, to create reservations of title, include the appropriate clauses from form 5-7.

Select one of the following alternative clauses.

Surviving Primary Beneficiary

Transferor, subject to the Reservations from Transfer, at Transferor’s death, grants and conveys the Property to Primary Beneficiary, to have and hold forever, but if any Primary Beneficiary predeceases Transferor, Transferor, subject to the Reservations from Transfer, at Transferor’s death, grants and conveys that deceased Primary Beneficiary’s share in the Property to surviving Primary Beneficiary, to have and hold forever.

Or

Anti-Lapse, Descendants of Deceased Primary Beneficiary

Transferor, subject to the Reservations from Transfer, at Transferor’s death, grants and conveys the Property to Primary Beneficiary, to have and hold forever, but if any Primary
Beneficiary predeceases Transferor and was a descendant of either of Transferor’s parents, Transferor, subject to the Reservations from Transfer, at Transferor’s death, grants and conveys that deceased Primary Beneficiary’s share to the surviving descendants of that Primary Beneficiary, to have and hold forever.

Continue with the following.

Select one of the following alternative clauses.

Anti-Lapse, Surviving Descendants of Primary Beneficiary

If Transferor is not survived by any Primary Beneficiary, Transferor, subject to the Reservations from Transfer, at Transferor’s death, grants and conveys the Property to the surviving descendants of the deceased Primary Beneficiary if the deceased Primary Beneficiary is a descendant of the Transferor or either of Transferor’s parents or to Alternative Beneficiary if the deceased Primary Beneficiary is not a descendant of the Transferor or either of Transferor’s parents, to have and hold forever.

Or

Alternative Beneficiaries

If Transferor is not survived by any Primary Beneficiary, Transferor, subject to the Reservations from Transfer, at Transferor’s death, grants and conveys the Property to Alternate Beneficiary, to have and hold forever.

If one or more alternative beneficiaries are designated, select one of the following alternative clauses.
Surviving Alternative Beneficiary

If any Alternative Beneficiary predeceases Transferor, Transferor, subject to the Reservations from Transfer, at Transferor’s death, grants and conveys that deceased Primary Beneficiary’s share in the Property to surviving Alternative Beneficiary.

Or

Anti-Lapse, Descendants of Deceased Alternative Beneficiary

If any Alternative Beneficiary predeceases Transferor and that deceased Alternative Beneficiary was a descendant of either of Transferor’s parents, Transferor, subject to the Reservations from Transfer, at Transferor’s death, grants and conveys that deceased Alternative Beneficiary’s share in the Property to the surviving descendants of the deceased Alternative Beneficiary.

If a prior transfer on death deed is being revoked in whole or in part, select one of the following alternative clauses.

Revocation of Prior Transfer on Death Deed

Transferor revokes the Prior Transfer on Death Deed.

Or

Partial Revocation of Prior Transfer on Death Deed

Transferor revokes the Prior Transfer on Death Deed as to all Beneficiaries but only to the Property.

Continue with the following.

When the context requires, singular nouns and pronouns include the plural.
[Name of transferor]

Include acknowledgment.
Revocation of Transfer on Death Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:
Transferor:
Transferor’s Mailing Address:

Prior Transfer on Death Deed

Date:
Transferor:
Primary Beneficiary:
Alternate Beneficiary:
Property:
Recording Information:

Transferor revokes the Prior Transfer on Death Deed in its entirety.

[Name of transferor]

Include acknowledgment.
Partial Revocation of Transfer on Death Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Transferor:

Transferor’s Mailing Address:

Prior Transfer on Death Deed

Date:

Transferor:

Primary Beneficiary:

Alternate Beneficiary:

Recording Information:

Revoked Property (including improvements):

Select one of the following. If revocation is to some designated beneficiaries, choose the first alternative clause below. If revocation is only of the described property, choose the second alternative clause.

Transferor revokes the Prior Transfer on Death Deed as to the transfer of the Revoked Property to \[names of revoked designated beneficiaries]\.

Or
Transferor revokes the Prior Transfer on Death Deed as to the transfer of the Revoked Property to all Beneficiaries in the Prior Transfer on Death Deed.

[Name of transferor]

Include acknowledgment.
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Chapter 6

Promissory Notes

§ 6.1 General Considerations Concerning Loan Transactions

In many of the loan transactions that are the subject of this manual, a seller or third party (lender) lends a buyer (borrower) all or a portion of the purchase money for real or personal property. The borrower usually executes a note promising to pay the lender. In the case of real property, the borrower usually executes a deed of trust encumbering the real property to secure the loan. If the loan is secured by personal property only, a security agreement and financing statement typically are also executed. If the real estate includes fixtures and personal property, the lender may include a security agreement and financing statement in the deed of trust to protect its interest in all the property related to the real estate. The forms in this chapter are intended for transactions such as these, but they may be modified as appropriate to fit other types of loans.

For mechanic’s lien transactions, the mechanic’s lien note (form 20-2 in this manual) should be used. The mechanic’s lien note is discussed in section 20.4:3.

For home equity loans, the home equity extension of credit (form 11-2) should be used instead of the note in this chapter.

The deed of trust to encumber real estate is discussed in chapter 8. The security agreement and financing statement are discussed in chapter 9, and modifications that may be made to the deed of trust to include a security agreement and financing statement are discussed in sections 8.11 through 8.11:2 and clause 8-9-10. In many loan transactions, in addition to the promissory note, there will be a separate loan agreement that includes details of the transaction. Promissory notes frequently refer to a separate loan agreement. See clauses 6-6-10 and 6-6-11. A separate loan agreement is included in this manual. See form 10-17.

§ 6.1:1 Promissory Note

The standard form (form 6-1 in this chapter) contains provisions most commonly used in promissory notes: the borrower’s unconditional promise to pay a sum certain to the lender; a description of events constituting defaults under the note and the lender’s right to accelerate the balance of the note on the occurrence of a default; the borrower’s waiver of the right to require the lender to give notices and demands otherwise required by law; a usury savings clause; and the borrower’s agreement to pay costs and reasonable attorney’s fees resulting from legal action seeking enforcement or payment. See F.R. Hernandez Construction & Supply Co. v. National Bank of Commerce, 578 S.W.2d 675, 677 (Tex. 1979) (contractual attorney’s fees).

Texas law has long “held that an installment of interest past due becomes principal, and bears interest, without any express stipulation to that effect.” Bothwell v. Farmers’ & Merchants’ State Bank & Trust Co., 30 S.W.2d 289, 291 (Tex. 1930); see Bair Chase Property Co. v. S&K Development Co., 260 S.W.3d 133, 142 n.5 (Tex. App.—Austin 2008, pet. denied). The language in form 6-1 matches the common law of Texas and provides that interest commences and continues on any part of an installment that is not timely paid when due.

In a Chapter 13 bankruptcy, the word maturity may be limited to meaning only the last date to pay the entire obligation. See Indian Cave Park Partnership v. Hence, 255 F. App’x 28 (5th Cir. 2007). As a result, for a Chapter 13 debtor, a bankruptcy
court may permit the debtor to stretch out (perhaps over the full five years of a plan) payment of the arrearage amount due on the date the bankruptcy case is filed. (The arrearage is the due and unpaid amount at the bankruptcy filing, other than that due because of acceleration.)

Although form 6-1 contains an express waiver of the borrower’s right to notices and demands that might accompany default proceedings, many attorneys attempting to enforce or collect on notes choose to give written notice to borrowers of certain actions and intentions—for example, notice of default, notice of intention to accelerate maturity, and notice of acceleration of maturity. Even though they obtain a waiver, these attorneys do not rely on the waiver and instead view it more as a safeguard to protect lenders from the complications of minor technicalities than as a license to foreclose without notice or demand on borrowers who might be unaware of default proceedings. Notwithstanding any express waiver in the note or other security instruments, certain notices regarding foreclosure under a power of sale conferred by a deed of trust or other contractual lien must be served on the debtor. See Tex. Prop. Code § 51.002; Tex. Bus. & Com. Code §§ 9.601, 9.602, 9.604(c). The statute of limitations for enforcing the obligation to pay the note runs from the due date of any such payment or, if the due date is accelerated, from the accelerated due date. Tex. Bus. & Com. Code § 3.118.

A notice-of-default clause may be added to require the lender to give the borrower notice of default and allow the borrower a period of time to cure the default. See clause 6-6-8 for an example of a notice-of-default clause.


A promissory note is a component of a “loan agreement” as defined in the Texas Business and Commerce Code statute of frauds for loan documents and requires the notice prescribed therein. See Tex. Bus. & Com. Code § 26.02. The notice of final agreement, form 10-14, may be used to satisfy the statutory requirements.

§ 6.1:2  Note Secured by Real Property

Parties may wish to secure a loan with real estate, such as a loan to purchase real estate or a refinance of a real estate secured loan. In these instances the promissory note not only serves as evidence of the debt but also defines the terms of payment and, with the deed of trust, the rights and responsibilities of the parties. A deed of trust is usually used to document the lien on the real estate that secures the note. Security-for-payment clauses, used to describe the deed of trust, are found in form 6-5 in this chapter.

§ 6.1:3  Unsecured Note

An unsecured promissory note evidences a debt and the borrower’s promise to pay the debt according to stated terms without collateral to secure the debt.
§ 6.1:4 Note Secured by Personal Property

If the note is secured by personal property only, a security agreement and financing statement usually are used to document and perfect the lien that secures the note. If the note is secured by a lien on real and personal property, the deed of trust may include a security agreement and financing statement. Security-for-payment clauses, used to describe the security agreement, are found in form 6-5 in this chapter.

§ 6.2 Cautions

§ 6.2:1 Usury

Texas usury law is complicated, technical, and beyond the scope of this manual. Most promissory notes contain a “usury savings clause,” and one is included in form 6-1 in this chapter. Such a clause is intended to protect against unintentional violations of usury law. However, a usury savings clause may not protect against all usury claims, such as where a note is usurious “on its face.” See Nevels v. Harris, 102 S.W.2d 1046 (Tex. 1937).

§ 6.2:2 Truth in Lending

An extension of credit may be subject to the Truth in Lending Act and its accompanying Regulation Z. See the discussion of this subject in chapter 12 in this manual. No forms are provided in the manual for variable-interest-rate loans.

§ 6.2:3 Imputed Interest

Interest may be imputed to a loan under provisions in the Internal Revenue Code if the interest rate chosen by the parties is lower than the minimum rate required by applicable provisions of the Code. See 26 U.S.C. § 7872.

§ 6.2:4 Negotiability

Certain terms added to the note may render it nonnegotiable. Determining negotiability is beyond the scope of this manual. For provisions of the Texas Uniform Commercial Code affecting negotiability, see Tex. Bus. & Com. Code §§ 3.101–.207.

§ 6.2:5 Unsecured Note

The borrower wishing to borrow under an unsecured note should be wary of future or other indebtedness clauses commonly used in deeds of trust, security agreements, and other collateral documents. If the borrower has executed loan documents with the same lender in the past, the lender might rely on any future and other indebtedness clauses in prior loan documents to secure a subsequent note.

§ 6.2:6 Consistency among Documents

Because several documents may be required for a loan transaction, provisions among the various documents must be consistent. See, e.g., Mathis v. DCR Mortgage III Sub 1, LLC, 389 S.W.3d 494 (Tex. App.—El Paso 2012, no pet.). For example, the promissory note and the deed of trust may both have an express waiver of notice of default, or a loan agreement and a promissory note may both address prepayment rights. The attorney should review all documents carefully to be sure the provisions
are consistent. A “conflicts” clause may be added to state which document will control if a conflict between provisions arises. See clause 6-6-12 in this chapter for an example of a conflicts clause.

§ 6.2:7 Consumer Loans under Texas Finance Code Chapter 342

Texas Finance Code chapter 342 regulates loans made by lenders in the business of making, arranging, or negotiating loans subject to the chapter if the interest exceeds 10 percent per year; the loan is extended primarily for personal, family, or household use; and the loan either is not secured by a lien on real property or is a secondary mortgage loan secured by a lien on real property improved by a dwelling designed for occupancy by four or fewer families and is subject to one or more prior liens. See clause 6-6-12 in this chapter for an example of a conflicts clause.

Tex. Fin. Code § 342.005. A lender in the business of making, arranging, or negotiating loans regulated by chapter 342 must obtain a license from the Texas Office of Consumer Credit Commissioner (the OCCC) unless the lender is a bank, savings bank, savings and loan association, credit union, or a residential mortgage loan originator licensed under Finance Code chapter 156. Tex. Fin. Code §§ 124.005, 339.004, 341.103-.104, 342.051. Unless exempt under Finance Code section 180.003, an individual who acts as a residential mortgage loan originator in the making, transacting, or negotiating of a secondary mortgage loan subject to chapter 342 must be individually licensed under chapter 342, be enrolled with the Nationwide Mortgage Licensing System and Registry as required by section 180.052, and comply with other applicable requirements of the Texas Secure and Fair Enforcement of Mortgage Licensing Act of 2009. Tex. Fin. Code ch. 180.

Finance Code section 341.502 provides that “[a] contract for a loan under Chapter 342, a retail installment transaction under Chapter 348, or a home equity loan regulated by the Office of Consumer Credit Commissioner must be . . . written in plain language designed to be easily understood by the average consumer.” See Tex. Fin. Code § 341.502(a). The Finance Commission of Texas is authorized to adopt model contracts for loans subject to that section. A lender may not use a contract other than a model contract unless the lender has submitted the contract to the OCCC for its approval. If the OCCC issues an order disapproving a submitted contract, the lender may not use the contract after the order takes effect. Tex. Fin. Code § 341.502(c). Plain-language model contracts and related rules for second-lien home improvement loans are codified at 7 Tex. Admin. Code §§ 90.601-.604.

The Texas attorney general has determined that section 341.502(a) is applicable only to those loan transactions for which the consumer credit commissioner is the appointed regulating official and has no application to loan transactions subject to the regulatory authority of the banking commissioner, the savings and mortgage lending commissioner, the credit union commissioner, and federal regulatory officials. Tex. Att’y Gen. Op. No. JC-0513 (2002). Banks, savings and loan associations, and credit unions accordingly are not required to comply with the section 341.502 “plain language” contract requirements or to obtain a license to engage in the business of making subordinate lien loans subject to chapter 342. Tex. Fin. Code § 342.051(c)(1). These institutional lenders nevertheless are thought to be subject to other substantive law provisions of chapter 342, including, for example, the limitations of that chapter on the collection of authorized fees and charges, as enforced policies of their respective regulatory agencies. See Tex. Fin. Code §§ 342.308, 342.502.

Before using the promissory note forms contained in this chapter of the manual for a loan subject to chapter 342 of the Finance Code, the attorney should determine whether the lender is subject to the plain-language model contract provisions of Finance Code section 341.502. The forms contained in this chapter have not been submitted to or approved by the OCCC.

If the attorney decides that the forms contained in this chapter may nevertheless be used for a loan regulated by chapter 342 of the Finance Code, the forms still must be modified to comply with the requirements of that chapter. For example, there are limits on the enforcement fees that may be collected from a borrower. See Tex. Fin. Code §§ 342.307, 342.502. The third para-
graph of the note form, form 6-1 in this chapter, concerning attorney’s fees should be replaced in its entirety with clause 6-6-14 for a loan under subchapter E of chapter 342 (that is, an installment loan not secured by a lien on real property) and replaced by clause 6-6-15 for a secondary mortgage loan subject to subchapter G of chapter 342.

§ 6.2:8 Cosigners

When the promissory note is signed by more than one party, the nature of the liability of the signers may be an issue. For example, a party who cosigns the promissory note as a maker but does not receive any of the proceeds of the loan is an “accommodation party” and is primarily liable on the note as a borrower. See Tex. Bus. & Com. Code § 3.419(a), (b). The rights of an accommodation party, however, differ from those of a true comaker. See, e.g., Tex. Bus. & Com. Code § 3.419(f).

If a party signing the promissory note does not intend to have full liability as a comaker, the note should specifically so indicate. See section 6.4:4 below for language indicating an intent to be a guarantor.

§ 6.3 Instructions for Completing Form

§ 6.3:1 Borrower’s Mailing Address

Under certain circumstances, the lender may be required to give certain notices to the borrower. As a result, the parties should confirm the exact address for mailing. This will eliminate the possibility that the borrower may not receive any notices and avoid questions about whether the lender properly gave any required notice.

§ 6.3:2 Place for Payment

The attorney may want to provide under “Place for Payment” not only the address, city, county, and state stipulated by the lender but also the phrase “or any other place that Lender may designate in writing.” This phrase permits the lender to change the place of payment.

§ 6.3:3 Annual Interest Rate

If the parties intend that interest will begin accruing at a time different from the date of the note, they should modify the form accordingly. If, for example, the note will be funded after it has been signed, the heading “Annual Interest Rate” could be modified to read “Annual Interest Rate on Unpaid Principal from Date of Funding, which is [date].”

Descriptions of variable interest rates necessarily include terms of payment that govern the conditions for changing the rates. The use of variable rates may require some modification of the note form. One suitable alteration for this purpose is to delete the heading for interest and modify the heading “Terms of Payment” to read “Terms of Payment, Including Variable Interest Rate on Unpaid Principal.” Examples of variable rates appear as clauses 6-2-17 and 6-2-18 in this chapter.

A conspicuous variable-rate disclosure must be made if credit extended primarily for personal, family, or household use includes a variable interest rate and if federal truth-in-lending disclosures are not made because the amount of the credit exceeds $25,000 and the credit is not secured either by personal property (for example, a manufactured home) used as the principal residence of the debtor or by real property. See Tex. Fin. Code § 303.015(c). See clause 6-6-16 for an example of the statutorily required variable-rate disclosure.
§ 6.3:4 Payment Clauses

The promissory note form may be adapted to variable-interest-rate loans, although only clauses 6-2-17 and 6-2-18 in this chapter are drafted for variable rates.

§ 6.3:5 Prepayment and Application of Prepayment Clauses

If the borrower will have the right to make prepayments on the note, a clause from form 6-3 in this chapter should be added to the note, and a clause from form 6-4 should be added to govern application of that prepayment. If the borrower will not have a right of prepayment at any time, clause 6-3-10 may be added after the payment clause to avoid controversy.

The purpose of the yield maintenance clause, clause 6-3-9, is to allow the lender or holder of the note, on prepayment of the note, to receive the same yield as provided in the note.

§ 6.3:6 Security for Payment

If security for the note consists of real property with an express vendor’s lien retained in the deed and a deed of trust, the security clause should identify the relevant documents, name the trustee, and describe the property. An abbreviated legal description or the full legal description from the deed and deed of trust may be used. A suitable clause is a straightforward statement followed by the property description. See clause 6-5-1 in this chapter.

If the note is secured only by real property without a vendor’s lien, the security clause should identify the deed of trust, name the trustee, and describe the property. See clause 6-5-2. If the borrower does not own the property, the security clause should not recite that “Borrower” has executed the deed of trust; rather it should identify by name the parties who are to sign that document. See also the discussion in section 8.2:1 in this manual.

If the note is secured by both real property and personal property, the security clause should describe both types of security. If the deed of trust and security agreement are in separate documents, clause 6-5-4 should be used. If any borrowers shown on the note did not also execute the deed of trust or any separate security agreement, clause 6-5-4 should be modified as suggested in the preceding paragraph.

Clause 6-5-3 is appropriate if the deed of trust also includes the security agreement and the collateral consists of real property and other property, such as fixtures or personalty. If the deed of trust covers both real property and personal property, the lender may proceed against both the real and personal property by foreclosing on the deed of trust. Tex. Bus. & Com. Code § 9.604(a). For a discussion of corresponding provisions to be inserted in the deed of trust in this event, see sections 8.11 and 8.11:2 and the related clauses in form 8-9.

Clause 6-5-5 is appropriate if the security interest is created not in the deed of trust but in a separate security agreement. If the borrower defaults, the personal property collateral covered by the separate security agreement must be sold according to the terms of the security agreement and the Uniform Commercial Code rather than as part of the realty foreclosure sale administered by the trustee.

If another note serves as security, the clause should indicate whether that note is unsecured or secured by other liens described in the clause.
Caution: There is no requirement that the note include a description of the collateral securing the note. The practitioner should remember that the security-for-payment clauses do not, by themselves, create or perfect a lien or security interest. A lien must be created in a separate document, such as a deed of trust or a security agreement.

Practitioners should also take care to use security-for-payment clauses consistently. The use of the clause in one transaction and the failure to use the clause in another transaction, both of which are intended to be secured, may cause an ambiguity or a conflict between the documents.

§ 6.4 Additional Clauses

Additional clauses that may be useful in the promissory note, such as second lien, wraparound loan, late charge, guaranty, notice of default, nonrecourse, reamortization, conflicts, and choice-of-law clauses, appear in form 6-6 in this chapter.

§ 6.4:1 Second Lien

If the lien securing the note is subordinate to a lien in the real or personal property securing an earlier note, insert one of the optional clauses 6-6-1, 6-6-2, or 6-6-3 in this chapter. Additionally, if the loan is a secondary mortgage loan, the attorney’s fee clause should be modified. See section 6.2:7 above and section 8.4 in this manual for a discussion of issues related to second liens.

§ 6.4:2 Wraparound Note

If the promissory note is part of a wraparound loan transaction, insert clause 6-6-4 in this chapter. The principal amount of the promissory note for a wraparound loan transaction will include the amount due under a prior note that will remain outstanding and secured by a first-lien mortgage. The borrower under the wraparound note makes one payment to the lender or the holder of the wraparound note. The lender or holder of the wraparound note continues to make the payments on the prior note, using part of the payments received from the wraparound note.

The wraparound note should be structured so that the payments are due before payments are due on the prior note. The maturity date of the prior note should be before the maturity date of the wraparound note, so as to afford the borrower some degree of assurance that by the time the wraparound note is paid, the prior note will be paid and the lien securing the note will be released.

Caution: The borrower should be advised of risks associated with wraparound notes. Generally the borrower will not receive notice of a default under the first-lien mortgage before foreclosure by the lender or holder of the prior note.

A more detailed discussion of wraparound notes is beyond the scope of this manual. For a general discussion of wraparound loan transactions, see sections 8.3 through 8.5:3 in this manual.

§ 6.4:3 Late Charge

A late charge may be included, but it should be determined that it is not usurious. See Texas Finance Code chapters 302, 342, and 347 for usury provisions.
Texas courts have consistently held that whether a charge is actually interest is a fact question to be determined from all the circumstances. A late payment charge is generally considered interest, because it is a charge for “detention” of money. See Tex. Fin. Code § 301.002(a)(4); see also Dixon v. Brooks, 604 S.W.2d 330, 333 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.). But see RIMCO Enterprises, Inc. v. Texas Electric Service Co., 599 S.W.2d 362, 366 (Tex. Civ. App.—Fort Worth 1980, writ ref’d n.r.e.). A loan primarily for business, commercial, investment, agricultural, or other similar purposes is a commercial loan. Tex. Fin. Code § 306.001(5). For a commercial loan, a late charge of up to 5 percent of the amount of an installment that is past due by not less than ten days may be assessed in addition to interest. Tex. Fin. Code § 306.006(1). Late charges for a secondary mortgage loan are authorized by Tex. Fin. Code § 342.302. If a late charge complies with either of these provisions of the Finance Code, the late charge is an authorized additional charge or additional interest that is not added to other interest for usury purposes. If a late charge does not comply with either of these provisions, it generally will be considered interest for usury purposes. See Butler v. Holt Machinery Co., 741 S.W.2d 169 (Tex. App.—San Antonio 1987) (opinion corrected on denial of rehearing, 739 S.W.2d 958); Talbert v. First National Bank, 664 S.W.2d 126 (Tex. App.—Tyler 1983, writ ref’d n.r.e.). Late charges for certain secondary mortgage loans may not exceed interest at the maximum contract rate for the period the installment is not paid. See Tex. Fin. Code § 342.305. See section 8.4 in this manual for a definition of a secondary mortgage loan and the requirements of such loans. A clause assessing a late charge should, therefore, be used cautiously. See clause 6-6-5. Late charges for first-lien residential real property loans that are subject to the federal preemption of state usury limitations are interest and therefore are also within the federal preemption and thus not subject to state usury limitations. Tex. Fin. Code § 302.103.

§ 6.4:4 Guaranty

If the parties wish to have a third party guarantee the promissory note and do not wish to execute a separate document, use clause 6-6-6 in this chapter. For a stand-alone guaranty form, see section 10.13 and form 10-15 in this manual. As a surety, a guarantor is entitled to certain notices and defenses. See, e.g., Tex. Civ. Prac. & Rem. Code ch. 43. Clause 6-6-6 contains the same kinds of waivers as are found in the stand-alone guaranty form.

§ 6.4:5 Default

Alternative default clauses for secured notes and unsecured notes are found in form 6-1 in this chapter.

A time for cure is not included in the note at form 6-1. If the borrower desires to receive notice and opportunity to cure any default before the lender accelerates the debt, the second paragraph of the default clauses and the section titled “Waivers” in form 6-1 should be replaced with clause 6-6-8.

§ 6.4:6 Nonrecourse

In a nonrecourse transaction, the lender’s right to recover judgment against the borrower for the debt evidenced by the note is negated, and the lender may proceed only against the collateral. Notes executed in these transactions must include a nonrecourse provision. A note may also provide for partial recourse. See clauses 6-6-18, 6-6-19, and 6-6-20 in this chapter.

§ 6.4:7 Reamortization

The reamortization clause allows the unpaid principal balance to be reamortized if the proceeds of a casualty or condemnation are applied to prepay a portion of the unpaid principal balance. See clause 6-6-9 in this chapter.
§ 6.4:8 Conflicts

When the lender and the borrower execute a promissory note and a loan agreement, additional provisions may be necessary to harmonize the note with the loan agreement. A note may be one of several promissory notes executed under a loan agreement, or it may be desirable simply to recite that the note is executed under the loan agreement. In other cases, a “conflicts” clause may be necessary to address conflicting provisions of the note and loan agreement. This provision gives one instrument effect over the other to the extent of the conflict. See clause 6-6-12 in this chapter.

§ 6.4:9 Choice of Law

A choice-of-law provision is found at clause 6-6-13 in this chapter.

§ 6.4:10 Fair Credit Reporting Act

Any financial institution that extends credit to an individual and regularly and in the ordinary course of business reports negative information to a credit bureau must give its individual customers a clear and conspicuous written notice about reporting negative information. See 15 U.S.C. § 6809. A financial institution complies with the notice requirement if the institution uses a model notice promulgated by the Board of Governors of the Federal Reserve System. There are two model notices: one that may be used before reporting negative information to a credit bureau and one that may be used after reporting negative information to a credit bureau. See clauses 14-7-2 and 14-7-3 in this manual for examples of these notices. If the financial institution chooses to give the notice in its initial loan documentation or related communication, the first form of notice should be given. The model form may be included with the note. This form of notice is found in clause 6-6-17. See the section titled “Fair Credit Reporting Act” in chapter 2.

§ 6.4:11 Spreading

The concept of spreading allows for the calculation of interest for usury purposes to be made over the stated term of the loan, rather than at any particular point in time during the loan. See, e.g., Tex. Fin. Code § 302.004. In certain loans, this can mitigate the effect of fees and charges made or collected at the beginning of the loan term. Spreading is expressly authorized for commercial loans and for consumer loans secured by real property. Tex. Fin. Code §§ 302.001, 302.004. Spreading is not statutorily permitted for consumer loans not secured by real property. A form of spreading provision is included as clause 6-6-21 in this chapter.

§ 6.5 Additional Forms

§ 6.5:1 Deed of Trust and Security Agreement

If the note is secured by a lien on real estate, a deed of trust, described in chapter 8 in this manual, or a security agreement and financing statement, described in chapter 9, or both, will be necessary. The deed of trust creates a lien on real property and enables the holder to enforce the lien by nonjudicial foreclosure. A security agreement is necessary to create or secure a lien against personal property and enable the holder to enforce the lien. See chapter 9 for a discussion of security agreements. The note may also be secured by a mechanic’s lien. See form 20-1 for a mechanic’s lien contract.
§ 6.5:2 Notice to Cosigner

By using form 6-7 in this chapter the lender discloses to a cosigner of a note the obligations the cosigner is assuming and the resulting potential liability. For consumer loans, banks (excluding savings banks that are members of the Federal Home Loan Bank System) must inform a cosigner of a note of the cosigner’s liability on the note before the cosigner becomes obligated. See 12 C.F.R. § 227.14. The cosigner’s execution of a disclosure statement substantially similar to form 6-7, in a separate document or included in the note, is sufficient to comply with this regulation, which prohibits unfair or deceptive acts or practices. See Unfair or Deceptive Acts or Practices (Regulation AA), 12 C.F.R. §§ 227.1–.16. This regulation does not apply to real estate purchase-money loans but applies to other obligations secured by real estate.

Form 6-1

Promissory Note

Basic Information

Date:

Borrower:

Borrower’s Mailing Address:

Lender:

Place for Payment:

Principal Amount:

Annual Interest Rate:

Maturity Date:

Annual Interest Rate on Matured, Unpaid Amounts:

Terms of Payment (principal and interest): [Insert clause from form 6-2 in this chapter.]

Security for Payment: [Insert clause from form 6-5; if note is unsecured, write “None.”]

Other Security for Payment:

Promise to Pay

Borrower promises to pay to the order of Lender the Principal Amount plus interest at the Annual Interest Rate. This note is payable at the Place for Payment and according to the Terms of Payment. All unpaid amounts are due by the Maturity Date. If any amount is not
paid either when due under the Terms of Payment or on acceleration of maturity, Borrower promises to pay any unpaid amount plus interest from the date the payment was due to the date of payment at the Annual Interest Rate on Matured, Unpaid Amounts.

Defaults and Remedies

Select one of the following. For an unsecured note, use the first paragraph. For a secured note, use the second paragraph.

A default exists under this note if (1) Borrower defaults in the payment of this note or in the performance of any obligation in any instrument securing or collateral to this note; (2) (a) Borrower or (b) any other person liable on any part of this note (an “Other Obligated Party”) fails to timely pay or perform any obligation or covenant in any written agreement between Lender and Borrower or any Other Obligated Party other than as described in (1) above; (3) any representation in this note or in any other written agreement between Lender and Borrower or any Other Obligated Party is materially false when made; (4) a receiver is appointed for Borrower or an Other Obligated Party; (5) a bankruptcy or insolvency proceeding is commenced by Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party; (6) (a) a bankruptcy or insolvency proceeding is commenced against Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party and (b) the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered; or (7) Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party is terminated, begins to wind up its affairs, or is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party.

Or
A default exists under this note if (1) Borrower defaults in the payment of this note or in the performance of any obligation in any instrument securing or collateral to this note; (2) (a) Borrower or (b) any other person liable on any part of this note (an “Other Obligated Party”) fails to timely pay or perform any obligation or covenant in any written agreement between Lender and Borrower or any Other Obligated Party other than as described in (1) above; (3) any representation in this note or in any other written agreement between Lender and Borrower or any Other Obligated Party is materially false when made; (4) a receiver is appointed for Borrower or an Other Obligated Party or any property on which a lien or security interest is created as security (the “Collateral Security”) for any part of this note; (5) any Collateral Security is assigned for the benefit of creditors; (6) a bankruptcy or insolvency proceeding is commenced by Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party; (7) (a) a bankruptcy or insolvency proceeding is commenced against Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party and (b) the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered; (8) Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party is terminated, begins to wind up its affairs, or is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party; or (9) any Collateral Security is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly replaced with collateral security of like kind and quality or restored to its former condition.

If the borrower desires to receive notice and opportunity to cure any default before the lender accelerates the debt, replace the following two paragraphs with clause 6-6-8. See section 6.4:5 in this chapter.
Upon the occurrence of a default under this note, Lender may declare the unpaid principal balance, earned interest, and any other amounts owed on the note immediately due, and may exercise all other rights and remedies available at law or in equity.

**Waivers**

Borrower waives, to the extent permitted by law, all (1) demand for payment, (2) presentation for payment, (3) notice of intention to accelerate maturity, (4) notice of acceleration of maturity, (5) protest, [and] (6) notice of protest [include if applicable: ], and (7) rights under sections 51.003, 51.004, and 51.005 of the Texas Property Code [include if applicable: ], and [(7)/(8)] rights under section 17.001 and chapter 43 of the Texas Civil Practice and Remedies Code [and rule 31 of the Texas Rules of Civil Procedure]].

**Attorney’s Fees**

The following paragraph concerning attorney’s fees should be replaced in its entirety with clause 6-6-14 for a loan under subchapter E of chapter 342 and replaced by clause 6-6-15 for a secondary mortgage loan subject to subchapter G of chapter 342. See section 6.2.7.

Borrower also promises to pay reasonable attorney’s fees and court and other costs if an attorney is retained to collect or enforce the note. These expenses will bear interest from the date of advance at the Annual Interest Rate on Matured, Unpaid Amounts. Borrower will pay Lender these expenses and interest on demand at the Place for Payment. These expenses and interest will become part of the debt evidenced by the note and will be secured by any security for payment.
Usury Savings

Interest on the debt evidenced by this note will not exceed the maximum rate or amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the Principal Amount or, if the Principal Amount has been paid, refunded. On any acceleration or required or permitted prepayment, any excess interest will be canceled automatically as of the acceleration or prepayment or, if the excess interest has already been paid, credited on the Principal Amount or, if the Principal Amount has been paid, refunded. This provision overrides any conflicting provisions in this note and all other instruments concerning the debt.

If the parties wish to include spreading, insert clause 6-6-21. See section 6.4:11.

Other Clauses

Each Borrower is responsible for all obligations represented by this note.

When the context requires, singular nouns and pronouns include the plural.

If appropriate, include additional clauses, like those suggested in form 6-6.

[Name of borrower]

If there is a guarantor and no separate guaranty, include clause 6-6-6 with the signature of the guarantor.
Form 6-2

Payment Clauses

Fixed Maturity—On a Certain Date

Clause 6-2-1

The Principal Amount is due and payable on [date], and the interest is due and payable [at maturity/monthly as it accrues/quarterly as it accrues/semi-annually as it accrues/annually as it accrues/as follows: [specify]]. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Clause 6-2-2

The Principal Amount is due and payable [number] days after the date of this note, and the interest is due and payable [at maturity/monthly as it accrues/quarterly as it accrues/semiannually as it accrues/annually as it accrues/as follows: [specify]]. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Monthly Installments, Including Interest, until Fully Paid

Clause 6-2-3

The Principal Amount and interest are due and payable in equal monthly installments of [amount] DOLLARS ($[amount]), on the [specify] day of each month, beginning [date] and continuing until the unpaid principal and accrued, unpaid interest have been paid in full. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.
Monthly Installments, Including Interest, with Fixed Maturity and a Balloon Payment

Clause 6-2-4

The Principal Amount and interest are due and payable in equal monthly installments of [amount] DOLLARS ($[amount]), on the [specify] day of each month, beginning [date] and continuing until [the expiration of number] years from the date of this note/[specify date], when the entire amount of principal and accrued, unpaid interest will be payable in full. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Or

Clause 6-2-5

The Principal Amount and interest are due and payable in equal monthly installments of [amount] DOLLARS ($[amount]), beginning [date], and thereafter on the [specify] day of each succeeding month through [date], and in one final installment on [date] in the amount of the unpaid principal and accrued, unpaid interest as of that date. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Monthly Installments, Including Interest, When Amount Changes at Certain Times

Clause 6-2-6

The Principal Amount and interest are due and payable in equal monthly installments of [amount] DOLLARS ($[amount]), on the [specify] day of each month, beginning [date] and continuing through [date]. After that date the unpaid principal balance and interest are payable in equal monthly installments of [amount] DOLLARS ($[amount]), on the [specify] day of each month,
beginning [date] and continuing until the Principal Amount and accrued, unpaid interest have been paid in full. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

*Initial Installments of Interest, Followed by Installments of Principal and Interest and a Balloon Payment*

**Clause 6-2-7**

Interest only is due and payable monthly as it accrues on the [specify] day of each month, beginning [date] and continuing through [date]. After that date the unpaid principal balance and interest are due and payable in equal monthly installments of [amount] DOLLARS ($[amount]), on the [specify] day of each month, beginning [date] and continuing until the expiration of [number] years from the date of this note. At that time the unpaid principal balance and accrued, unpaid interest will be payable in full. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

*Additional Installment to Be Paid on Principal within Certain Time*

**Clause 6-2-8**

The following sentence should be added before the last sentence of the payment clause if an additional installment will be paid within a specified time.

An additional principal installment of [amount] DOLLARS ($[amount]) is due and payable [[specify] days after the date of this note/on [date]].
Monthly Installments of Principal, Plus Interest

Clause 6-2-9

The Principal Amount is due and payable in equal monthly installments of \([\text{amount}]\) DOLLARS ($\[\text{amount}\]$), on the \([\text{specify}]\) day of each month, beginning \([\text{date}]\) and continuing until the Principal Amount has been paid in full. Interest computed on the unpaid principal balance is due and payable monthly as it accrues, on the same dates as and in addition to the installments of principal. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Annual Installments, Including Interest

Clause 6-2-10

The Principal Amount and interest are due and payable in equal annual installments of \([\text{amount}]\) DOLLARS ($\[\text{amount}\]$), on \([\text{date}]\) of each year, beginning \([\text{date}]\) and continuing annually until the Principal Amount and accrued, unpaid interest have been paid in full. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Annual Principal Installments, Plus Interest

Clause 6-2-11

The Principal Amount is due and payable in equal annual installments of \([\text{amount}]\) DOLLARS ($\[\text{amount}\]$), on \([\text{date}]\) of each year, beginning \([\text{date}]\) and continuing annually until the Principal Amount has been paid in full. Interest on the unpaid principal balance is due and payable annually as it accrues, on the same dates as and in addition to the installments of principal. Payments will
be applied first to accrued interest and the remainder to reduction of the Principal Amount.

**Clause 6-2-12**

The Principal Amount is due and payable in three annual installments, as follows:

the first, in the amount of [amount] DOLLARS ($[amount]), on [date];

the second, in the amount of [amount] DOLLARS ($[amount]), on [date];

the third, in the amount of [amount] DOLLARS ($[amount]), on [date].

Interest on the unpaid principal balance is due and payable annually as it accrues, on the same dates as and in addition to the installments of principal. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

**Semiannual Installments, Including Interest**

**Clause 6-2-13**

The Principal Amount and interest are due and payable in equal semiannual installments of [amount] DOLLARS ($[amount]). The first installment is payable on [date] and the others semiannually on the [specify] day of [month] and [month] of each year until the Principal Amount and accrued, unpaid interest have been paid in full. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.
Semiannual Principal Installments, Plus Interest

Clause 6-2-14

The Principal Amount is due and payable in equal semiannual install-ments of [amount] DOLLARS ($[amount]), on the [specify] day of [month] and [month] of each year, beginning [date] and continuing semiannually until the Principal Amount has been paid in full. Interest on the unpaid principal balance is due and payable semiannually as it accrues, on the same dates as and in addition to the installments of principal. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Quarterly Installments, Including Interest

Clause 6-2-15

The Principal Amount and interest are due and payable in equal quarterly installments of [amount] DOLLARS ($[amount]). The first installment is payable on [date] and the others quarterly on the [specify] day of [month], [month], [month], and [month] of each year until the Principal Amount and accrued, unpaid interest have been paid in full. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Quarterly Installments, Plus Interest

Clause 6-2-16

The Principal Amount is due and payable in equal quarterly installments of [amount] DOLLARS ($[amount]), on the [specify] day of [month], [month], [month], and [month] of each year, beginning [date] and continuing quarterly until the Principal Amount has been paid in full. Interest on the unpaid principal balance is due and payable quarterly as it accrues, on the same dates as and
in addition to the installments of principal. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Variable Rates—Commercial Transaction

Clause 6-2-17

Interest will accrue at the rate per year that will be the lesser of [percent] percent ([percent]%) in excess of the Prime Interest Rate, adjusted [daily/on the first day of each calendar month] based on the Prime Interest Rate then in effect, or the maximum nonusurious rate of interest permitted by applicable law. [Include if applicable: At no time will the interest rate be greater than [percent] percent ([percent]%) or less than [percent] percent ([percent]%).]

Select one of the following.

The Prime Interest Rate means the annual rate of interest announced from time to time by [financial institution] as its base or prime commercial lending rate. If that rate ceases to be available, the Prime Interest Rate will be a reasonably comparable rate to be determined by Lender.

Or

The Prime Interest Rate means the annual rate of interest identified as the “U.S. prime rate” in the “Money Rates” column published in the Wall Street Journal. If the published prime rate is expressed on the applicable date as a range, the prime rate for purposes of this note will be the average between the high and low of that range. If the Wall Street Journal ceases to publish a prime rate, Lender may refer to another similar source to identify the prime rate on corporate loans at large United States money center commercial banks and apply that rate.
Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

*Variable Rates—Residential Transaction*

**Clause 6-2-18**

The initial interest rate will be [percent] percent ([percent]%) per year, and it may change on the [specify] day of [month] [year] and on that day every [number] month[s] thereafter. Each date on which the interest rate could change is a “Change Date.”

Beginning with the first Change Date, the interest rate will be based on an index, which is [the weekly average yield on United States Treasury Securities adjusted to a constant maturity of one year as made available by the Federal Reserve Board/[state other index]].

The most recent index figure available as of the date forty-five days before each Change Date is the “Current Index.”

If the index is no longer available, a new index will be chosen by Lender on the basis of comparable information.

Before each Change Date, the new interest rate will be calculated by adding [number] percentage point[s] to the Current Index. The result of this addition will be rounded to the nearest one-eighth of 1 percent (0.125%). Subject to the limits stated below, this rounded amount will be the new interest rate until the next Change Date.
The amount of the monthly payment that would be sufficient to pay in full the Principal Amount remaining on the Change Date by the maturity date at the new interest rate, in substantially equal payments, will be calculated and will be the new amount of the monthly payment. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

The interest will never be increased or decreased on any single Change Date by more than [number] percentage point[s] from the highest rate of interest that has been paid during the preceding twelve months.

The interest rate will never be greater than [percent] percent ([percent]%).

The new interest rate will become effective on each Change Date. The new monthly payment will be paid from the first monthly payment date after the Change Date until the amount of the monthly payment changes again.

Lender will notify Borrower of the new interest rate, new monthly payment amount, and due date of the first new monthly payment at least [number] days before the new monthly payment is due.
Form 6-3

A clause from form 6-4 in this chapter should be added to a prepayment clause allowing partial pre- 
payments if the prepayment clause does not specify how the prepayment will be applied. The attorney 
may wish to add clause 6-3-11 to a prepayment clause that includes a premium payment or a yield 
maintenance amount.

Prepayment Clauses

Prepayment

Clause 6-3-1

Borrower may prepay this note in any amount at any time before the 
Maturity Date without penalty or premium.

Or

Clause 6-3-2

Borrower may prepay at any time before the Maturity Date the entire 
unpaid principal balance of this note with interest to the date of prepayment 
plus a premium of [percent] percent ([percent]%) of the amount of the prin- 
cipal balance.

Or

Clause 6-3-3

On or after [number] years after the date of this note, Borrower may pre- 
pay on any monthly installment date the entire unpaid principal balance, with 
interest to the date of prepayment, or any part of it in multiples of [amount] 
DOLLARS ($[amount]), with interest to the date of prepayment, in addition to 
the monthly installment then payable.
Clause 6-3-4

Borrower has the option at any time to pay \([\text{amount}]\) DOLLARS ($[\text{amount}]$) or multiples of that amount on any installment date before the Maturity Date, but the total prepayments in any one year may not exceed \([\text{percent}]\) percent \(([\text{percent}]\%)\) of the Principal Amount of this note. Before exercising this option, Borrower will give \([\text{number}]\) days’ written notice to Lender.

Clause 6-3-5

Borrower has the option at any time to make prepayments on this note on any installment date before the Maturity Date, subject to these conditions: If the total prepayments during any one year do not exceed \([\text{percent}]\) percent \(([\text{percent}]\%)\) of the Principal Amount of this note, no premium for prepayment will be due; if total prepayments during any one year exceed that amount, Borrower will pay a premium equal to \([\text{percent}]\) percent \(([\text{percent}]\%)\) of the amount by which prepayments exceed the amount allowed without premium.

Clause 6-3-6

Borrower may prepay on any monthly installment date before the Maturity Date all or any part of the unpaid principal balance plus accrued interest on the amount of principal prepaid, and Borrower agrees to pay a premium of \([\text{percent}]\) percent \(([\text{percent}]\%)\) of any amount of principal prepaid.
Clause 6-3-7

Borrower has the option at any time to prepay on any installment date before the Maturity Date all or any part of the unpaid principal balance plus accrued interest on the amount of principal prepaid, and Borrower agrees to pay a premium of [percent] percent ([percent]%) of the amount of principal prepaid; however, during the first three years of this note, prepayments of unpaid principal must be [amount] DOLLARS ($[amount]) or multiples of that amount, and in each of those years total prepayments may not exceed [percent] percent ([percent]%) of the Principal Amount of this note.

Clause 6-3-8

Borrower has the option at any time of doubling the regular principal payment payable on any principal payment date; however, all additional payments will be applied to the final maturing installment or installments of principal.

Yield Maintenance Clause

Clause 6-3-9

On or after [number] [years/months] following the date of this note and thirty days following Lender’s receipt of written notice of Borrower’s election to prepay, Borrower may prepay the entire unpaid principal balance plus all accrued interest plus the greater of the Yield Maintenance Amount or a premium of 1 percent (1%) of the unpaid principal balance.

The Yield Maintenance Amount is an amount, never less than zero, equal to the present value of a series of Monthly Amounts, assumed to be paid
at the end of each month remaining from the prepayment date through the Maturity Date, discounted at the U.S. Securities Rate.

The Monthly Amount is the Annual Interest Rate minus the yield (U.S. Securities Rate), as of the prepayment date, as published by the Federal Reserve System in its “Statistical Release H.15(519), Selected Interest Rates” under the caption “U.S. Government Securities/Treasury Constant Maturities,” for a U.S. Government Security with a term equal to that remaining on this note on the prepayment date (which term may be obtained by interpolating between the yields published for specific whole years), divided by twelve and the quotient then multiplied by the amount prepaid on the prepayment date.

No Right of Prepayment

Clause 6-3-10

Borrower may not make any prepayments without the prior written consent of Lender.

Prepayment because of Casualty or Condemnation

Clause 6-3-11

If Borrower prepays this note because of a casualty or condemnation the [premium/Yield Maintenance Amount] will not apply.
Form 6-4

If the note allows partial prepayment, the prepayment clause (form 6-3 in this chapter) should specify how the prepayment will be applied. The following clauses suggest three possibilities; the appropriate clause should be added to the prepayment clause if the prepayment clause does not specify how the prepayment will be applied.

Application of Prepayment

Clause 6-4-1

Prepayments will be applied to installments on the last maturing principal, and interest on that prepaid principal will immediately cease to accrue.

Or

Clause 6-4-2

Partial prepayments will be credited to principal; installments will continue as scheduled and interest on that prepaid principal will immediately cease to accrue.

Or

Clause 6-4-3

Prepayments will be applied first to accrued interest and the remainder to installments on principal in the inverse order of maturity so that they will be applied to the last maturing principal installments first. These prepayments will not reduce the amount or time of payment of the remaining installments, which will continue until the Principal Amount and all accrued interest are paid. Interest on the prepaid principal will immediately cease to accrue.
Form 6-5

Security for Payment

Note Secured by Real Property Only

Clause 6-5-1

This note is secured by a vendor’s lien [include if applicable: and superior title] retained in a deed from [name] to Borrower dated [date] and by a deed of trust of even date from [Borrower/[name of grantor in deed of trust]] to [name of trustee], trustee, both of which cover the following real property: [property description].

Or

Clause 6-5-2

This note is secured by a deed of trust dated [date] from [Borrower/[name of grantor in deed of trust]] to [name of trustee], trustee, which covers the following real property: [property description].

Note Secured by Both Real Property and Personal Property

Clause 6-5-3

This note is secured by a deed of trust and security agreement dated [date] from [Borrower/[name of grantor in deed of trust and security agreement]] to [name of trustee], trustee. The deed of trust contains a security agreement that covers the personal property described in the deed of trust and the following real property: [property description].
Security Interest Is Created in a Deed of Trust and a Separate Security Agreement

Clause 6-5-4

This note is secured by a deed of trust dated [date] from [Borrower/ [name of grantor in deed of trust]] to [name of trustee], trustee, which covers the following real property: [property description]. This note is additionally secured by a security interest created in a security agreement that covers personal property and that is dated [date] and executed by [Borrower/[name of debtor in security agreement]] as the debtor in favor of Lender as the secured party.

Note Secured by Personal Property Only

Clause 6-5-5

This note is secured by a security interest created in a security agreement that covers [type of collateral] and that is dated [date] and executed by [Borrower/[name of debtor in security agreement]] as the debtor in favor of Lender as the secured party.
Form 6-6

Additional Clauses for Promissory Notes

Second Lien

Clause 6-6-1

The lien[s] securing this note [is/are] subordinate to the lien securing another note in the original principal amount of [amount] DOLLARS ($[amount]), dated [date], and executed by [name], payable to the order of [name].

Or

Clause 6-6-2

The lien securing this note is subordinate to the lien securing another note in the original principal amount of [amount] DOLLARS ($[amount]), dated [date], and executed by [name], payable to the order of [name], and described in a deed of trust recorded in [recording data] of the real property records of [county] County, Texas. If there is a default in payment of any part of principal or interest of that $[amount] note or a breach of any covenants contained in any instruments securing it, the debt evidenced by this note will immediately become payable at the option of Lender. If Borrower fails to perform any of Borrower’s obligations in that $[amount] note or in any instruments securing it, Lender may perform those obligations and be reimbursed by Borrower, on demand, at the Place for Payment for any amounts advanced, including attorney’s fees, plus interest on those amounts from the date of payment at the Annual Interest Rate on Matured, Unpaid Amounts. The amount to be reimbursed will be secured by all instruments securing this note.
Clause 6-6-3

This note is the second of two notes that Borrower executed today in favor of Lender, and each lien securing payment of this note is and will remain subordinate to each lien securing payment of the first note in the original principal amount of [amount] DOLLARS ($[amount]).

Wraparound Lien

Clause 6-6-4

The following paragraph is to be used for a wraparound loan transaction in conjunction with deed-of-trust forms, if modified as suggested in sections 8.3–8.5:3 in this manual.

The lien[s] securing this note [is/are] subordinate to the lien[s] securing payment of the unpaid balance of a prior note in the original principal amount of [amount] DOLLARS ($[amount]), dated [date], and executed by [name], described in and secured by a deed of trust recorded in [recording data] of the real property records of [county] County, Texas. Borrower has not assumed payment of that prior note, but Lender is obligated to pay it according to its terms. If Lender defaults in payment of the prior note, Borrower has the right to cure the default and receive credit on this note. The subordinate lien[s] securing this note [is/are] also provided for in the warranty deed with vendor’s lien and deed of trust described above, which this note incorporates and is subject to.
Late Charge

Clause 6-6-5

If any installment becomes overdue for more than [number] days, at Lender’s option a late payment charge of $[amount] may be charged in order to defray the expense of handling the delinquent payment.

Guaranty of Payment

Clause 6-6-6

For value received, [I/we], [name[s]], [jointly and severally,] absolutely, irrevocably, and unconditionally guarantee payment of this note according to its terms to the same extent as if [I/we] were Borrower[s] on this note. [I/We] [jointly and severally] waive all demands and all notices, including notice of intention to accelerate maturity, notice of acceleration of maturity, notice of nonpayment or default, presentment for payment, protest, notice of protest, suit, and diligence. [I/We] also [jointly and severally] waive any notice of and defense based on the extension of time of payment or change in methods of payment or the release of any collateral securing this note and consent to all renewals, extensions, and other adjustments in the manner of payment of this note and any transfer of this note to any third party. This is an unconditional guaranty of payment and performance, not of collection, and it is an agreement of guaranty, not of suretyship. [I/We] [jointly and severally] waive defenses based on suretyship or impairment of collateral and all requirements of law, if any, that any collection efforts be made against Borrower or that any action be brought against Borrower before resorting to this guaranty, including rights under section 17.001 and chapter 43 of the Texas Civil Practice and Remedies Code and rule 31 of the Texas Rules of Civil Procedure.
Notice to Cure Default

Clause 6-6-8

Notwithstanding any other provision of this note, in the event of a default, before exercising any of Lender’s remedies under this note or any [deed of trust/security agreement/instrument] securing [include if applicable: or collateral to] it, Lender will first give Borrower written notice of default and Borrower will have ten days after notice is given in which to cure the default. If the default is not cured ten days after notice, (1) Borrower and each surety, endorser, and guarantor waive all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law [include if applicable: , and rights under sections 51.003, 51.004, and 51.005 of the Texas Property Code] [include if applicable: , and rights under section 17.001 and chapter 43 of the Texas Civil Practice and Remedies Code [and rule 31 of the Texas Rules of Civil Procedure]]; and (2) Lender may declare the unpaid principal balance, earned interest, and any other amounts owed on the note immediately due and may exercise all other rights and remedies available at law or in equity.
Reamortization

Clause 6-6-9

If the proceeds of a casualty or condemnation are applied to the Principal Amount of this note resulting in prepayment of more than 10 percent of the unpaid principal balance and more than one year remains until the Maturity Date, the unpaid principal balance will be reamortized over the remaining period of this note. The reamortization will be used to calculate the amount of the monthly payment that would be sufficient to pay in full the unpaid principal amount remaining on the prepayment date, plus interest, by the Maturity Date. The reduced payments of principal and interest to be made on this note as the result of the reamortization will be the new monthly amount, and the payments will begin the next month after the prepayment date.

Loan Agreements

Clause 6-6-10

This note is the [identify defined term from the loan agreement] note required under [specific provision] of a loan agreement of the same date as the note.

Or

Clause 6-6-11

The execution and delivery of this note are required under a loan agreement of the same date as the note.
Conflicts

Clause 6-6-12

If any provision of this note conflicts with any provision of a loan agreement, deed of trust, or security agreement of the same transaction between Lender and Borrower, the provisions of the [loan agreement/deed of trust/security agreement/note] will govern to the extent of the conflict.

Choice of Law

Clause 6-6-13

This note will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction.

Attorney’s Fees (Consumer Loan under Texas Finance Code Chapter 342, Not Secured by a Lien on Real Estate)

Clause 6-6-14

Borrower also promises to pay court and other costs and attorney’s fees assessed by a court if an attorney is retained to collect or enforce the note. Borrower will pay Lender these expenses on demand at the Place for Payment. These expenses will become part of the debt evidenced by the note and will be secured by any security for payment.

Attorney’s Fees (Secondary Mortgage Loan under Texas Finance Code Chapter 342)

Clause 6-6-15

Borrower also promises to pay reasonable attorney’s fees and court and other costs and fees incurred if an attorney is retained who is not an employee of Lender to collect or enforce the note. Borrower will pay Lender these
expenses on demand at the Place for Payment. These expenses will become part of the debt evidenced by the note and will be secured by any security for payment.

Variable-Rate Disclosure

Clause 6-6-16

NOTICE TO CONSUMER: UNDER TEXAS LAW, IF YOU CONSENT TO THIS AGREEMENT, YOU MAY BE SUBJECT TO A FUTURE RATE AS HIGH AS 24 PERCENT PER YEAR.

Fair Credit Reporting Act Notice

Clause 6-6-17

Lender may report information about Borrower’s loan account to credit bureaus. Late payments, missed payments, or other defaults on this note may be reflected in your credit report.

Nonrecourse

Clause 6-6-18

Notwithstanding any other provision of this note, Lender may satisfy the debt evidenced by this note only by the enforcement of Lender’s rights in the [identify collateral] pursuant to [identify collateral documents], and Borrower will not be liable for a money judgment in the event of a default under this note or the [identify collateral documents].
Clause 6-6-19

Notwithstanding any other provision of this note, Lender may satisfy the debt evidenced by this note only by the enforcement of Lender’s rights in the [identify collateral] pursuant to [identify collateral documents], and Borrower will not be liable for a money judgment in the event of a default in payment of the debt evidenced by this note; provided, however, Lender may recover against Borrower if Borrower defaults on Borrower’s obligation to [describe obligations, e.g., pay ad valorem taxes owed on the collateral].

Partial Recourse

Clause 6-6-20

Borrower has no personal liability for the obligations under this note or under the Deed of Trust, and no personal judgment may be taken and no claim for personal liability may be made against Borrower. Lender’s sole remedy for default under this note or the Deed of Trust is the foreclosure of the liens and security interests created hereunder. Exceptions to the foregoing provisions are limited to, and Borrower is liable for, the following: taxes, assessments, and charges for labor, materials, or other amounts that if unpaid may create an encumbrance against the collateral for this note; unpaid premiums for insurance required under the Deed of Trust; damage to the collateral for this note if any insurance required hereunder is not maintained; all rents, issues, profits, and income derived from the collateral for this note after a default occurs and not expended for operating expenses of the collateral for this note; tenant security deposits for leases of the collateral for this note; any condemnation or insurance proceeds not paid or applied as required hereunder; [include if applicable: damage to and depreciation of the collateral for this note beyond normal
wear and tear caused by the negligence of Borrower or the failure of Borrower
to keep the collateral for this note in good repair and condition; the return of or
reimbursement for all personal property taken from the collateral for this note
by or on behalf of Borrower;] damages resulting from any fraud or misrepre-
sentation by Borrower; damages resulting from any breach of any warranty of
title; interest on the note from the date of default through foreclosure, payment,
or settlement of the debt; all interest on the note during any bankruptcy pro-
ceeding of Borrower and all reasonable attorney’s fees and expenses incurred
as a result of Borrower’s bankruptcy; and all attorney’s fees and expenses
incurred by Lender or other holder of the note to collect any of the foregoing
amounts.

Spreading

Clause 6-6-21

All calculations of the rate of interest contracted for, charged, taken,
reserved, or received in connection with this note that are made for the purpose
of determining whether such rate exceeds the maximum nonusurious rate of
interest permitted by law shall be made, to the extent permitted by applicable
laws, by spreading, during the period of the full term of this note, all interest at
any time contracted for, charged, taken, reserved, or received by Lender.
Form 6-7

Notice to Cosigner

You are being asked to guarantee this debt. Think carefully before you do. If the borrower does not pay the debt, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility.

You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase the amount.

The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, or the like. If this debt is ever in default, that fact may become a part of your credit record.

This notice is not the contract that makes you liable for the debt.

I HAVE READ AND UNDERSTAND THE FOREGOING NOTICE.

[Name of cosigner]
Date:
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§ 8.1 Use and Effect of Deed of Trust

A deed of trust is a mortgage with a power of sale. Although a deed of trust by its literal terms conveys the described property in trust to the trustee, its actual effect under Texas law is to create a lien against the property to secure a debt of the grantor of the lien to the beneficiary of the lien. The deed of trust is often used to establish a lien on property for which a lender has advanced purchase money, but it may also secure a loan or other obligation unrelated to the property. The primary advantage of the deed of trust over the type of mortgage used in many other states is that it provides the default remedy of nonjudicial foreclosure by a trustee’s sale without the necessity of a lawsuit.

This chapter provides three basic forms: the deed of trust (form 8-1), the deed of trust to secure assumption (form 8-2), and the leasehold deed of trust (form 8-10). As discussed in this chapter, the forms may be adapted to a variety of situations.

The deed of trust often includes a security agreement and financing statement to cover personal property and fixtures associated with the real estate. For drafting instructions for using a deed of trust with a security agreement, see section 8.11:2 below.

The Texas Trust Code does not apply to a deed of trust. Tex. Prop. Code § 111.003(a).

§ 8.1:1 Terms and Conditions

The deed-of-trust form provided in this manual may be adapted to cover indebtedness other than the note specifically described, such as future advances or overdrafts, and to serve as a security agreement for personal property. Due-on-sale clauses, prohibitions against further encumbrances, and tax and insurance reserve clauses may be added. Clauses for these purposes are suggested in form 8-9 in this chapter.

§ 8.1:2 Precautions for Deed of Trust

The lender’s attorney should determine whether the property is the borrower’s homestead and, if so, whether a valid lien can be created against it. The Texas Constitution and Property Code allow liens against homesteads only under certain conditions. See Tex. Const. art. XVI, § 50; Tex. Prop. Code ch. 41.

Article XVI, section 50, of the Texas Constitution was amended in 1997 to permit home equity lending under certain circumstances. Home equity lending is discussed in chapter 11 in this manual. The attorney is cautioned against using the forms in this chapter for that purpose. In particular, the attorney should be aware that nonjudicial foreclosure is not available in home equity loans.

Trustees foreclosing under a deed of trust must comply exactly with all requirements of Property Code section 51.002, which specifies in detail the procedures for a trustee’s sale. See Tex. Prop. Code § 51.002. Trustees must also comply with any additional requirements imposed by the deed of trust. Under certain circumstances, a lender, trustee, or substitute trustee may

A deed of trust is generally a component of a “loan agreement” as defined in the Texas Business and Commerce Code statute of frauds for loan documents and requires the notice prescribed therein. See Tex. Bus. & Com. Code § 26.02. The notice of final agreement, form 10-14 in this manual, may be used to satisfy the statutory requirements.

Texas Finance Code chapter 343 regulates certain types of home loans. For example, “[a] lender may not replace or consolidate a low-rate home loan directly made by a government or nonprofit lender before the seventh anniversary of the date of the loan” unless the transaction meets the requirements of chapter 343 of the Texas Finance Code. Tex. Fin. Code § 343.101(b). See section 10.14 for further discussion.

§ 8.2 Considerations in Drafting Deed of Trust

§ 8.2:1 Parties

For general information about designation of parties, see the remarks at section 3.9 in this manual.

The party granting the deed-of-trust lien and the borrower in the note secured are not necessarily the same party. The attorney drafting the deed of trust must make certain that all parties are properly designated. Paragraph E.14. in the deed-of-trust form (form 8-1 in this chapter) recognizes that the party granting the lien and the party obligated to pay the note may not be the same. This provision is included to add versatility to the form. The attorney dealing with such a situation, however, should consider specifying in greater detail the obligations of the respective parties—for example, that while the borrower in the note is obligated to pay the note, the grantor in the deed of trust is responsible for performance of the other covenants contained in the deed of trust, such as payment of ad valorem taxes. If the attorney elects to add such detail, the deed of trust should make clear that any default by either party is also a default by the other, entitling the lender to exercise the remedies contained in both the note and the deed of trust.

The lender should be identified by full name and, if the lender is a legal entity rather than a natural person, the type of entity. The lender’s name should appear exactly as it does in the note.

Individuals, not corporations, are usually named as trustees. Institutional lenders frequently prefer to designate one of their own officers or attorneys to serve in this capacity.

One or more persons may be authorized to exercise the power of sale under a security instrument. See Tex. Prop. Code § 51.0074(a).

§ 8.2:2 Description of Note

The deed of trust should provide at least basic information about the note so that the note may be clearly identified. Attorneys have different ideas about how much information the deed of trust should reveal about the note being secured, and some prefer not to disclose the payment terms. Usually, though, the note’s date, amount, borrower, lender, and, if desired, final maturity date are shown. If parties prefer not to disclose the payment terms, they may insert in the relevant space on the form a short phrase such as “As provided in the note” or “Monthly installments according to terms provided in the note.”
If the final maturity date of the note is stated, it should be possible to avoid any assertion that limitations began to run on execution of the note. Stating the final maturity date should also make limitations available in clearing title of old time-barred deeds of trust. On the other hand, if this information is included in the deed of trust, it is critical that it be accurate and that any extensions granted by the lender be documented in a duly recorded extension agreement to preclude limitations barring a valid deed-of-trust lien against purchasers for value without notice.

§ 8.2:3 Property Description

For remarks and cautions in general about property descriptions, see section 3.7 in this manual. Also, note that the description of the property in the leasehold deed of trust (form 8-10 in this chapter) should be of the leasehold interest of the tenant granting the deed-of-trust lien.

§ 8.2:4 Prior Liens

If the deed of trust creates a first lien on the property, the word none is adequate for the space for listing prior liens on the form. If the lien is a second or other subordinate lien, all prior liens should be fully described.

In listing the prior liens, the attorney should not overlook previously recorded deeds of trust to secure assumption that affect the priority of subsequent liens.

§ 8.2:5 Other Exceptions to Conveyance and Warranty

For remarks about reservations from conveyance and exceptions to conveyance and warranty, see sections 5.2:6 and 5.2:7 in this manual.

§ 8.2:6 Vendor’s Lien Clauses

If a vendor’s lien clause is used it should be added to paragraph 19. of “General Provisions” in the deed of trust. See form 8-3 in this chapter. Clause 8-3-3 may be used if no vendor’s lien is expressly retained in the deed and the note evidences money used to purchase the property.

§ 8.2:7 Mechanic’s Lien Clauses

If a mechanic’s lien contract with power of sale is used (such as that in chapter 20 in this manual), a deed of trust is not necessary but should be used if there is a third-party lender. If a mechanic’s lien contract without a power of sale is used and a contractor wants to reserve the right to a nonjudicial foreclosure in a separate deed of trust, a clause like clause 8-9-1 should be added to paragraph 19. of “General Provisions.”

§ 8.2:8 Clauses Extending Existing Liens

If an existing lien is extended, the clauses in form 8-4 in this chapter should be added to paragraph 19. of “General Provisions.”
Extension of Existing Deed-of-Trust Lien. The bracketed sentences of clauses 8-4-1 through 8-4-4 are appropriate if the renewed and extended note has been assigned to the lender secured by the deed of trust but should not be used if the lender secured by the deed of trust is the original lender in the note.

In the transaction described in clause 8-4-2, the sum of the unpaid balance of the prior note and the amount of cash advanced should equal the amount of the note secured by this deed of trust.

Alternative Renewal and Extension Language. Some attorneys prefer to use more comprehensive language renewing and extending the lien than that in extension clauses 8-4-1 through 8-4-4. The language suggested in clause 8-4-5 extends a deed-of-trust lien, but it can be modified to address other types of liens. If clause 8-4-5 is used, it replaces the sentence in clauses 8-4-1 through 8-4-4 beginning “Grantor acknowledges that the lien(s) . . .”

Extension of Prior Lien to Be Released, Not Assigned. Clause 8-4-6 is drafted for use if a note and a deed of trust are being used to extend a deed-of-trust lien, but it can be modified to extend other types of liens.

Extension of Lien to Only Part of Property. Clause 8-4-7 extends a vendor’s lien and a deed-of-trust lien as to only part of the property.

§ 8.2:9 Acknowledging Cash Advanced

Clause 8-3-3 in this chapter acknowledges the receipt of cash and is appropriate if all or part of the cash advanced is applied to the purchase price and no vendor’s lien is retained in the deed. If cash is advanced and used for other purposes, one of the clauses in form 8-5 may be suitable or may be adapted, and it should be added to paragraph 19. of “General Provisions.”

To Pay Ad Valorem Taxes. If the borrower files a sworn affidavit with the tax office authorizing the lender to pay taxes on the property, the tax office transfers the tax lien to the lender when the lender pays the taxes. The lien must be recorded in the real property records of the county in which the property is located, with a sworn statement and affidavit attesting to the transfer of the tax lien, and foreclosure on the lien may not be initiated for one year after its recording, unless the deed of trust or other agreement between the borrower and the lender provides otherwise. Tex. Tax Code §§ 32.06, 32.065. See clause 8-5-3. See also the section titled “Ad Valorem Taxes” in chapter 2 of this manual.

§ 8.2:10 Due-on-Sale Clause

The deed-of-trust form in this manual includes a due-on-sale clause, that is, a clause accelerating the underlying debt on the transfer of property. The attorney should remove this clause if it is not applicable to the transaction in question. Events triggering acceleration of the debt under the due-on-sale clause include transfer of the property by the owner, granting of subordinate liens on the property, and transfers of equity interest in the owner, with exceptions for transfers to other family members or entities when no change of control results. Because many lenders evaluate the creditworthiness, track record, and management ability of the grantor, as well as the predicted cash flow of the property, during the underwriting process, they require that a deed of trust contain a due-on-sale clause to prevent a change of management or ownership (including current ownership of voting interests in business entities not publicly held) without an opportunity for the lender to reevaluate the security for the loan. Many lenders also require a due-on-sale clause that applies when subordinate liens are granted because historically many bankruptcy proceedings have been funded by subordinate lenders attempting to delay foreclosure proceedings. The Texas Real Estate Commission’s Seller Financing Addendum contains an election that includes a due-on-sale clause. Federal law prohibits the enforcement of a due-on-sale clause for owner-occupied residential property under certain circumstances. See 12
U.S.C. § 1701j–3(d); 12 C.F.R. § 591.5(b). The exceptions to the due-on-sale clause in the residential deed of trust are derived from these federal restrictions.

Alternative due-on-transfer clauses are found at clauses 8-9-21 through 8-9-23 in this chapter.

§ 8.2:11 Confidentiality Notice

If any party to a deed of trust, including the trustee, is an individual, the deed of trust must contain the confidentiality notice required by Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 8.3 Use and Effect of Subordinate Deed of Trust

A subordinate deed of trust is one that is either recorded after a previously recorded deed of trust or, less often, expressly made subordinate to it by agreement of the lender. A deed of trust can also become subordinate by another lien’s having a superpriority—for example, ad valorem tax liens. The most common uses of a subordinate deed of trust are in cases involving a borrower whose property is subject to an existing lien and who desires additional financing to be secured by the same property, and in cases involving seller financing.

A wraparound mortgage is a subordinate mortgage secured by real property on which a prior lien remains outstanding and unsatisfied and on which the original obligor remains obligated. The wraparound debt includes within it the balance of the underlying lien debt. In some wraparound mortgages the prior lien may be “wrapped” more than once.

In a wraparound financing transaction the borrower (usually the buyer) agrees to make payments on the wraparound mortgage to the lender (usually the seller) who, as required by the wraparound mortgage agreement, must in turn make payments on the prior, underlying, or wrapped lien to the prior lienholder. If the lender fails to pay off the first lien, the wraparound agreement normally gives the borrower the right to make the first-lien payments and receive credit on the wraparound note. The two primary reasons for a wraparound transaction are to take advantage of the spread in interest rates between the underlying and wrap notes and to provide the wrap-note lender with the assurances that the underlying note payments are made. Use of the forms provided in this manual for a wraparound transaction requires the use of specific clauses in both the note and the deed of trust. For examples of these, see clauses 6-6-4 and 8-9-11 in this manual.

§ 8.4 Precautions for Subordinate Deed of Trust

Subordinate lien financing involves a number of considerations for all the parties involved: the borrower, the prior lender, and the subordinate lender. The borrower should ascertain that the creation of a subordinate lien will not be a default under the prior deed of trust, because subordinate encumbrances are expressly prohibited in many deeds of trust. The prior lender may have concerns about the ability of the borrower to service both the superior and subordinate lien debts. If the borrower should default on the subordinate lien debt and the subordinate lender should foreclose, the borrower, although still liable on the debt, will no longer be the owner of the property, and the incentive to repay the senior loan will obviously be diminished.

The party at greatest risk in subordinate lien financing transactions is the subordinate lender. Foreclosure of a superior lien extinguishes all subordinate liens. See Exchange Savings & Loan Ass’n v. Monocrete Proprietary, Ltd., 629 S.W.2d 34 (Tex. 1982). In Texas, unlike many other jurisdictions, a subordinate lienholder is not entitled by law to notice of default on the prior lien debt or notice of foreclosure proceedings. The subordinate lienholder is likewise not entitled to share in the foreclosure
proceeds, unless there is an excess after payment of costs and expenses in connection with the foreclosure and satisfaction of the prior lien debt. The subordinate lienholder may therefore want to obtain the prior lienholder’s agreement to provide notice of any default by the borrower under the first-lien note and deed of trust and the opportunity to cure such default or require the borrower to provide continuing proof that payments on the prior lien debt have been made.

Another concern for the subordinate lender is the potential application of a “dragnet” or “other indebtedness” clause in the prior deed of trust. If the prior deed of trust secures debt of the borrower other than the prior lien note itself, there is a likelihood that the total debt secured by the prior lien will exceed the value of the property, and the subordinate lender’s lien may be for all practical purposes worthless. These are issues that the subordinate lender may want to address by an agreement with the prior lender, generally called a lender’s “estoppel certificate” or an intercreditor agreement. See form 10-10 in this manual.

A subordinate lien transaction may be subject to chapter 342 of the Texas Finance Code if the property is a dwelling designed for occupancy by four or fewer families and the interest rate exceeds 10 percent per year. See Tex. Fin. Code §§ 342.001(4), 342.005. Chapter 342 applies to a secondary mortgage loan made by a person in the business of making, arranging, or negotiating those types of loans. Tex. Fin. Code § 342.005(3). The chapter does not apply to a secondary mortgage loan made by a seller of property to secure all or part of the unpaid purchase price. Tex. Fin. Code § 342.006. If a lender is in the business of making, arranging, or negotiating secondary mortgage loans, the lender must obtain a license from the Office of Consumer Credit Commissioner (the OCCC) unless the lender is a bank, savings bank, savings and loan association, credit union, or a residential mortgage loan originator licensed under chapter 156. See Tex. Fin. Code §§ 124.005, 339.004, 341.103–.104, 342.051. Unless exempt under section 180.003, an individual who acts as a residential mortgage loan originator in the making, transacting, or negotiating of a secondary mortgage loan subject to chapter 342 must individually be licensed under chapter 342, be enrolled with the Nationwide Mortgage Licensing System and Registry as required by section 180.52, and comply with other applicable requirements of the Texas Secure and Fair Enforcement of Mortgage Licensing Act of 2009. Tex. Fin. Code ch. 180.

Chapter 342 loans are highly specialized and regulated, and thus if a subordinate lien transaction is subject to chapter 342, the attorney must carefully review the chapter to make sure all requirements have been met. Texas Finance Code section 341.502 provides that “[a] contract for a loan under Chapter 342, a retail installment transaction under Chapter 348, or a home equity loan regulated by the Office of Consumer Credit Commissioner must be . . . written in plain language designed to be easily understood by the average consumer.” Tex. Fin. Code § 341.502(a). The Finance Commission of Texas is authorized to adopt model contracts for loans subject to that section. A lender may not use a contract other than a model contract unless the lender has submitted the contract to the OCCC for its approval. If the OCCC issues an order disapproving a submitted contract, the lender may not use the contract after the order takes effect. Tex. Fin. Code § 341.502(b)–(d). Plain-language model contracts and related rules for chapter 342, subchapter G, second-lien home improvement contracts are codified at 7 Tex. Admin. Code §§ 90.601–.604.

The attorney general of Texas determined that section 341.502(a) is applicable only to those loan transactions for which the consumer credit commissioner is the appointed regulating official and has no application to loan transactions subject to the regulatory authority of the banking commissioner, the savings and mortgage lending commissioner, the credit union commissioner, and federal regulatory officials. See Tex. Att’y Gen. Op. No. JC-0513 (2002).

Banks, savings and loan associations, and credit unions accordingly are not required to comply with the section 341.502 “plain language” contract requirements or to obtain a license to engage in the business of making subordinate lien loans subject to chapter 342. Tex. Fin. Code § 342.051(c)(1). These institutional lenders nevertheless are thought to be subject to other
substantive law provisions of chapter 342, including, for example, the limitations of that chapter on the collection of authorized fees and charges, as enforced by the policies of their respective regulatory agencies. See Tex. Fin. Code §§ 342.308, 342.502.

Before using the deed-of-trust forms contained in this chapter of the manual for a loan subject to chapter 342 of the Texas Finance Code, the attorney should determine whether the lender is subject to the plain-language model contract provisions of Texas Finance Code section 341.502. The forms contained in this chapter have not been submitted to or approved by the OCCC.

If the attorney decides that the forms contained in this chapter may nevertheless be used for a loan regulated by chapter 342 of the Texas Finance Code, the forms still must be modified to comply with the requirements of that chapter. For example, the secondary mortgage loan documents for a loan made by a licensed lender must contain the name, mailing address, and telephone number of the OCCC. Tex. Fin. Code § 14.104. See clause 8-9-24 in this chapter. Neither the deed-of-trust forms nor the note forms in this manual contain that information. The attorney should include that information in both the deed-of-trust form and the note form when documenting a secondary mortgage loan if the lender has a license from the OCCC. Additionally, if a subordinate lien transaction is subject to chapter 342, the printed language in the deed of trust must be modified slightly. In paragraph 4. of “Grantor’s Obligations,” the phrase “issued by insurers and written on policy forms acceptable to Lender” must be struck. This change is necessary because Finance Code sections 342.404 through 342.405 and 342.413 prohibit a lender from approving the selection of insurance. See Tex. Fin. Code §§ 342.404–.405, 342.413. Also, Finance Code section 342.404 provides that when insurance is required in connection with a loan made under that chapter, the lender must furnish the borrower a statement like the one in clause 8-9-9, which may be added to the deed of trust as a numbered paragraph under “General Provisions.” See Tex. Fin. Code § 342.404.

The same chapter imposes other requirements if the lender sells or procures insurance related to the loan at a rate not fixed or approved by the State Board of Insurance. See Tex. Fin. Code § 342.405.

Finance Code section 342.307 limits the enforcement fees that may be included in secondary mortgage loan documents. To comply with this section, the attorney’s fee provisions in the note, form 6-1, and the deed of trust should be modified if used in transactions subject to chapter 342 of the Finance Code. See Tex. Fin. Code § 342.307. In the note, the third paragraph, concerning attorney’s fees, should be replaced with clause 6-6-15. See section 6.2:7. To modify the deed of trust, in paragraph E.16., after the words “the hands of an attorney” add “who is not an employee of Lender.”

An institutional third-party lender may be required to provide the borrower a truth-in-lending disclosure (loan) form. An example of this form is included in chapter 12 in this manual. The clauses in form 8-8 are examples of second-lien clauses.

If the prior deed of trust contains a due-on-sale clause, the wraparound deed-of-trust conveyance, like other subordinate liens, may violate the due-on-sale clause.

The wraparound mortgage has usury implications that are not yet fully settled, centering primarily around the issue of whether the entire principal amount of the wraparound note or merely the difference between the principal amount of the wraparound note and the balance of the underlying note should be used for interest calculations. The attorney is referred to the December 31, 1981, letter from the OCCC, which may be obtained from that office, and to Summers v. Consolidated Capital Special Trust, 783 S.W.2d 580 (Tex. 1989), for two analyses of these issues.

The wraparound mortgage, like other subordinate lien mortgages, may be subject to chapter 342 of the Texas Finance Code.
§ 8.5 Considerations in Drafting Subordinate Deed of Trust

It is essential that a subordinate deed of trust contain terms and provisions identifying the prior lien and obligating the borrower to keep the prior note and deed of trust current and not in default. The clauses in form 8-8 in this chapter may be used for this purpose. The parties may wish to attempt to obtain an estoppel letter or intercreditor agreement from the prior lienholder. An example of such an instrument may be found at form 10-10.

There are additional considerations in drafting instruments for a wraparound transaction: modification of the warranty deed with vendor’s lien (see chapter 5), promissory note (see chapter 6), and deed of trust (see sections 8.2:1 through 8.2:9 above). These forms should be completed according to the instructions in their respective sections of this manual, and then all three documents should be modified further according to the instructions in sections 8.5:1 through 8.5:3 below.

§ 8.5:1 Additional Clauses for Wraparound Deed of Trust

A deed of trust should be drafted according to the comments in sections 8.2:1 through 8.2:9 above and then modified to accommodate a wraparound transaction.

If the transaction is subject to chapter 342 of the Texas Finance Code, see section 8.4 above for a suggested modification of the form.

In the space following “General Provisions,” a vendor’s lien clause like clause 8-3-1 in this chapter should appear. Also, a wraparound clause similar to clause 8-9-11 should be included in the same part of the deed of trust.

If the deed of trust securing the prior note requires monthly deposits to a reserve account for payment of taxes and insurance premiums, a similar requirement should be inserted in the wraparound deed of trust securing the wraparound note. A clause serving this purpose appears at 8-9-4. Also, language similar to that suggested in the second part of clause 8-9-11 should be added to the wraparound lien clause.

§ 8.5:2 Additional Documents for Use with Wraparound Mortgage

An additional document often used in wraparound transactions is a collection agreement specifying the terms by which the borrower makes payments on the subordinate lien note to an escrow agent, usually a bank, rather than to the lender. This procedure protects the borrower from the possibility that the lender will fail to forward part of the payment to the holder of the prior lien. The lender’s failure to make payments on the prior lien would, of course, cause a default that the borrower would have to cure to avoid a foreclosure on the property. A collection agreement usually provides that the agent will use the borrower’s subordinate lien payment to pay the prior lienholder and then remit the excess to the lender. A sample of such an agreement is found at form 10-7 in this manual.

§ 8.5:3 Other Comments

The prior note may be secured by liens other than those discussed in sections 8.2:6 through 8.2:9 above. If so, those liens should be described.

The lender sometimes adds to the clauses a provision that, as between the borrower and the lender, the lender is not required to make payments under the prior note or liens if the borrower fails to make payments on the wraparound note.
The borrower often insists on another modification of the clauses to provide compensation beyond the amount tendered to cure a default by the lender in payment of the prior note. A common provision credits the borrower with 110 percent of the payment made to cure the default and characterizes the added 10 percent as liquidated damages to compensate for expenses incurred.

The borrower also will often include in the wraparound note a requirement that the lender must give notice regularly that the prior note payment has been made.

The wraparound note should be structured so that payments are due before payments are due on the prior note.

§ 8.5:4 Confidentiality Notice

If any party to a deed of trust, including the trustee, is an individual, the deed of trust must contain the confidentiality notice required by Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 8.6 Use and Effect of Deed of Trust to Secure Assumption

The deed of trust to secure assumption may be used if the buyer assumes payment of a debt for which the seller is liable at the time of sale. If this instrument is used under these circumstances, the seller usually conveys title by deed with a vendor’s lien reserved. The assumed debt and lien are evidenced by a note and deed of trust. The deed of trust to secure assumption provides that the lien it creates is released with the release of the prior deed of trust, unless before the release the seller files a notice with the proper county clerk setting forth any amount the seller has advanced to cure a default in payment of the assumed lien.

The primary function of the deed of trust to secure assumption is to give the seller recourse against the property if the buyer defaults in payment of the debt secured by the first lien.

In a transaction involving the deed of trust to secure assumption the buyer is the grantor in the deed of trust to secure assumption and the grantee in the warranty deed. The seller is the grantor in the warranty deed, the lender in the deed of trust to secure assumption, and usually the borrower in the note and grantor in the deed of trust assumed.

Caution: The deed of trust to secure assumption is not appropriate for use in a wraparound mortgage transaction. Also, its use may violate a due-on-sale clause in the prior deed of trust.

§ 8.7 Considerations in Drafting Deed of Trust to Secure Assumption

Chapter 3 in this manual offers useful suggestions for completing the basic information required for this form, such as designation of parties and recording information. The property description should either repeat exactly the description in the deed of trust assumed or incorporate that description by reference. References to the deed of trust should include its recording information.

§ 8.7:1 Additional Clauses for Use with Deed of Trust to Secure Assumption

The assumption provision in the deed includes an indemnity against all damages caused by the assuming party’s breach of its obligations. It is likely, considering the election-of-remedies provision of paragraph 3. under section D, “General Provisions,”
in the deed of trust to secure assumption, that a cause of action for damages would survive action taken under the deed of trust to secure assumption.

§ 8.7:2 Warranty Deed Provisions for Use with Deed of Trust to Secure Assumption

The grantor in the warranty deed accompanying the deed of trust to secure assumption is the beneficiary (lender) of the deed of trust to secure assumption, and the buyer of the property is the grantee in the deed and the borrower (grantor) in the deed of trust to secure assumption.

The deed should contain an assumption clause like clause 5-6-1 in this manual and a clause for vendor’s lien and deed of trust to secure assumption like clause 5-9-10 or 5-9-11.

§ 8.8 Use of Leasehold Deed of Trust

The leasehold deed of trust should be used if the grantor is encumbering a leasehold interest instead of a fee interest in real property. The grantor of the leasehold deed of trust must be the tenant under the lease encumbered by the leasehold deed of trust.

The attorney drafting the leasehold deed of trust must first determine if the tenant’s interest in the lease may be encumbered. The encumbrance of a tenant’s interest in a lease is considered a sublease under Texas law. See Amco Trust, Inc. v. Naylor, 317 S.W.2d 47 (Tex. 1958); American National Bank & Trust Co. v. First Wisconsin Mortgage Trust, 577 S.W.2d 312 (Tex. Civ. App.—Beaumont 1979, writ ref’d n.r.e.), disapproved on other grounds by Stewart Title Guaranty Co. v. Sterling, 822 S.W.2d 1, 11 (Tex. 1991). Section 91.005 of the Property Code prohibits subleases without the prior consent of the landlord. Also, many leases in Texas expressly prohibit the subleasing or encumbering of the tenant’s interest without the landlord’s consent. However, a tenant whose lease gives authorization to sublease any part of the leased premises also has the right to encumber the leasehold estate. See Menger v. Ward, 30 S.W. 853 (Tex. 1895).

Therefore, the attorney must find that the lease allows encumbrance of the tenant’s interest without the landlord’s consent or that any required landlord consent has been obtained before execution of the leasehold deed of trust. See form 8-11 in this chapter for a form of consent by landlord to a leasehold deed of trust that also includes additional representations and agreements by the landlord that a lender will require as a condition to making a loan secured by the leasehold deed of trust, including the opportunity to cure defaults by the tenant under the lease.

In addition to a description of the lease, the leasehold deed of trust contains affirmative and negative covenants and representations by the grantor that relate specifically to the lease that is being encumbered. These covenants are intended generally to cause the grantor to keep the lease in effect during the term of the loan in substantially the same status as the grantor represented it to be when the loan was made.

Certain covenants in the deed of trust (form 8-1) that may be inconsistent with the tenant’s obligations under the lease (for example, payment of taxes, maintenance and repair, and insurance) have been deleted from the leasehold deed of trust in favor of the covenants by the grantor to observe and perform all of its obligations and to enforce the landlord’s obligations under the lease.
§ 8.8:1 Confidentiality Notice

If any party to a deed of trust, including the trustee, is an individual, the deed of trust must contain the confidentiality notice required by Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 8.8:2 Title Insurance for Leasehold Deeds of Trust

A leasehold loan policy endorsement (T-5) is available, at no extra charge, for leasehold deeds of trust.

§ 8.9 Use of Consent to Leasehold Deed of Trust

If the lease does not allow encumbrance of the tenant’s interest without the landlord’s consent, the lease will also not contain the additional representations and agreements by the landlord that a lender will typically require as a condition to making a loan secured by the leasehold deed of trust. In this case, the lender not only must obtain the written consent of the landlord to the leasehold deed of trust but should also seek from the landlord certain representations about the status of the lease and certain affirmative and negative covenants designed to preserve the lease as viable collateral for the loan. The consent to leasehold deed of trust (form 8-11 in this chapter) may be used for this purpose.

Form 8-11 covers common issues of importance to the lender, including rights to give to the tenant notice and cure of tenant defaults, access to the leased premises to enforce a security interest in the tenant’s personalty, free assignability of the lease at foreclosure and to a purchaser from the lender of the tenant’s assets after foreclosure, and to demand a new lease on the same terms if the lease is terminated or rejected by a trustee in bankruptcy. The lender that is considering demanding a new lease should also be aware of the effect of the termination of the lease on any subleases in effect as of the termination and may wish to consider adding to form 8-11 a provision that allows the new tenant to reinstate desirable subleases without the landlord’s consent.

§ 8.10 Additional Clauses

If used, clauses such as those in form 8-9 in this chapter should appear as numbered paragraphs following paragraph E.12. in the deed of trust (form 8-1), paragraph E.9. in the deed of trust to secure assumption (form 8-2), and paragraph G.11. in the leasehold deed of trust (form 8-10).

Both the deed of trust and the deed of trust to secure assumption may be modified to secure other obligations of the borrower such as guaranties and “subject to” transactions in which the borrower does not assume the underlying debt.

§ 8.10:1 Future Advances

Future advance clauses may be enforceable to the extent that they secure a debt that is within the reasonable contemplation of the parties when the deed of trust is executed. The lien securing a future advance may have priority over an intervening lien if the intervening lienholder has notice that the earlier lien secures future advances. Form 8-6 in this chapter contains several examples of future advance clauses. If the future indebtedness to be secured is that of someone other than the borrower granting the lien, these clauses should be modified accordingly.

Clause 8-6-4, in addition to future advances, also covers present or future debts of other borrowing entities in which the borrower has an interest.
§ 8.10:2 Partial Release

If the parties anticipate circumstances requiring partial release of the lien, such as subdivision of the property, they often include partial release provisions in the deed of trust or, if the terms are complex and lengthy, in a separate agreement referred to in the deed of trust. The partial release clause should specify exactly which part of the property will be released from the lien and what amount of debt must be paid. The terms of release, especially an accurate description of the affected property, must be precise. The clauses in form 8-7 in this chapter are examples of partial release clauses. The first is for use if releases are by acre, the second if the property is subdivided at the time of the granting of the deed of trust, and the third if a separate agreement is used in connection with a seller-financed sale contemplating the buyer’s subdivision of the property. Because each situation requiring a partial release is unique, these clauses must be adapted to the particular situation at hand.

For an example of a partial release of lien, see form 10-3 in this manual.

§ 8.10:3 Recordkeeping

If the property covered by the deed of trust is income-producing, the lender will frequently require the grantor to maintain records of operation on the property and make them available for the lender’s review. Clause 8-9-14 in this chapter contains such a requirement.

§ 8.10:4 Financial Statements

If the loan is commercial, the lender will frequently require the grantor to prepare and submit to the lender periodic financial statements, either on request or on an annual basis. Such a requirement is also sometimes imposed in connection with residential construction loans, but rarely in connection with residential mortgage loans. Clause 8-9-15 in this chapter requires financial statements from the grantor.

§ 8.10:5 Appraisals

In the aftermath of the banking and thrift crisis of the 1980s, the requirements for appraisals of real property securing loans made by federally insured lenders were greatly strengthened and banking regulatory agencies were required to develop standards for appraisals. See 12 U.S.C. §§ 3331, 3335. These standards were codified at 12 C.F.R. §§ 34.41–.47, 225.61–.67, 323.1–.7, 564.1–.8. Appraisals may be required not only in connection with the underwriting of the loan but also during its term. Clause 8-9-16 in this chapter allows the lender to obtain such appraisals at the grantor’s expense.

§ 8.10:6 Further Assurances

Institutional lenders commonly require grantors to agree to reexecute documents, modify executed documents, or execute additional documents if the lender determines that it is necessary to secure or perfect the lender’s liens or security interests or to correct errors in the loan documents. Such agreements, commonly called agreements for further assurances, may take the form of separate documents, or they may be included as clauses in the loan documents. Clause 8-9-17 in this chapter is a further assurance clause for use in the deed of trust.
§ 8.10:7 Insurance

The attorney may wish to substitute the more detailed insurance provisions found at clause 8-9-18 in this chapter for the existing provisions in the deed-of-trust form, particularly if the deed of trust covers income-producing property or secures a construction loan. If clause 8-9-18 is used, it replaces the clause at paragraph B.1. in the deed of trust. Form 8-12 describes specific endorsements and coverage that the lender may want to include.

If the lender requires contractual indemnity from the borrower independent of insurance, or for damages that would otherwise be the lender’s responsibility (for example, arising out of the ordinary negligence or strict liability of the lender), form 8-12 may be used, adapted, or incorporated into the deed of trust. Clauses that indemnify the lender for the lender’s negligence or other liability must be in type more conspicuous than the other indemnity language in the document.

§ 8.10:8 Subordinate Liens

In the context of commercial loans, the lender may wish to prohibit junior liens against the property because their foreclosure would divest the grantor of title to the collateral for the loan, even though the foreclosure would not affect the prior lien position. Clause 8-9-19 in this chapter prohibits subordinate liens against the property covered by the deed of trust.

§ 8.10:9 Business Use

The applicability of several Texas statutes depends on whether loan proceeds are used primarily for business, commercial, investment, or similar purposes or are made primarily for personal, family, or household use. Texas Business and Commerce Code section 26.02 provides that the statute-of-frauds provisions for written loan agreements do not apply to certain loans made primarily for personal, family, or household use. See Tex. Bus. & Com. Code § 26.02(a)(2). Texas Civil Practice and Remedies Code section 15.020 excludes from the definition of a major transaction one entered into primarily for personal, family, or household purposes. Parties to a major transaction may agree in writing that a suit arising from the transaction may be brought in a specific county of the state. See Tex. Civ. Prac. & Rem. Code § 15.020. Texas Finance Code section 303.009(c) provides that credit extended for business, commercial, investment, or similar purposes may take advantage of interest rate ceilings up to 28 percent per year rather than the otherwise applicable 24 percent per year maximum rate ceiling. See Tex. Fin. Code § 303.009(c). Finance Code section 306.001(5) defines a commercial loan as a loan made primarily for business, commercial, investment, agricultural, or similar purposes and not including a loan made primarily for personal, family, or household use. See Tex. Fin. Code § 306.001(5). The Finance Code includes special provisions for commercial loans. For example, section 342.005 subjects a loan extended primarily for personal, family, or household use to the requirements of Finance Code chapter 342. See Tex. Fin. Code § 342.005. If a party is relying on any of these statutes as a basis for terms of a transaction, a statement of the purpose of the loan establishes a basis for that reliance. See clause 8-9-20 in this chapter.

§ 8.10:10 No Personal Liability

If the lender is satisfied that the collateral itself is ample security for the repayment of the loan, the lender may agree that the borrower will have no personal liability for the repayment of the loan and that the lender’s sole recourse in the event of default is to foreclose on the collateral. Such agreements generally except from the “no personal liability” conditions certain “bad acts” by the borrower, such as failure to pay taxes, misapplication of insurance proceeds, failure to pay charges for labor and material that could give rise to liens against the property, and diversion of revenues from the operation of the property. See clause 8-9-26 in this chapter.
§ 8.10:11 Due-on-Sale Clause

Institutional lenders often base their willingness to make a loan on the creditworthiness of the borrower, rather than the expected cash flow of the property, and in such cases generally want the original borrower to own the property as long as the loan remains outstanding. See section 8.2:10 above for a discussion of due-on-sale clauses.

§ 8.11 Deed of Trust as Security Agreement and Financing Statement

In addition to creating a lien on the real property conveyed, the deed of trust with a few modifications can serve as a security agreement for personal property collateral related to the real estate and thus give the creditor the benefit of the secured transactions provisions of revised chapter 9 of the Texas Business and Commerce Code (Tex. Bus. & Com. Code §§ 9.101–.709). With other modifications described below, it may also serve as a financing statement for several classifications of collateral, including fixtures.

§ 8.11:1 Legal Considerations


If the deed of trust, as security agreement, covers both personal and real property and the debtor defaults, the creditor may proceed under chapter 9 of the Code as to the personal property without prejudicing any rights with respect to the real property or “may proceed . . . as to both the personal property and the real property in accordance with the rights with respect to the real property,” in which case the default provisions of chapter 9 do not apply. Tex. Bus. & Com. Code § 9.604(a). The deed of trust creates a lien on fixtures even without constituting a security agreement because chapter 9 does not prevent creation of an encumbrance on fixtures under real property law. See Tex. Bus. & Com. Code § 9.334(b). If the deed of trust, as security agreement, covers goods that are or become fixtures, the creditor may proceed under chapter 9 or may proceed in accordance with the rights with respect to real property, in which case the default provisions of chapter 9 do not apply. Tex. Bus. & Com. Code § 9.604(b).

A properly created and perfected security interest affords the creditor the benefit of the priorities established by chapter 9, which can protect the creditor against other creditors claiming the same collateral. In many cases, a valid security interest may be perfected by the proper filing of a financing statement in the appropriate UCC filing offices. See section 9.5 in this manual for a discussion of the other means of perfecting an attached security interest. Chapter 9 generally requires that financing statements be filed in the office of the secretary of state. The proper place to file a financing statement covering as-extracted collateral (which includes oil, gas, or other minerals), timber to be cut, or fixtures, however, is the real estate recording office for a mortgage on the related real property. Tex. Bus. & Com. Code § 9.501(a). A deed of trust duly recorded in the proper office will be effective as a financing statement covering as-extracted collateral, timber, or fixtures if it—

1. provides the name of the debtor (grantor);
2. provides the name of the secured party (beneficiary) or the secured party’s representative;
3. indicates the goods, fixtures, or accounts that it covers;
4. indicates that it covers this type of collateral;
5. indicates that it is to be filed for record in the real property records;
6. provides a legally sufficient description of the real property to which the collateral is related; and

7. provides the name of a record owner if the debtor does not have an interest of record in the real property (for example, a leasehold estate not filed of record).


In addition to the foregoing minimum requirements, a real estate filing office may refuse to accept a deed of trust filed as a financing statement unless it also—

8. provides the debtor’s mailing address;

9. indicates whether the debtor is an individual or an organization;

10. if the debtor is an individual, indicates the debtor’s surname; and

11. provides the mailing address of the secured party or its representative.


The difference in legal effect between the absence from the deed of trust of any of the minimum requirements in items 1. through 7. above and the absence from the deed of trust of any of the requirements in items 8. through 11. above is that, in the former case, the deed of trust will be ineffective as a financing statement even if it is accepted for filing by the real estate filing office, whereas in the latter case the recorded deed of trust will be effective as a financing statement (as long as the requirements in items 1. through 7. are included). See Tex. Bus. & Com. Code § 9.520(c). If the deed of trust is to serve as a financing statement, the preparer should note the first boxed instruction in forms 8-1 and 8-2 in this chapter calling for the inclusion of the information set forth in items 8. through 11. above that is not already called for in those forms.

No filing fee is required beyond the regular fee charged for recording the deed of trust with respect to a deed of trust that is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut. Tex. Bus. & Com. Code § 9.525(e). Unlike a regular financing statement (which is effective, if not continued, for only five years from the date of filing), a deed of trust that satisfies the above requirements is effective as a fixture filing, and as a financing statement covering as-extracted collateral or timber to be cut, “until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property.” Tex. Bus. & Com. Code § 9.515(g).

For other documents and commentary relating to security agreements and financing statements, see chapter 9 in this manual.

§ 8.11:2 Modifications and Clauses

If the deed of trust is to serve as a security agreement or as a security agreement and a financing statement, a heading to that effect should be added beneath or beside the “Deed of Trust” heading.

Chapter 9, as effective July 1, 2001, retains the requirement that a security agreement reasonably identify the collateral. See Tex. Bus. & Com. Code §§ 9.108(a), 9.203(b)(3)(A). Reasonable identification of collateral may be by specific listing, category, type, quantity, computational formula, or any other method under which the identity of the collateral is objectively determinable. Tex. Bus. & Com. Code § 9.108(b). In a security agreement, an “all assets” or “all personal property” description is, however, insufficient. Tex. Bus. & Com. Code § 9.108(c). Even though an “all assets” or “all personal property” collateral description is insufficient in a security agreement, an indication in a financing statement that the collateral is “all assets or all personal property” is sufficient. Tex. Bus. & Com. Code § 9.504. Accordingly, if a deed of trust is to be used as a security
agreement as well as a financing statement, the deed of trust must reasonably identify the collateral. If, however, the deed of trust is to serve only as a financing statement, an “all assets or all personal property” description is sufficient.

If the collateral is not affixed to the real estate conveyed, it may be sufficiently described, for security agreement purposes, by adding to the legal description of the realty a phrase such as “and all inventory, equipment, and consumer goods on the property.” If the collateral is affixed to the real estate, it may still be described, for security agreement purposes, by a phrase or sentence added to the legal description of the realty. A description of fixtures, for example, might be “and all goods that are or will be fixtures and that are or will be located on the property.”

To serve as a security agreement, the deed of trust must also clearly state that the borrower grants a security interest in the collateral to the lender. A clause such as 8-9-10 in this chapter should appear as a numbered paragraph under “General Provisions.”

In addition, if the deed of trust is to secure a construction loan, to take advantage of the priority afforded construction lenders by revised section 9.334, the attorney should add the personal property description and construction mortgage clauses found at clauses 8-9-12 and 8-9-13, respectively. The attorney should also give serious consideration to preparing a construction loan agreement to deal with such issues as retainage, conditions for advances, and storage of supplies and materials.

Form 8-1

Deed of Trust

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Basic Information

Date:

Grantor:

Grantor’s Mailing Address:

Trustee[s]:

Trustee’s Mailing Address[es]:

Lender:

Lender’s Mailing Address:

Obligation

Note

Date:

Original principal amount:
Borrower:

Lender:

Maturity date:

If there is more than one note, repeat above information for each additional note and change the word Note to Notes in all applicable instances.

Other Debt: [include optional clauses from form 8-6 in this chapter or describe other debt]

Property (including any improvements):

For construction loans, include clause 8-9-12 immediately following the real property description.

Prior Lien: [include recording information]

If there is more than one prior lien, repeat above information for each additional prior lien and change the words Prior Lien to Prior Liens in all applicable instances.

Other Exceptions to Conveyance and Warranty:

A. Granting Clause

For value received and to secure payment of the Obligation, Grantor conveys the Property to Trustee in trust. Grantor warrants and agrees to defend the title to the Property, subject to the Other Exceptions to Conveyance and Warranty. On payment of the Obligation and all other amounts secured by this deed of trust, this deed of trust will have no further effect, and Lender will release it at Grantor’s expense.
B. Grantor’s Obligations

Consider substituting all or part of clause 8-9-18, as appropriate, for clause B.1, to cover different risks specific to the activities on or regarding the property.

B.1. Grantor agrees to maintain all property and liability insurance coverages with respect to the Property, revenues generated by the Property, and operations on the Property that Lender reasonably requires (“Required Insurance Coverages”), issued by insurers and written on policy forms acceptable to Lender, and as to property loss, that are payable to Lender under policies containing standard mortgagee clauses, and deliver evidence of the Required Insurance Coverages in a form acceptable to Lender before execution of this deed of trust and again at least ten days before the expiration of the Required Insurance Coverages.

B.2. Grantor agrees to—

a. keep the Property in good repair and condition;

b. pay all taxes and assessments on the Property before delinquency, not authorize a taxing entity to transfer its tax lien on the Property to anyone other than Lender, and not request a deferral of the collection of taxes pursuant to section 33.06 of the Texas Tax Code;

c. defend title to the Property subject to the Other Exceptions to Conveyance and Warranty and preserve the lien’s priority as it is established in this deed of trust;

d. obey all laws, ordinances, and restrictive covenants applicable to the Property;

e. keep any buildings occupied as required by the Required Insurance Coverages;
f. if the lien of this deed of trust is not a first lien, pay or cause to be paid all prior lien notes and abide by or cause to be abided by all prior lien instruments; and

g. notify Lender of any change of address.

C. Lender’s Rights

C.1. Lender or Lender’s mortgage servicer may appoint in writing one or more substitute trustees, succeeding to all rights and responsibilities of Trustee.

C.2. If the proceeds of the Obligation are used to pay any debt secured by prior liens, Lender is subrogated to all the rights and liens of the holders of any debt so paid.

C.3. Lender may apply any proceeds received under the property insurance policies covering the Property either to reduce the Obligation or to repair or replace damaged or destroyed improvements covered by the policy. If the Property is Grantor’s primary residence and Lender reasonably determines that repairs to the improvements are economically feasible, Lender will make the property insurance proceeds available to Grantor for repairs.

C.4. Notwithstanding the terms of the Note to the contrary, and unless applicable law prohibits, all payments received by Lender from Grantor with respect to the Obligation or this deed of trust may, at Lender’s discretion, be applied first to amounts payable under this deed of trust and then to amounts due and payable to Lender with respect to the Obligation, to be applied to late charges, principal, or interest in the order Lender in its discretion determines.

C.5. If Grantor fails to perform any of Grantor’s obligations, Lender may perform those obligations and be reimbursed by Grantor on demand for any amounts so paid, including attorney’s fees, plus interest on those amounts from the dates of payment at the rate stated in the Note for matured, unpaid amounts. The amount to be reimbursed will be secured by this deed of trust.
C.6. COLLATERAL PROTECTION INSURANCE NOTICE

In accordance with the provisions of section 307.052(a) of the Texas Finance Code, the Beneficiary hereby notifies the Grantor as follows:

(A) the Grantor is required to:

(i) keep the collateral insured against damage in the amount the Lender specifies;

(ii) purchase the insurance from an insurer that is authorized to do business in the state of Texas or an eligible surplus lines insurer; and

(iii) name the Lender as the person to be paid under the policy in the event of a loss;

(B) the Grantor must, if required by the Lender, deliver to the Lender a copy of the policy and proof of the payment of premiums; and

(C) if the Grantor fails to meet any requirement listed in Paragraph (A) or (B), the Lender may obtain collateral protection insurance on behalf of the Grantor at the Grantor’s expense.

C.7. If a default exists in payment of the Obligation or performance of Grantor’s obligations and the default continues after any required notice of the default and the time allowed to cure, Lender may—

a. declare the unpaid principal balance and earned interest on the Obligation immediately due;
b. exercise Lender’s rights with respect to rent under the Texas Property Code as then in effect;

c. direct Trustee to foreclose this lien, in which case Lender or Lender’s agent will cause notice of the foreclosure sale to be given as provided by the Texas Property Code as then in effect; and

d. purchase the Property at any foreclosure sale by offering the highest bid and then have the bid credited on the Obligation.

C.8. Lender may remedy any default without waiving it and may waive any default without waiving any prior or subsequent default.

D. Trustee’s Rights and Duties

If directed by Lender to foreclose this lien, Trustee will—

D.1. either personally or by agent give notice of the foreclosure sale as required by the Texas Property Code as then in effect;

D.2. sell and convey all or part of the Property “AS IS” to the highest bidder for cash with a general warranty binding Grantor, subject to the Prior Lien and to the Other Exceptions to Conveyance and Warranty and without representation or warranty, express or implied, by Trustee;

D.3. from the proceeds of the sale, pay, in this order—

a. expenses of foreclosure, including a reasonable commission to Trustee;

b. to Lender, the full amount of principal, interest, attorney’s fees, and other charges due and unpaid;

c. any amounts required by law to be paid before payment to Grantor; and
d. to Grantor, any balance; and

D.4. be indemnified, held harmless, and defended by Lender against all costs, expenses, and liabilities incurred by Trustee for acting in the execution or enforcement of the trust created by this deed of trust, which includes all court and other costs, including attorney’s fees, incurred by Trustee in defense of any action or proceeding taken against Trustee in that capacity.

E. General Provisions

E.1. If any of the Property is sold under this deed of trust, Grantor must immediately surrender possession to the purchaser. If Grantor does not, Grantor will be a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

E.2. Recitals in any trustee’s deed conveying the Property will be presumed to be true.

E.3. Proceeding under this deed of trust, filing suit for foreclosure, or pursuing any other remedy will not constitute an election of remedies.

E.4. This lien will remain superior to liens later created even if the time of payment of all or part of the Obligation is extended or part of the Property is released.

E.5. If any portion of the Obligation cannot be lawfully secured by this deed of trust, payments will be applied first to discharge that portion.

E.6. Grantor assigns to Lender all amounts payable to or received by Grantor from condemnation of all or part of the Property, from private sale in lieu of condemnation, and from damages caused by public works or construction on or near the Property. After deducting any expenses incurred, including attorney’s fees and court and other costs, Lender will either release any remaining amounts to Grantor or apply such amounts to reduce the Obliga-
tion. Lender will not be liable for failure to collect or to exercise diligence in collecting any such amounts. Grantor will immediately give Lender notice of any actual or threatened proceedings for condemnation of all or part of the Property.

E.7. Grantor collaterally assigns to Lender all present and future rent from the Property and its proceeds. Grantor warrants the validity and enforceability of the assignment. Grantor will apply all rent to payment of the Obligation and performance of this deed of trust, but if the rent exceeds the amount due with respect to the Obligation and the deed of trust, Grantor may retain the excess. If a default exists in payment of the Obligation or performance of this deed of trust, Lender may exercise Lender’s rights with respect to rent under the Texas Property Code as then in effect. Lender neither has nor assumes any obligations as lessor or landlord with respect to any occupant of the Property. Lender may exercise Lender’s rights and remedies under this paragraph without taking possession of the Property. Lender will apply all rent collected under this paragraph as required by the Texas Property Code as then in effect. Lender is not required to act under this paragraph, and acting under this paragraph does not waive any of Lender’s other rights or remedies.

E.8. Interest on the debt secured by this deed of trust will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the debt.

E.9. In no event may this deed of trust secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.
E.10. If Grantor transfers any part of the Property without Lender’s prior written consent, Lender may declare the Obligation immediately payable and invoke any remedies provided in this deed of trust for default. If the Property is residential real property containing fewer than five dwelling units or a residential manufactured home, this provision does not apply to (a) a subordinate lien or encumbrance that does not transfer rights of occupancy of the Property; (b) creation of a purchase-money security interest for household appliances; (c) transfer by devise, descent, or operation of law on the death of a co-Grantor; (d) grant of a leasehold interest of three years or less without an option to purchase; (e) transfer to a spouse or children of Grantor or between co-Grantors; (f) transfer to a relative of Grantor on Grantor’s death; (g) a transfer resulting from a decree of a dissolution of marriage, a legal separation agreement, or an incidental property settlement agreement by which the spouse of Grantor becomes an owner of the Property; or (h) transfer to an inter vivos trust in which Grantor is and remains a beneficiary and occupant of the Property.

E.10. Grantor may not sell, transfer, or otherwise dispose of any Property, whether voluntarily or by operation of law, without the prior written consent of Lender. If granted, consent may be conditioned upon (a) the grantee’s integrity, reputation, character, creditworthiness, and management ability being satisfactory to Lender; and (b) the grantee’s executing, before such sale, transfer, or other disposition, a written assumption agreement containing any terms Lender may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, a transfer fee, or any other modification of the Note, this deed of trust, or any other instruments evidencing or securing the Obligation.
Grantor may not cause or permit any Property to be encumbered by any liens, security interests, or encumbrances other than the liens securing the Obligation and the liens securing ad valorem taxes not yet due and payable without the prior written consent of Lender. If granted, consent may be conditioned upon Grantor’s executing, before granting such lien, a written modification agreement containing any terms Lender may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, an approval fee, or any other modification of the Note, this deed of trust, or any other instruments evidencing or securing the Obligation.

Grantor may not grant any lien, security interest, or other encumbrance (a “Subordinate Instrument”) covering the Property that is subordinate to the liens created by this deed of trust without the prior written consent of Lender. If granted, consent may be conditioned upon the Subordinate Instrument’s containing express covenants to the effect that—

a. the Subordinate Instrument is unconditionally subordinate to this deed of trust;

b. if any action is instituted to foreclose or otherwise enforce the Subordinate Instrument, no action may be taken that would terminate any occupancy or tenancy without the prior written consent of Lender, and that consent, if granted, may be conditioned in any manner Lender determines;

c. rents, if collected by or for the holder of the Subordinate Instrument, will be applied first to the payment of the Obligation then due and to expenses incurred in the ownership, operation, and maintenance of the Property in any order Lender may determine, before being applied to any indebtedness secured by the Subordinate Instrument;

d. written notice of default under the Subordinate Instrument and written notice of the commencement of any action to foreclose or otherwise
enforce the Subordinate Instrument must be given to Lender concurrently with or immediately after the occurrence of any such default or commencement; and

e. in the event of the bankruptcy of Grantor, all amounts due on or with respect to the Obligation and this deed of trust will be payable in full before any payments on the indebtedness secured by the Subordinate Instrument.

Grantor may not cause or permit any of the following events to occur without the prior written consent of Lender: if Grantor is (a) a corporation, the termination of the corporation or the sale, pledge, encumbrance, or assignment of any shares of its stock; (b) a limited liability company, the termination of the company or the sale, pledge, encumbrance, or assignment of any of its membership interests; (c) a general partnership or joint venture, the termination of the partnership or venture or the sale, pledge, encumbrance, or assignment of any of its partnership or joint venture interests, or the withdrawal from or admission into it of any general partner or joint venturer; or (d) a limited partnership, (i) the termination of the partnership, (ii) the sale, pledge, encumbrance, or assignment of any of its general partnership interests, or the withdrawal from or admission into it of any general partner, (iii) the sale, pledge, encumbrance, or assignment of a controlling portion of its limited partnership interests, or (iv) the withdrawal from or admission into it of any controlling limited partner or partners. If granted, consent may be conditioned upon (a) the integrity, reputation, character, creditworthiness, and management ability of the person succeeding to the ownership interest in Grantor (or security interest in such ownership) being satisfactory to Lender; and (b) the execution, before such event, by the person succeeding to the interest of Grantor in the Property or ownership interest in Grantor (or security interest in such ownership) of a written modification or assumption agreement containing such terms as Lender may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, a transfer...
fee, or any other modification of the Note, this deed of trust, or any other instruments evidencing or securing the Obligation.

E.11. When the context requires, singular nouns and pronouns include the plural.

E.12. The term Note includes all extensions, modifications, and renewals of the Note and all amounts secured by this deed of trust.

E.13. This deed of trust binds, benefits, and may be enforced by the successors in interest of all parties.

E.14. If Grantor and Borrower are not the same person, the term Grantor includes Borrower.

E.15. Grantor and each surety, endorser, and guarantor of the Obligation waive, to the extent permitted by law, all (a) demand for payment, (b) presentation for payment, (c) notice of intention to accelerate maturity, (d) notice of acceleration of maturity, (e) protest, [and] (f) notice of protest [include if applicable: and (g) rights under sections 51.003, 51.004, and 51.005 of the Texas Property Code].

E.16. Grantor agrees to pay reasonable attorney’s fees, trustee’s fees, and court and other costs of enforcing Lender’s rights under this deed of trust if an attorney [include if the transaction is a secondary mortgage loan: who is not an employee of Lender] is retained for its enforcement.

E.17. If any provision of this deed of trust is determined to be invalid or unenforceable, the validity or enforceability of any other provision will not be affected.

E.18. The term Lender includes any mortgage servicer for Lender.
E.19. Grantor hereby grants Lender a right of first refusal with respect to Grantor’s power to authorize any third party (other than Lender pursuant to its rights as set forth in this instrument) to pay ad valorem taxes on the Property and authorize a taxing entity to transfer its tax lien on the Property to that third party. Grantor’s authorization to any third party (other than Lender) to pay the ad valorem taxes and receive transfer of a taxing entity’s lien for ad valorem taxes shall be null and void and of no force and effect unless Lender, within ten days after receiving written notice from Grantor, fails to pay the ad valorem taxes pursuant to Lender’s rights as set forth in this instrument.

E.20. Grantor represents that this deed of trust and the Note are given for the following purposes: [list specific purposes].

[Name of grantor]

Include acknowledgment.
Deed of Trust to Secure Assumption

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Basic Information

Date:

Grantor:

Grantor’s Mailing Address:

Trustee:

Trustee’s Mailing Address:

Beneficiary:

Beneficiary’s Mailing Address:

Note and Deed of Trust Assumed

Date:

Original principal amount:

Borrower:
Lender:

Recording information:

Property (including any improvements):

Prior Lien: [include recording information]

Other Exceptions to Conveyance and Warranty:

Consideration: Beneficiary has conveyed the Property to Grantor, who as part of the consideration promised to pay the Note Assumed and to be bound by the Deed of Trust Assumed.

A. Granting Clause

For value received and to secure Grantor’s assumption, Grantor conveys the Property to Trustee in trust. Grantor warrants and agrees to defend the title to the Property, subject to the Other Exceptions to Conveyance and Warranty. If Grantor performs all the covenants of the Note and Deed of Trust Assumed and if Beneficiary has not filed a notice of advancement, a release of the Deed of Trust Assumed will release this deed of trust to secure assumption and Beneficiary’s vendor’s lien.

B. Grantor’s Obligations

Grantor agrees to—

B.1. perform all the covenants of the Note and Deed of Trust Assumed; and

B.2. notify Beneficiary and Lender of any change of address.
C. **Beneficiary’s Rights**

   **C.1.** Beneficiary may appoint in writing a substitute trustee, succeeding to all rights and responsibilities of Trustee.

   **C.2.** If Grantor fails to perform any of Grantor’s obligations under the Note Assumed or Deed of Trust Assumed, Beneficiary may perform those obligations, advance funds required, and then be reimbursed by Grantor on demand for any amounts so advanced, including attorney’s fees, plus interest on those amounts from the dates of payment at the highest legal rate. The amount to be reimbursed will be secured by this deed of trust to secure assumption.

   **C.3.** **COLLATERAL PROTECTION INSURANCE NOTICE**

   In accordance with the provisions of section 307.052(a) of the Texas Finance Code, the Beneficiary hereby notifies the Grantor as follows:

   (A) the Grantor is required to:

   (i) keep the collateral insured against damage in the amount the Lender specifies;

   (ii) purchase the insurance from an insurer that is authorized to do business in the state of Texas or an eligible surplus lines insurer; and

   (iii) name the Lender as the person to be paid under the policy in the event of a loss;

   (B) the Grantor must, if required by the Lender, deliver to the Lender a copy of the policy and proof of the payment of premiums; and
(C) if the Grantor fails to meet any requirement listed in Paragraph (A) or (B), the Lender may obtain collateral protection insurance on behalf of the Grantor at the Grantor’s expense.

C.4. Beneficiary may file a sworn notice of such advancement in the office of the county clerk in the county in which the Property is located. The notice will detail the dates, amounts, and purposes of the amounts advanced and the legal description of the Property.

C.5. If Grantor fails on demand to reimburse Beneficiary for the amounts advanced and such failure continues after Beneficiary gives Grantor notice of the failure and the time within which it must be cured, to the extent required by law or by written agreement, Beneficiary may—

a. exercise Beneficiary’s rights with respect to rent under the Texas Property Code as then in effect;

b. direct Trustee to foreclose this lien, in which case Beneficiary or Beneficiary’s agent will cause notice of the foreclosure sale to be given as provided by the Texas Property Code as then in effect; and

c. purchase the Property at any foreclosure sale by offering the highest bid and then have the bid credited to the amount owed to Beneficiary.

D. Trustee’s Rights and Duties

If directed by Beneficiary to foreclose this lien, Trustee will—

D.1. either personally or by agent give notice of the foreclosure sale as required by this deed of trust to secure assumption and the Texas Property Code as then in effect;
D.2. sell and convey all or part of the Property “AS IS” to the highest bidder for cash with a general warranty binding Grantor, subject to the Prior Lien and to the Other Exceptions to Conveyance and Warranty and without representation or warranty, express or implied, by Trustee;

D.3. from the proceeds of the sale, pay, in this order—

a. expenses of foreclosure, including a reasonable commission to Trustee;

b. to Beneficiary, the full amount advanced, attorney’s fees, and other charges due and unpaid;

c. any amounts required by law to be paid before payment to Grantor; and

d. to Grantor, any balance; and

D.4. be indemnified, held harmless, and defended by Beneficiary against all costs, expenses, and liabilities incurred by Trustee for acting in the execution or enforcement of the trust created by this deed of trust to secure assumption, which includes all court and other costs, including attorney’s fees, incurred by Trustee in defense of any action or proceeding taken against Trustee in that capacity.

E. General Provisions

E.1. If any of the Property is sold under this deed of trust to secure assumption, Grantor must immediately surrender possession to the purchaser. If Grantor does not, Grantor will be a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

E.2. Recitals in any trustee’s deed conveying the Property will be presumed to be true.
E.3. Proceeding under this deed of trust to secure assumption, filing suit for foreclosure, or pursuing any other remedy will not constitute an election of remedies.

E.4. This lien will be superior to liens later created even if Beneficiary has made no advancements when later liens are created.

E.5. If any portion of the advancements cannot be lawfully secured by this deed of trust to secure assumption, payments will be applied first to discharge that portion.

E.6. A sale of the Property under this deed of trust to secure assumption—

a. is subject to Grantor’s continuing obligation to make all payments owing on the Note Assumed and to perform all obligations under the Deed of Trust Assumed; and

b. does not extinguish Trustee’s right to conduct subsequent sales of the Property for future Grantor defaults under this deed of trust to secure assumption.

E.7. Grantor collaterally assigns to Beneficiary all present and future rent from the Property and its proceeds. Grantor warrants the validity and enforceability of the assignment. Grantor will apply all rent to payment of the Note Assumed and performance of the Deed of Trust Assumed, but if the rent exceeds the amount due with respect to the Note and Deed of Trust Assumed, Grantor may retain the excess. If a default exists in payment of the Note Assumed or performance of this deed of trust to secure assumption or of the Deed of Trust Assumed, Beneficiary may exercise Beneficiary’s rights with respect to rent under the Texas Property Code as then in effect. Beneficiary neither has nor assumes any obligations as lessor or landlord with respect to any occupant of the Property. Beneficiary may exercise Beneficiary’s rights and remedies under this paragraph without taking possession of the Property.
Beneficiary will apply all rent collected under this paragraph as required by the Texas Property Code as then in effect. Beneficiary is not required to act under this paragraph, and acting under this paragraph does not waive any of Beneficiary’s other rights or remedies.

_E.8._ Interest on the debt secured by this deed of trust to secure assumption will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the debt.

_E.9._ Any action taken under this deed of trust to secure assumption will not extinguish the rights of Beneficiary to proceed against Grantor under the indemnity contained in the deed by which Borrower assumed the Note and Deed of Trust Assumed.

_E.10._ The term *Beneficiary* includes any mortgage servicer for Beneficiary.

_E.11._ When the context requires, singular nouns and pronouns include the plural.
E.12. This deed of trust to secure assumption binds, benefits, and may be enforced by the successors in interest of all parties.

E.13. Grantor waives and surrenders to Lender (a) Grantor’s power to authorize anyone (other than Lender or Grantor) to pay ad valorem taxes on the Property and (b) Grantor’s power to authorize a taxing entity to transfer its tax lien on the Property to anyone other than Lender. Grantor agrees and declares that any authorization from Grantor to another (other than Lender) to pay the taxes and transfer a tax lien on the Property is void.

[Name of grantor]

Include acknowledgment.
Form 8-3

Vendor’s Lien Clauses

If Vendor’s Lien in Favor of Seller Is Retained in Deed

Clause 8-3-1

The debt evidenced by the Note is in [include if applicable: part] payment of the purchase price of the Property; the debt is secured both by this deed of trust and by a vendor’s lien on the Property, which is expressly retained in a deed [to Grantor of even date/of even date given by [name] to [name]]. This deed of trust does not waive the vendor’s lien, and the two liens and the rights created by this deed of trust are cumulative. Lender may elect to foreclose either of the liens without waiving the other or may foreclose both.

Or

If Vendor’s Lien in Favor of Third Party Is Retained in Deed

Clause 8-3-2

The debt evidenced by the Note is in part payment of the purchase price of the Property; the debt is secured by this deed of trust and by a vendor’s lien on the Property, which is expressly retained in a deed [to Grantor of even date/of even date given by [name] to [name]]. The vendor’s lien is transferred to Lender by the deed. This deed of trust does not waive the vendor’s lien, and the two liens and the rights created by this deed of trust are cumulative. Lender may elect to foreclose either of the liens without waiving the other or may foreclose both.
Vendor’s Lien Clause for Use If Lien Is Not Retained in Deed

Clause 8-3-3

Grantor expressly acknowledges a vendor’s lien on the Property as security for the Note secured by this deed of trust, which represents funds advanced by Lender at Grantor’s request and used in payment of [include if applicable: a portion of] the purchase price of the Property. This deed of trust does not waive the vendor’s lien, and the two liens and the rights created by this deed of trust are cumulative. Lender may elect to enforce either of the liens without waiving the other or may enforce both.
Form 8-4

Clauses Extending Existing Liens

Extension of Existing Deed-of-Trust Lien

Clause 8-4-1

The Note renews and extends the balance of \([\text{amount}]\) DOLLARS \($[\text{amount}]\) that Grantor owes on a prior note in the original principal amount of \([\text{amount}]\) DOLLARS \($[\text{amount}]\), which is dated [date], executed by [name], and payable to the order of [name]. The prior note is more fully described in and secured by a deed of trust on the Property, which is dated [date] and recorded in [recording data] of the real property records of [county] County, Texas. [Include if applicable: The prior note and the lien securing it have been transferred to Lender.] Grantor acknowledges that the lien securing the prior note is valid, that it subsists against the Property, and that by this deed of trust it is renewed and extended in full force to secure payment of the Note.

Extension of Existing Deed-of-Trust Lien and Security for Cash Advanced

Clause 8-4-2

The Note renews and extends the balance of \([\text{amount}]\) DOLLARS \($[\text{amount}]\) that Grantor owes on a prior note in the original principal amount of \([\text{amount}]\) DOLLARS \($[\text{amount}]\), which is dated [date], executed by [name], and payable to the order of [name]. The prior note is secured by a deed of trust on the Property from [name] to [name], Trustee, dated [date] and recorded in [recording data] of the real property records of [county] County, Texas. [Include if applicable: The prior note and the lien securing it have been transferred to Lender.] The Note also represents \([\text{amount}]\) DOLLARS
Form 8-4  Clauses Extending Existing Liens

Clause 8-4-2

($[amount]$) in cash that Lender advanced to Grantor on [date] at Grantor’s request. Grantor acknowledges receipt of the amount advanced. Grantor acknowledges that the lien securing the prior note is valid, that it subsists against the Property, and that by this deed of trust it is renewed and extended in full force until the Note secured by this deed of trust is paid.

Extension of Existing Vendor’s Lien and Deed of Trust

Clause 8-4-3

The Note renews and extends the balance of $[amount]$ DOLLARS ($[amount]$) that Grantor owes on a prior note in the original principal amount of $[amount]$ DOLLARS ($[amount]$), which is dated [date], executed by [name], and payable to the order of [name]. The prior note is secured by two instruments, both of which create liens against the Property: a deed retaining a vendor’s lien from [name] to [name], dated [date] and recorded in [recording data] of the real property records of [county] County, Texas; and a deed of trust from [name] to [name], Trustee, dated [date] and recorded in [recording data] of the real property records of [county] County, Texas. [Include if applicable: The prior note and the liens securing it have been transferred to Lender.] Grantor acknowledges that the liens securing the prior note are valid, that they subsist against the Property, and that by this deed of trust they are renewed and extended in full force until the Note is paid.

Extension of Mechanic’s Lien Contract

Clause 8-4-4

The Note renews and extends the balance of $[amount]$ DOLLARS ($[amount]$) that Grantor owes on a prior note in the original principal amount
of [amount] DOLLARS ($[amount]), which is dated [date], executed by [name], and payable to the order of [name]. The prior note is secured by a mechanic’s lien contract creating a lien on the Property, dated [date] and recorded in [recording data] of the real property records of [county] County, Texas. [Include if applicable: The prior note and the lien securing it have been transferred to Lender.] Grantor acknowledges that the lien securing the prior note is valid, that it subsists against the Property, and that by this deed of trust it is renewed and extended in full force until the Note is paid.

Alternative Renewal and Extension Language

Clause 8-4-5

If clause 8-4-5 is used, its language should replace the last sentence in one of the preceding clauses, which begins “Grantor acknowledges that the lien(s) securing the prior note . . .”

Grantor acknowledges and agrees that this extension and renewal will not be considered a novation of account or a new contract but that all rights, titles, powers, liens, security interests, and estates created by the prior note and deed of trust securing it constitute a valid and subsisting lien against the Property. Grantor also acknowledges that by this deed of trust Lender and Lender’s heirs, successors, and assigns are subrogated to all rights, titles, powers, security interests, and liens that accrued to the original holder and owner of the prior note.

Extension of Prior Lien to Be Released, Not Assigned

Clause 8-4-6

The Note represents the amount of [amount] DOLLARS ($[amount]) in cash that Lender advanced to Grantor and that Grantor used [include if applica-
ble: in part] to discharge a prior note in the original principal amount of [amount] DOLLARS ($[amount]), which is dated [date], executed by [name], and payable to the order of [name]. The prior note is secured by a deed of trust on the Property from [name] to [name], Trustee, dated [date] and recorded in [recording data] of the real property records of [county] County, Texas.

Grantor acknowledges that the lien securing the prior note is valid, that it subsists against the Property, and that by this deed of trust it is renewed and extended in full force until the Note is paid, even though the prior lien is released and not assigned to Lender.

Extension of Lien to Only Part of Property

Clause 8-4-7

The Note represents the amount of [amount] DOLLARS ($[amount]) in cash that Lender advanced to Grantor and that Grantor used [include if applicable: in part] to discharge a prior note in the original principal amount of [amount] DOLLARS ($[amount]), which is dated [date], executed by [name], and payable to the order of [name]. The prior note is secured by two instruments, both of which create liens against real estate that includes the Property: a deed retaining a vendor’s lien executed by [name] to [name], dated [date] and recorded in [recording data] of the real property records of [county] County, Texas; and a deed of trust from [name] to [name], Trustee, dated [date] and recorded in [recording data] of the real property records of [county] County, Texas. Grantor acknowledges that, to the extent they cover the Property, the liens securing the prior note are valid, that they subsist against the Property as well as the other real estate, and that by this deed of trust they are renewed and extended in full force until the Note is paid.
Clauses Acknowledging Cash Advanced

To Individuals

Clause 8-5-1

The Note represents [amount] DOLLARS ($[amount]) in cash that Lender advanced to Grantor on this day at Grantor’s request and that Grantor acknowledges receiving.

To a Corporation

Clause 8-5-2

The Note represents [amount] DOLLARS ($[amount]) in cash that Lender advanced to Grantor on this day at its request and that it will use under its charter powers to discharge corporate debts. Grantor represents to Lender that its board of directors has authorized its legally elected, qualified, and acting officers to execute the Note and this deed of trust.

To Pay Ad Valorem Taxes

Clause 8-5-3

The Note represents [amount] DOLLARS ($[amount]) in cash that, at Grantor’s request, Lender advanced to pay the following taxes [include if applicable: , including penalties, interest, and collection expenses,] assessed and owed on the Property, which Grantor now owns: [amount] DOLLARS ($[amount]) to [county] County in payment of taxes for the years [specify];
and \[\text{amount} \text{ DOLLARS ($\text{amount}$)}\] to the city of \[\text{city}\] in payment of taxes for the years \[\text{specify}\].

Grantor agrees that Lender is subrogated to the rights, liens, and equities of the tax authorities paid, and the same are renewed and extended by this deed of trust until the Note is paid.

\textit{To Pay Income Taxes}

\textit{Clause 8-5-4}

The Note includes \[\text{amount} \text{ DOLLARS ($\text{amount}$)}\] that, at Grantor’s request, Lender advanced to the United States Internal Revenue Service to discharge federal tax lien number \[\text{number}\], which is recorded in \[\text{recording data}\] of the federal tax lien records of \[\text{county}\] County, Texas. Grantor agrees that Lender is subrogated to all rights, titles, and liens held by the tax authority under this federal tax lien, which Grantor acknowledges to be valid and subsisting, and the same are renewed and extended by this deed of trust until the Note is fully paid.
Other Indebtedness Clauses

Clause 8-6-1

This deed of trust also secures payment of any debt that Grantor may subsequently owe to Lender and that arises while Grantor owns the Property.

Or

Clause 8-6-2

This deed of trust also secures payment of any debt that Grantor may subsequently owe to Lender; when it accrues, any such future debt will bear interest at the rates provided in the Note, will be payable to Lender at the same place provided in the Note, and in all respects will be deemed a part of the debt secured by this deed of trust.

Or

Clause 8-6-3

This conveyance is also made in trust to secure payment of all other present and future debts that Grantor may owe to Lender, regardless of how any other such debt is incurred or evidenced. Payment on all present and future debts of Grantor to Lender will be made at [specify] in [county] County, Texas, and the debts will bear interest as provided in notes or other evidences of debt that Grantor will give to Lender. This conveyance is also made to secure payment of any renewal or extension of any present or future debt that Grantor owes to Lender, including any loans and advancements from Lender to Grantor under the provisions of this deed of trust. When Grantor repays all debts owed to Lender, this deed-of-trust lien will terminate only if Lender
releases this deed of trust at the request of Grantor. Until Lender releases it, this deed of trust will remain fully in effect to secure other present and future advances and debts, regardless of any additional security given for any debt and regardless of any modification.

Clause 8-6-4

This deed of trust, to the extent permitted by law, also secures payment of all other present and future debts, obligations, and liabilities owed to Lender by Grantor as a partner, venturer, or member of any partnership, joint venture, association, or other group, regardless of how the other debts, obligations, and liabilities are incurred and regardless of whether they are evidenced by a note, open account, overdraft, endorsement, surety agreement, guarantee, or other document.
Form 8-7

Partial Release Clauses

Clause 8-7-1

If no default exists under any of the terms and conditions of this deed of trust or the Note, and if no event has occurred that, with notice, passage of time, or both, would be an event of default, Grantor is entitled to partial releases of the lien of the deed of trust on the following terms and conditions:

1. Releases will be granted by tracts of not less than [number] acre[s] each, successively and contiguously, beginning with the [specify] portion of the Property and proceeding [specify]. Each tract to be released will be approximately [specify, e.g., rectangular] in shape and will have as its boundary a portion of the Property’s frontage on [specify], and as its [specify] boundary an approximately equal portion of the [specify] boundary of the Property. No release will be granted that would deny frontage or disproportionately reduce the frontage on [specify] available to the unreleased portion of the Property or cause the unreleased portion of the property to be less than [specify area]. Access from the unreleased portion of the Property to [specify] must be at least [number] ([number]) feet wide.

2. To obtain a release, a principal amount of $[amount] per [acre/square foot] in cash must be paid on the Note. All payments for partial releases will be applied as a prepayment on the Note.

3. At the time a partial release is requested, the party requesting the release must furnish to the holder of the Note a calculation of area
by field notes and a plat of survey, indicating the area to be released and its relationship to the portion of the Property not to be released. All expenses incident to the granting of partial releases will be borne by the party requesting the release, including but not limited to the cost of the survey, Lender’s attorney’s fees, and recording costs. Under no circumstances will the unreleased portion be incapable of supporting a building permit.

Clause 8-7-2

If no default exists under the Note or this deed of trust, and if no event has occurred that, with notice, passage of time, or both, would be an event of default, Grantor may have released from all liens securing the Note one or more lots out of the Property by paying to Lender the release price per lot as follows:

1. The release price per lot will be the greater of $[amount] or the net proceeds from the sale of that lot. “Net proceeds” is the gross sales price received by Grantor, or any person or entity related to or affiliated with Grantor, less the expenses of sale, including title insurance premiums, survey fees, real estate commissions not to exceed 6 percent of the gross sales price, reasonable attorney’s fees, filing fees, recording fees, and other reasonable and customary closing costs in connection with the sale. Only those real estate commissions paid to parties other than Grantor, including persons or entities affiliated with Grantor, may be counted as deductible expenses.
2. The release price paid by Grantor will be applied by Lender as a prepayment on the Note. All payments for partial releases will be applied as a prepayment on the Note.

3. At the time a partial release is requested, the party requesting the release must furnish to the holder of the Note a calculation of area by field notes and a plat of survey, indicating the area to be released and its relationship to the portion of the Property not to be released. All expenses incident to the granting of partial releases will be borne by the party requesting the release, including but not limited to the cost of the survey, Lender’s attorney’s fees, and recording costs.

**Clause 8-7-3**

Grantor is entitled to partial releases from the vendor’s lien and this deed of trust as provided in an agreement of even date between Grantor and Lender.
Form 8-8

Second-Lien Clauses for Use with Subordinate Deeds of Trust

Clause 8-8-1

The lien created by this deed of trust will be subordinate to the lien securing payment of a note, and any renewals, extensions, and modifications thereof, in the original principal amount of [amount] DOLLARS ($[amount]), which is dated [date], executed by [name], payable to the order of [name], and more fully described in a deed of trust recorded in [recording data] of the real property records of [county] County, Texas. If default occurs in payment of any part of principal or interest of that $[amount] note or in observance of any covenants of the deed of trust securing it, the entire debt secured by this deed of trust will immediately become payable at the option of Lender.

Or

Clause 8-8-2

If Grantor fails to pay any part of principal or interest secured by a prior lien or liens on the Property when it becomes payable or defaults on any prior lien instrument, the entire debt secured by this deed of trust will immediately become payable at the option of Lender.
Additional Clauses for Deeds of Trust

Mechanic’s Lien Clause

Clause 8-9-1

The Note secured by this deed of trust is given in part payment for improvements on the Property that Lender has agreed to make for Grantor under a mechanic’s lien contract of even date between Grantor as owner and Lender as contractor creating a lien against the Property to secure the Note. Grantor acknowledges that the lien created by the mechanic’s lien contract is valid, that it subsists against the Property, and that by this deed of trust it is renewed and extended in full force and effect until the Note is fully paid.

Homestead Disclaimer and Designation

Clause 8-9-2

Grantor represents to Lender that no part of the Property is exempt as homestead from forced sale under the Texas Constitution or other laws.

Include the following paragraph only if there is no separate designation of homestead executed by the grantor. A separate instrument is preferable. See form 10-8 in this manual.

All real estate constituting Grantor’s homestead exempt from forced sale under the Texas Constitution or other laws consists of the following: [include legal description of homestead].

Or
Clause 8-9-3

See comment in clause 8-9-2 concerning desirability of a separate homestead and disclaimer instrument.

Grantor represents to Lender that no part of the Property is either the residential or business homestead of Grantor and that Grantor neither resides nor intends to reside in nor conducts nor intends to conduct business on the Property. Grantor renounces all present and future rights to a homestead exemption for the Property. Grantor’s homestead and residence is property in [county] County, Texas, known as [address], [city], Texas. Grantor acknowledges that Lender relies on the truth of representations in this paragraph in making the loan secured by this deed of trust.

Tax and Insurance Reserve or Escrow Account

Clause 8-9-4

Grantor agrees to make an initial deposit in a reasonable amount to be determined by Lender and then make monthly payments to a fund for taxes and insurance premiums on the Property. Monthly payments will be made on the payment dates specified in the Note, and each payment will be one-twelfth of the amount that Lender estimates will be required annually for payment of taxes and insurance premiums. The fund will accrue no interest, and Lender will hold it without bond in escrow and use it to pay the taxes and insurance premiums. If Grantor has complied with the requirements of this paragraph, Lender must pay taxes before [the end of the calendar year/delinquency]. Grantor agrees to make additional deposits on demand if the fund is ever insufficient for its purpose. If an excess accumulates in the fund, Lender may either credit it to future monthly deposits until the excess is exhausted or refund it to Grantor. When Grantor makes the final payment on the Note, Lender will
credit to that payment the whole amount then in the fund. \textbf{[include if applicable: or, at Lender’s option, refund it after the Note is paid].} If this deed of trust is foreclosed, any balance in the fund over that needed to pay taxes, including taxes accruing but not yet payable, and to pay insurance premiums will be paid under section C, “Trustee’s Rights and Duties.” \textbf{[Include if applicable: If the Property is transferred, any balance then in the fund will still be subject to the provisions of this paragraph and will inure to the benefit of the transferee.]}

Deposits to the fund described in this paragraph are in addition to the \textbf{[include if applicable: monthly]} payments provided for in the Note.

\textit{Assignment of Insurance Policies and Unearned Premiums}

\textbf{Clause 8-9-5}

If the Property is transferred by foreclosure, the transferee will acquire title to all insurance policies on the Property, including all paid but unearned premiums.

\textit{Evidence of Payment of Taxes}

\textbf{Clause 8-9-6}

\begin{quote}
\textbf{Clause 8-9-6} should not be used if the escrow clause at 8-9-4 is used.
\end{quote}

Grantor agrees to furnish on Lender’s request evidence satisfactory to Lender that all taxes and assessments on the Property have been paid when due.
Evidence of Payment of Taxes and Insurance

Clause 8-9-7

Grantor will furnish to Lender or other holder of the Note annually, before taxes become delinquent, copies of tax receipts showing that all taxes on the Property have been paid. Grantor will annually furnish to Lender or other holder of the Note evidence of current paid-up insurance naming Lender or other holder of the Note as an insured.

Inspection of Collateral

Clause 8-9-8

Grantor agrees to allow Lender or Lender’s agents to enter the Property at reasonable times and inspect it and any personal property in which Lender is granted a security interest by this deed of trust.

Consumer Credit Insurance Notice

Clause 8-9-9

Grantor may furnish any insurance required by this deed of trust either through existing policies owned or controlled by Grantor or through equivalent coverage from any insurance company authorized to transact business in Texas.

Deed of Trust as a Security Agreement

Clause 8-9-10

In addition to creating a deed-of-trust lien on all the real and other property described above, Grantor also grants to Lender a security interest in all of
the above-described personal property pursuant to and to the extent permitted by the Texas Uniform Commercial Code.

If the security agreement covers nonfixtures and other personally, continue with the following.

In the event of a foreclosure sale under this deed of trust, Grantor agrees that all the Property may be sold as a whole at Lender’s option and that the Property need not be present at the place of sale.

Wraparound Lien

Clause 8-9-11

The lien created by this deed of trust is subordinate to the lien securing the unpaid balance of a prior promissory note in the original principal amount of [amount] DOLLARS ($[amount]), which is described in and secured by a deed of trust recorded in [recording data] of the real property records of [county] County, Texas. Grantor has not assumed payment of the prior note, but Lender is obligated to pay it according to its terms. Lender agrees to timely pay all installment payments due on the prior note and to deliver to Grantor a good and sufficient release of the prior deed of trust at or before the time Grantor pays the Note secured by this deed of trust to Lender. The warranty deed with vendor’s lien referred to above provides that in the event of default in payment of the prior note, Grantor will have the right to cure any such default as long as Grantor is not in default in payment of the Note secured by this deed of trust or in default in performance of the covenants of this deed of trust. If Grantor cures a default in payment of the prior note, Grantor may receive credit on the Note secured by this deed of trust for all amounts so paid as of the date of the payment, in accordance with the terms of the Note.
If Lender fails to make when due any deposit to the tax and insurance reserve fund provided for under the deed of trust securing payment of the prior note, Grantor will have the right to make the deposit to the tax and insurance reserve fund as long as Grantor is not in default in payment of the Note secured by this deed of trust or in performance of the covenants of this deed of trust. If Grantor makes such a deposit, Grantor will receive credit on the tax and insurance reserve fund provided for in this deed of trust for all amounts so deposited, as of the date of the deposit.

**Clauses for Deed of Trust for Construction Loan**

To create a deed of trust for a construction loan, include clauses 8-9-10, 8-9-12, and 8-9-13 in the deed of trust.

**Clause 8-9-12**

Include clause 8-9-12 immediately following the real property description.

, together with the following personal property:

All fixtures, supplies, building materials, and other goods of every nature now or hereafter located, used, or intended to be located or used on the Property;

All plans and specifications for development of or construction of improvements on the Property;

All contracts and subcontracts relating to the construction of improvements on the Property;
Additional Clauses for Deeds of Trust

All accounts, contract rights, instruments, documents, general intangibles, and chattel paper arising from or by virtue of any transactions relating to the Property;

All permits, licenses, franchises, certificates, and other rights and privileges obtained in connection with the Property;

All proceeds payable or to be payable under each policy of insurance relating to the Property; and

All products and proceeds of the foregoing.

Notwithstanding any other provision in this deed of trust, the term “Property” does not include personal effects used primarily for personal, family, or household purposes.

Clause 8-9-13

Include clause 8-9-13 above the signatures. In paragraph 1., select the appropriate Code reference depending on the date of the transaction.

E. Construction Loan Mortgage

1. This deed of trust is a “construction mortgage” within the meaning of section 9.334 of the Texas Business and Commerce Code. The liens and security interests created and granted by this deed of trust secure an obligation incurred for the construction of improvements on land [include if applicable: ], including the acquisition cost of the land.

2. Grantor agrees to comply with the covenants and conditions of the construction loan agreement, if any, executed in connection with the Note and this deed of trust. All advances made by Lender under the construction loan
agreement will be indebtedness of Grantor secured by the liens created by this deed of trust, and such advances are conditioned as provided in the construction loan agreement.

3. All amounts disbursed by Lender before completion of the improvements to protect the security of this deed of trust up to the principal amount of the Note will be treated as disbursements under the construction loan agreement. All such amounts will bear interest from the date of disbursement at the rate stated in the Note, unless collections from Grantor of interest at that rate would be contrary to applicable law, in which event such amounts will bear interest at the rate stated in the Note for matured, unpaid amounts and will be payable on notice from Lender to Grantor requesting payment.

4. From time to time as Lender deems necessary to protect Lender’s interests, Grantor will, on request of Lender, execute and deliver to Lender, in such form as Lender directs, assignments of any and all rights or claims that relate to the construction of improvements on the Property.

5. In case of breach by Grantor of the covenants and conditions of the construction loan agreement, Lender, at its option, with or without entry on the Property, may (a) invoke any of the rights or remedies provided in the construction loan agreement, (b) accelerate the amounts secured by this deed of trust and invoke the remedies provided in this deed of trust, or (c) do both.

6. If, after commencement of amortization of the Note, the Note and this deed of trust are sold by Lender, after the sale the construction loan agreement will cease to be a part of this deed of trust, and Grantor will not assert any right of setoff, counterclaim, or other claim or defense arising out of or in con-
nection with the construction loan agreement against the obligations of the Note and this deed of trust.

| Important Notice: You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract and you fail to meet the terms and conditions of this contract, you may lose your legal ownership rights in your home. Know your rights and duties under the law. |

Recordkeeping

Clause 8-9-14

Grantor agrees to (1) keep at Grantor’s address, or such other place as Lender may approve, accounts and records reflecting the operation of the Property and copies of all written contracts, leases, and other instruments that affect the Property; (2) prepare financial accounting records in compliance with [generally accepted/sound/cash basis federal income tax] accounting principles consistently applied; and (3), at Lender’s request from time to time, permit Lender to examine and make copies of such books, records, contracts, leases, and other instruments at any reasonable time.

Financial Statements

Clause 8-9-15

Grantor agrees to deliver to Lender, at Lender’s request from time to time, [audited/reviewed/compiled/internally prepared] financial statements of
Grantor and each guarantor of the Note prepared in accordance with [generally accepted/sound/cash basis federal income tax] accounting principles consistently applied, in detail reasonably satisfactory to Lender and certified to be true and correct by [include if applicable: the chief financial officer of] Grantor [include if applicable: and accompanied by an opinion of an independent certified public accountant].

**Appraisals**

**Clause 8-9-16**

If Lender orders an appraisal of the Property while a default exists or to comply with legal requirements affecting Lender, Grantor, at Lender’s request, agrees to reimburse Lender for the cost of any such appraisal. [Include if applicable: Lender agrees to deliver to Grantor a copy of any such appraisal within ten days of receipt of Grantor’s reimbursement]. If Grantor fails to reimburse Lender for any such appraisal within ten days of Lender’s request, that failure is a default under this deed of trust.

**Further Assurances**

**Clause 8-9-17**

Grantor agrees to execute, acknowledge, and deliver to Lender any document requested by Lender, at Lender’s request from time to time, to (1) correct any defect, error, omission, or ambiguity in this deed of trust or in any other document executed in connection with the Note or this deed of trust; (2) comply with Grantor’s obligations under this deed of trust and other documents; (3) subject to and perfect the liens and security interests of this deed of trust and other documents any property intended to be covered thereby; and (4)
protect, perfect, or preserve the liens and the security interests of this deed of trust and other documents against third persons or make any recordings, file any notices, or obtain any consents requested by Lender in connection therewith. Grantor agrees to pay all costs of the foregoing.

Insurance

Clause 8-9-18

B.1. Grantor agrees to maintain, at Grantor’s expense, the following insurance plus such other insurance policies with other coverages or increased coverages as Lender may require from time to time (“Required Insurance Coverages”):

B.1.a. Liability Insurance Policies

i. commercial general liability insurance on Insurance Services Office (“ISO”) standard occurrence-based form, covering Grantor and Grantor’s operations on the Property and containing contractual liability coverage for broad-form indemnities [./, and/;]

ii. business automobile liability insurance covering owned, nonowned, or rented automobiles [./; [and]]
iii. workers’ compensation insurance and employer’s liability insurance covering Grantor [./; [and]]

iv. for any third party-manager or lessee of the Property (a) commercial general liability insurance equivalent to the ISO standard occurrence-based form, covering the manager or lessee and its operations on the Property and containing contractual liability coverage for broad-form indemnities, (b) business automobile liability insurance covering owned, nonowned, or rented automobiles, and (c) workers’ compensation insurance and employer’s liability insurance covering the manager or lessee [./; [and]]

v. for all contractors and subcontractors performing construction at the Property, (a) commercial general liability insurance equivalent to the ISO standard occurrence-based form, covering the contractor or subcontractor and its operations on the Property and containing contractual liability coverage for broad-form indemnities, (b) business automobile liability insurance covering owned, nonowned, or rented automobiles, and (c) workers’ compensation insurance and employer’s liability insurance covering the manager or lessee [./; [and]]
employer’s liability insurance covering the contractor or subcontractor [./ [and]]

And/Or

Include the following if a third-party design professional is employed to design improvements at the property.

vi. for all engineers, architects, and other design professionals performing work with respect to the Property, (a) professional liability insurance, [include the following if the design professional will be performing part of its duties at the property]: (b) commercial general liability insurance equivalent to the ISO standard occurrence-based form, covering the design professional and its operations on the Property and containing contractual liability coverage for broad-form indemnities,] [(b)/(c)] business automobile liability insurance covering owned, nonowned, or rented automobiles, and [(c)/(d)] workers’ compensation insurance and employer’s liability insurance covering the design professional.

Continue with the following.

Each commercial general and business automobile liability insurance policy will name Lender as an additional insured on an additional insured endorsement acceptable to Lender.

B.1.b. Property Insurance Policies

Include one or more of the following paragraphs as applicable and modify paragraph numbers as appropriate.
Include the following if the property includes a completed building or if a building is under construction, for the period after completion of construction.

i. commercial property insurance using ISO form CP 00 10, “Building and Personal Property Coverage Form,” and CP 10 30, “Causes of Loss—Special Form,” insuring against all direct physical loss or damage to the Property except for exclusions or limitations acceptable to Lender, including optional coverages for agreed value and replacement cost (without deduction for depreciation), and endorsements to cover equipment breakdown (formerly boiler and machinery), higher limits for increased costs to comply with an ordinance or law, higher limits for debris removal, business income and rental value (formerly business interruption), [and] terrorism [include the following if the property is in a “Special Flood Hazard Area” as defined in the National Flood Insurance Program and flood insurance in excess of the National Flood Insurance Program limits is desired: , and flood coverage] \[./; [and]]

And/Or

Include the following if the property is in a “Special Flood Hazard Area” as defined in the National Flood Insurance Program.

ii. flood insurance policy covering the Property issued pursuant to the National Flood Insurance Program \[./; [and]]

And/Or

Include the following for while any improvements on the property are under construction and in lieu of commercial property insurance.
iii. a builder’s risk property insurance policy written on a completed value, nonreporting form and on an all-risks basis, with no exclusions unacceptable to Lender, with coverage extensions, if necessary, to eliminate coinsurance and to cover collapse, debris removal, soft costs such as loan interest, real estate taxes, and additional legal, architectural, and engineering costs, [include the following if the property is in a “Special Flood Hazard Area” as defined in the National Flood Insurance Program: floods.] loss of rents, testing of mechanical equipment, and increased costs due to ordinance or law [./; [and]]

And/Or

Include the following if the property will be leased to third parties or if the grantor employs a third-party property manager.

iv. for third-party property managers and lessees, commercial property insurance using CP 10 30, “Causes of Loss—Special Form,” insuring against all direct physical loss or damage to the furniture fixtures, equipment, and other business personal property of the property manager or lessee. In addition, lessees’ commercial property insurance policies will cover any leasehold improvements or betterments constructed by or for the lessee.

Continue with the following.

Any commercial general or builder’s risk policy carried by Grantor will contain standard mortgagee or lender loss payable clauses providing that (i) the insurer will pay the loss or damage directly to Lender, (ii) Lender will have the
right to receive payment under the policy even if the insurance company has
denied Grantor’s claim or Grantor has failed to comply with the terms of the
policy, (iii) the insurer will give written notice to Lender of cancellation ten
days before its cancellation for nonpayment or thirty days before cancellation
for any other reason, and (iv) the insurer will give written notice to Lender if
the policy has not been renewed ten days before its expiration.

B.2. General Insurance Policy Requirements

Any reference to an ISO form in this deed of trust is to the most
recent edition of the form or equivalent.

The Required Insurance Coverages will (a) be issued by compa-
nies reasonably acceptable to Lender, (b) be in a form and with exclu-
sions, endorsements, and amendments acceptable to Lender, and (c)
have limits, deductibles, and self-insured retention acceptable to Lender.

Grantor will deliver evidence of the Required Insurance Cover-
ages in a form acceptable to Lender at least ten days before the expira-
tion of the Required Insurance Coverages; the original of each policy,
coincident with the execution of this deed of trust; and the original of
each renewal policy, not less than ten days before the expiration of the
initial policy or each immediately preceding renewal policy. In case of
Grantor’s failure to keep the Property insured or to provide evidence that
the Property is insured, as required herein, Lender, after notice to
Grantor, at its option may acquire the Required Insurance Coverages at
Grantor’s sole expense.
Subordinate Liens

Clause 8-9-19

Grantor agrees not to grant any lien or security interest in the Property or to permit any junior encumbrance to be recorded or any claim to otherwise become an encumbrance against the Property. If an involuntary encumbrance is filed against the Property, Grantor agrees, within thirty days, to either remove the involuntary encumbrance or provide a bond acceptable to Lender against the involuntary encumbrance.

Business Use

Clause 8-9-20

Grantor warrants to Lender and agrees that the proceeds of the Note will be used primarily for business or commercial purposes and not primarily for personal, family, or household purposes.

Due on Transfer—Nonresidential Property

Clause 8-9-21

Lender may declare the debt secured by this deed of trust immediately payable and invoke any remedies provided in this deed of trust for default if Grantor transfers any of the Property to a person who is not a permitted transferee without Lender’s consent or, if Grantor is not a natural person, if any person owning a direct or indirect interest in Grantor transfers such interest to a person that is not a “permitted transferee” without Lender’s consent. “Permitted transferee” for a natural person means that person’s spouse or children, any trust for that person’s benefit or the benefit of the person’s spouse or children, or any corporation, partnership, or limited liability company in which the
direct and beneficial owner of all the equity interest is a natural person or that person’s spouse or children or any trust for the benefit of them; and the heirs, beneficiaries, executors, administrators, or personal representatives of a natural person on the death of that person or on the incompetency or disability of that person for purposes of the protection and management of that person’s assets; and for a person that is not a natural person, any other person controlling, controlled by, or under common control with that person.

Clause 8-9-22

If all or any part of the Property is sold, transferred, or conveyed without the prior written consent of Lender or other holder of the Note, Lender or other holder of the Note may, at its sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Lender or other holder of the Note has no obligation to consent to any such sale or conveyance of the Property, and Lender or other holder of the Note is entitled to condition any consent on a change in the interest rate that will thereafter apply to the Note and any other change in the terms of the Note or Deed of Trust that Lender or other holder of the Note in its sole discretion deems appropriate. A lease for a period longer than three years, a lease with an option to purchase, or a contract for deed will be deemed to be a sale, transfer, or conveyance of the Property for purposes of this provision. Any deed under threat or order of condemnation, any conveyance solely between makers, and the passage of title by reason of death of a maker or by operation of law will not be construed as a sale or conveyance of the Property. The creation of a subordinate lien without the consent of Lender or other holder of the Note will be construed as a sale or conveyance of the Property, but any subsequent sale under a subordinate lien
to which Lender or other holder of the Note has consented will not be con-
strued as a sale or conveyance of the Property.

**Due-on-Sale Clause (Residential)**

**Clause 8-9-23**

If Grantor transfers any part of the Property without Lender’s prior writ-
ten consent, Lender may declare the debt secured by this deed of trust immedi-
ately payable and invoke any remedies provided in this deed of trust for
default. If the Property is residential real property containing fewer than five
dwelling units or a residential manufactured home occupied by Grantor, excep-
tions to this provision are limited to (1) a subordinate lien or encumbrance that
does not transfer rights of occupancy of the Property; (2) creation of a
purchase-money security interest for household appliances; (3) transfer by
devise, descent, or operation of law on the death of a co-Grantor; (4) grant of a
leasehold interest of three years or less without an option to purchase;
(5) transfer to a spouse or children of Grantor or between co-Grantors;
(6) transfer to a relative of Grantor on Grantor’s death; and (7) transfer to an
inter vivos trust in which Grantor is and remains a beneficiary and occupant of
the Property.

**Office of Consumer Credit Commissioner**

**Clause 8-9-24**

Lender is subject to regulation by the Office of Consumer Credit Com-
missoner of the state of Texas. The name, mailing address, and telephone
numbers of the office are:
Clause 8-9-25

Grantor will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Grantor in this Deed of Trust. The sole remedy of Lender or other holder of the Note in the event of a default by Grantor under the Note or this Deed of Trust will be to foreclose the liens and security interests granted in this Deed of Trust, and Lender or other holder of the Note will not be entitled to any personal judgment against Grantor.

Clause 8-9-26

Grantor has no personal liability for the obligations under this deed of trust or under the Note, and no personal judgment may be taken and no claim for personal liability may be made against Grantor. Lender’s sole remedy for default under the Note or this deed of trust is the foreclosure of the liens and security interests created hereunder. Exceptions to the foregoing provisions are limited to, and Grantor is liable for, the following: taxes, assessments, and charges for labor, materials, or other amounts that if unpaid may create an encumbrance against the Property; unpaid premiums for insurance required
hereunder; damage to the Property if any insurance required hereunder is not maintained; all rents, issues, profits, and income derived from the Property after a default occurs and not expended for operating expenses of the Property; tenant security deposits for leases of the Property; any condemnation or insurance proceeds not paid or applied as required hereunder; [include if applicable: damage to and depreciation of the Property beyond normal wear and tear caused by the negligence of Grantor or the failure of Grantor to keep the Property in good repair and condition; the return of or reimbursement for all personal property taken from the Property by or on behalf of Grantor;] damages resulting from any fraud or misrepresentation by Grantor; damages resulting from any breach of any warranty of title; interest on the Note from the date of default through foreclosure, payment, or settlement of the debt; all interest on the Note during any bankruptcy proceeding of Grantor and all reasonable attorney’s fees and expenses incurred as a result of Grantor’s bankruptcy; and all attorney’s fees and expenses incurred by Lender to collect any of the foregoing amounts.

Full Recourse

Clause 8-9-27

Grantor will have full recourse liability for repayment of the principal and interest of the Note and the performance of all covenants and agreements of Grantor in this Deed of Trust.
Assumption without Consent

Clause 8-9-28

The Property may be sold, transferred, or conveyed without the consent of Lender or other holder of the Note, provided any subsequent buyer or transferee assumes in writing for the benefit of Lender or other holder of the Note the obligation to pay the Note and to perform the covenants and agreements in this Deed of Trust in accordance with the terms of those instruments. No such assumption will release Grantor from any liabilities or obligations arising under the Note or Deed of Trust. Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Property.

Assumption with Consent

Clause 8-9-29

The Property may be sold, transferred, or conveyed provided that (1) any subsequent buyer assumes in writing for the benefit of Lender or other holder of the Note the obligation to pay the Note and to perform the covenants and agreements in this Deed of Trust in accordance with the terms of those instruments and (2) Grantor or the subsequent buyer obtains prior written consent to the sale from Lender or other holder of the Note. Consent will be based on the subsequent buyer’s credit history, with no change in interest rate or terms, and may not be unreasonably withheld, conditioned, or delayed. No such assumption will release Grantor from any liabilities or obligations arising under the Note or Deed of Trust. If all or any part of the Property is sold, conveyed, leased for a period longer than three years, leased with an option to purchase, otherwise sold (including by contract for deed), or otherwise transferred or conveyed without prior written consent of Lender or other holder of the
Note, Lender or other holder of the Note may, at its sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Any deed under threat or order of condemnation, any conveyance solely between Grantors, and the passage of title by reason of death of a Grantor or by operation of law will not be construed as a sale or conveyance of the Property. [Select one of the following: Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Property./The creation of a subordinate lien without the consent of Lender will be construed as a sale or conveyance of the Property, but any subsequent sale under a subordinate lien to which Lender or other holder of the Note has consented will not be construed as a sale or conveyance of the Property.]

**With Escrow**

**Clause 8-9-30**

Grantor will deposit with Lender or other holder of the Note, in addition to the principal and interest installments, a pro rata part of the estimated annual ad valorem taxes on the Property and a pro rata part of the estimated annual insurance premiums for the improvements on the Property. These tax and insurance deposits are only estimates and may be insufficient to pay total taxes and insurance premiums. Grantor must pay any deficiency within thirty days after notice from Lender or other holder of the Note. Grantor’s failure to pay the deficiency will constitute a default under the Deed of Trust. If any superior lienholder on the Property is collecting escrow payments for taxes and insurance, this paragraph will be inoperative as long as payments are being made to the superior lienholder.
Cross-Default

Clause 8-9-31

Any act or occurrence that would constitute default under the terms of any lien superior to the lien securing the Note will constitute a default under this Deed of Trust securing the Note.
Leasehold Deed of Trust

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Basic Information

Date:

Grantor:

Grantor’s Mailing Address:

Trustee:

Trustee’s Mailing Address:

Lender:

Lender’s Mailing Address:

Obligation

Note

Date:

Original principal amount:

Borrower:

Lender:
Maturity date:

Other Debt: [include optional clauses from form 8-6 in this chapter or describe other debt]

Property (including any improvements): The Leasehold Estate.

Lease

Date:

Landlord:

Tenant: Grantor

Premises:

Amendments (if applicable):

Leasehold Estate: All of Tenant’s rights under the Lease.

Prior Lien: [include recording information]

Other Exceptions to Conveyance and Warranty:

A. Granting Clause

For value received and to secure payment of the Obligation, Grantor conveys the Property to Trustee in trust. Grantor warrants and agrees to defend the title to the Property, subject to the Other Exceptions to Conveyance and Warranty. On payment of the Obligation and all other amounts secured by this deed of trust, this deed of trust will have no further effect, and Lender will release it at Grantor’s expense.
B.  **Grantor agrees to—**

   B.1.  perform all of Tenant’s obligations under the Lease and deliver, on Lender’s written request, satisfactory evidence of timely payment of all rents and other charges due under the Lease;

   B.2.  enforce Landlord’s obligations under the Lease;

   B.3.  within [number] days after receipt, deliver a copy of each notice received by Grantor from Landlord to Lender;

   B.4.  timely exercise each option to extend the term of the Lease as long as the Obligation remains unpaid and concurrently deliver to Lender a copy of the notice doing so. If Grantor does not exercise an option to extend the term of the Lease, Lender may, at its option, exercise the option on behalf of Grantor. Grantor appoints Lender its attorney-in-fact to execute and deliver all instruments necessary to extend the term of the Lease or to exercise any other rights, powers, or privileges under the Lease; this power, being coupled with an interest, is irrevocable as long as the Obligation remains unpaid;

   B.5.  use commercially reasonable efforts to deliver to Lender, within twenty days after written request by Lender, an estoppel certificate from Landlord setting forth (a) that the Lease has not been modified or, if it has been modified, the date of each modification (together with copies of each modification), (b) the date to which all rent has been paid by Tenant under the Lease, and (c) whether there are any defaults of Tenant under the Lease and, if there are, setting forth the nature of the default(s) in reasonable detail;

   B.6.  execute and deliver on the request of Lender any instruments required to permit Lender to cure any default under the Lease or preserve the interest of Lender in the Leasehold Estate;
B.7. defend title to the Property subject to the Other Exceptions to Conveyance and Warranty and preserve the lien’s priority as it is established in this deed of trust;

B.8. obey all laws, ordinances, and restrictive covenants applicable to the Property;

B.9. if the lien of this deed of trust is not a first lien, pay or cause to be paid all prior lien notes and abide by or cause to be abided by all prior lien instruments; and

B.10. notify Lender of any change of address.

C. **Grantor agrees not to**—

C.1. do or permit anything to be done that will impair the security of this deed of trust or will be grounds for terminating the Lease; or

C.2. consent, without Lender’s prior written consent, to (a) any waiver, cancellation, or amendment of any provision of the Lease or (b) the subordination of the Lease to any mortgage of the fee interest of Landlord in the Premises.

D. **Grantor represents that**—

D.1. the Lease is enforceable;

D.2. except as set forth above, there are no amendments to the Lease; and

D.3. Grantor is not in default under the Lease and, to the best of Grantor’s knowledge, Landlord is not in default under the Lease, and no event exists that, with the passage of time or the giving of notice, or both, would constitute a default under the Lease.

E. **Lender’s Rights**

E.1. Lender or Lender’s mortgage servicer may appoint in writing a substitute trustee, succeeding to all rights and responsibilities of Trustee.
E.2. If the proceeds of the Obligation are used to pay any debt secured by prior liens, Lender is subrogated to all the rights and liens of the holders of any debt so paid.

E.3. Notwithstanding the terms of the Note to the contrary, and unless applicable law prohibits, all payments received by Lender from Grantor with respect to the Obligation or this deed of trust may, at Lender’s discretion, be applied first to amounts payable under this deed of trust and then to amounts due and payable to Lender with respect to the Obligation, to be applied to late charges, principal, or interest in the order Lender in its discretion determines.

E.4. If Grantor fails to perform any of Grantor’s obligations, Lender may perform those obligations and be reimbursed by Grantor on demand for any amounts so paid, including attorney’s fees, plus interest on those amounts from the dates of payment at the rate stated in the Note for matured, unpaid amounts. The amount to be reimbursed will be secured by this deed of trust.

E.5. COLLATERAL PROTECTION INSURANCE NOTICE

In accordance with the provisions of section 307.052(a) of the Texas Finance Code, the Beneficiary hereby notifies the Grantor as follows:

(A) the Grantor is required to:

(i) keep the collateral insured against damage in the amount the Lender specifies;

(ii) purchase the insurance from an insurer that is authorized to do business in the state of Texas or an eligible surplus lines insurer;

and

(iii) name the Lender as the person to be paid under the policy in the event of a loss;
(B) the Grantor must, if required by the Lender, deliver to the Lender a copy of the policy and proof of the payment of premiums; and

(C) if the Grantor fails to meet any requirement listed in Paragraph (A) or (B), the Lender may obtain collateral protection insurance on behalf of the Grantor at the Grantor’s expense.

E.6. If a default exists in payment of the Obligation or performance of Grantor’s obligations and the default continues after any required notice of the default and the time allowed to cure, Lender may—

a. declare the unpaid principal balance and earned interest on the Obligation immediately due;

b. exercise Lender’s rights with respect to rent under the Texas Property Code as then in effect;

c. direct Trustee to foreclose this lien, in which case Lender or Lender’s agent will cause notice of the foreclosure sale to be given as provided by the Texas Property Code as then in effect; and

d. purchase the Property at any foreclosure sale by offering the highest bid and then have the bid credited on the Obligation.

E.7. Lender may remedy any default without waiving it and may waive any default without waiving any prior or subsequent default.

E.8. If Grantor fails to perform any of its obligations, covenants, or agreements under the Lease, Lender may do any act it deems necessary to cure such failure. Lender may enter the Premises with or without notice and to do anything that Lender deems necessary or prudent to do.
E.9. If Lender elects to make any payments or do any act or thing required to be paid or done by Grantor as Tenant under the Lease, Lender will be fully subrogated to the rights of Landlord, and any sums advanced by Lender are a part of the Obligation.

F. Trustee’s Rights and Duties

If directed by Lender to foreclose this lien, Trustee will—

F.1. either personally or by agent give notice of the foreclosure sale as required by the Texas Property Code as then in effect;

F.2. sell and convey all or part of the Property “AS IS” to the highest bidder for cash with a general warranty binding Grantor, subject to the Prior Lien and to the Other Exceptions to Conveyance and Warranty and without representation or warranty, express or implied, by Trustee;

F.3. from the proceeds of the sale, pay, in this order—

a. expenses of foreclosure, including a reasonable commission to Trustee;

b. to Lender, the full amount of principal, interest, attorney’s fees, and other charges due and unpaid;

c. any amounts required by law to be paid before payment to Grantor; and

d. to Grantor, any balance; and

F.4. be indemnified, held harmless, and defended by Lender against all costs, expenses, and liabilities incurred by Trustee for acting in the execution or enforcement of the trust created by this deed of trust, which includes all court and other costs, including attorney’s fees, incurred by Trustee in defense of any action or proceeding taken against Trustee in that capacity.
G. General Provisions

G.1. If any of the Property is sold under this deed of trust, Grantor must immediately surrender possession to the purchaser. If Grantor fails to do so, Grantor will become a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

G.2. Recitals in any trustee’s deed conveying the Property will be presumed to be true.

G.3. Proceeding under this deed of trust, filing suit for foreclosure, or pursuing any other remedy will not constitute an election of remedies.

G.4. This lien will remain superior to liens later created even if the time of payment of all or part of the Obligation is extended or part of the Property is released.

G.5. If any portion of the Obligation cannot be lawfully secured by this deed of trust, payments will be applied first to discharge that portion.

G.6. Grantor assigns to Lender all amounts payable to or received by Grantor from condemnation of all or part of the Property, from private sale in lieu of condemnation, and from damages caused by public works or construction on or near the Property. After deducting any expenses incurred, including attorney’s fees and court and other costs, Lender will either release any remaining amounts to Grantor or apply such amounts to reduce the Obligation. Lender will not be liable for failure to collect or to exercise diligence in collecting any such amounts. Grantor will immediately give Lender notice of any actual or threatened proceedings for condemnation of all or part of the Property.

G.7. Grantor collaterally assigns to Lender all present and future rent from the Property and its proceeds. Grantor warrants the validity and enforceability of the assignment. Grantor will apply all rent to payment of the Obligation and performance of this deed of trust, but if the rent exceeds the amount due with respect to the Obligation and the deed of trust,
Grantor may retain the excess. If a default exists in payment of the Obligation or performance of this deed of trust, Lender may exercise Lender’s rights with respect to rent under the Texas Property Code as then in effect. Lender neither has nor assumes any obligations as lessor or landlord with respect to any occupant of the Property. Lender may exercise Lender’s rights and remedies under this paragraph without taking possession of the Property. Lender will apply all rent collected under this paragraph as required by the Texas Property Code as then in effect. Lender is not required to act under this paragraph, and acting under this paragraph does not waive any of Lender’s other rights or remedies.

G.8. Interest on the debt secured by this deed of trust will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the debt.

G.9. In no event may this deed of trust secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

G.10. When the context requires, singular nouns and pronouns include the plural.

G.11. The term Note includes all extensions, modifications, and renewals of the Note and all amounts secured by this deed of trust.

G.12. This deed of trust binds, benefits, and may be enforced by the successors in interest of all parties.
G.13. If Grantor and Borrower are not the same person, the term Grantor includes Borrower.

G.14. Grantor and each surety, endorser, and guarantor of the Obligation waive all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

G.15. Grantor agrees to pay reasonable attorney’s fees, trustee’s fees, and court and other costs of enforcing Lender’s rights under this deed of trust if this deed of trust is placed in the hands of an attorney [include if the transaction is a secondary mortgage loan: who is not an employee of Lender] for enforcement.

G.16. If any provision of this deed of trust is determined to be invalid or unenforceable, the validity or enforceability of any other provision will not be affected.

G.17. As long as the Obligation remains unpaid, unless Lender otherwise consents in writing, the fee title to the Premises and the Leasehold Estate will not merge but will always remain separate, notwithstanding a union of the estates.

G.18. This deed of trust does not constitute an assignment of the Lease, and Lender has no liability or obligation under the Lease by reason of its acceptance of this deed of trust. Lender is liable for the obligations of Tenant arising out of the Lease for only that period of time after Lender has acquired, by foreclosure or otherwise, and is holding Grantor’s interest in the Leasehold Estate.

G.19. The term Lender includes any mortgage servicer for Lender.

G.20. Grantor represents that this deed of trust and the Note are given for the following purposes: [list specific purposes].
[Name of grantor]
Form 8-11

Consent to Leasehold Deed of Trust

Basic Information

Date:

Landlord:

Landlord’s Mailing Address:

Tenant:

Tenant’s Mailing Address:

Lender:

Lender’s Mailing Address:

Lease (between Landlord and Tenant)

Date:

Premises:

Recording information (if applicable):

Amendments (if applicable):

Obligation

Note

Date:
Maker: Tenant

Payee: Lender

Original principal amount:

Maturity date:

Deed of Trust

Date:

Trustee:

Recording information (if known):

Other Debt (if any):

A. Landlord’s Agreements and Representations

A.1. Landlord consents to the encumbrance by Tenant of Tenant’s interest under the Lease pursuant to the Deed of Trust.

A.2. Landlord represents to Lender that (a) the Lease is in effect, (b) except as set forth above, there are no amendments to the Lease, (c) no default under the Lease has occurred by Landlord or by Tenant, and (d) to Landlord’s actual knowledge, no event has occurred that, with the passage of time or the giving of notice or both, is a default by Landlord or Tenant under the Lease.

A.3. Until the Obligation is satisfied, Landlord will not (a) take any action to terminate the Lease or exercise any other remedy for default by Tenant under the Lease without first complying with the requirements of this agreement or (b) modify or cancel the Lease without Lender’s prior written consent.
A.4. Lender has the right to access and remove from the Premises Tenant’s personal property to enforce Lender’s security interest, either during the term of the Lease or within [number] days after the expiration or termination of the Lease or rejection of the Lease in bankruptcy. If Lender exercises this right after the end of the Lease term, Lender must, for that period, pay all rent and comply with all other requirements of Tenant under the Lease as a condition to exercising this right. Landlord subordinates to Lender’s security interest any lien that Landlord has in any of Tenant’s personal property located at the Premises.

A.5. Landlord will concurrently send to Lender a copy of any notice of default sent to Tenant. Landlord will accept performance by Lender of any term of the Lease.

A.6. The Lease will not be terminated because of a default by Tenant unless (a) notice of the default is delivered to Lender; (b) Lender has not cured a monetary default within fifteen days after the expiration of any of Tenant’s notice and cure periods set forth in the Lease; (c) Lender has not cured a nonmonetary default within thirty days after the expiration of any of Tenant’s cure periods in the Lease or, if the default is curable but cannot be cured within the thirty-day period, (i) Lender has not notified Landlord within the thirty-day period that it intends to cure the default, (ii) Lender has not diligently commenced to cure the default, or (iii) Lender does not prosecute the cure to completion within a reasonable period of time after the expiration of any applicable cure periods in the Lease, but not to exceed sixty days; and (d) with respect to a nonmonetary default of such a nature that it is not reasonably susceptible of being cured by Lender (e.g., a nonpermitted assignment by Tenant), Lender is not otherwise paying rent and performing all of Tenant’s obligations that, by their nature, Lender may perform.

A.7. If Lender acquires Tenant’s interest under the Lease pursuant to foreclosure proceedings or otherwise, Lender is not required to cure any default under the Lease existing prior to such acquisition if the default cannot be cured by the payment of money or is personal to Tenant and, therefore, not susceptible of cure by Lender.
A.8. The following transfers of Tenant’s interest under the Lease are permitted and do not require the consent of Landlord as long as the transferee assumes all of Tenant’s obligations under the Lease: (a) a transfer resulting from a foreclosure under the Deed of Trust, (b) a deed in lieu of foreclosure of the Deed of Trust, and (c) a subsequent transfer by Lender or its designee if they acquire such interest.

A.9. On request by Lender, Landlord will deliver to Lender estoppel certificates related to the Lease and copies of documents creating or evidencing the Lease, certified by Landlord.

B. General Provisions

B.1. Until the Obligation is satisfied, Landlord and Tenant will not subordinate the Lease to any lien that may be placed on Landlord’s interest in the Premises unless the lienholder enters into a subordination and nondisturbance agreement reasonably acceptable to Landlord, Tenant, and Lender.

B.2. If the Lease is terminated for any reason before expiration of its stated term or is rejected in bankruptcy, Landlord will, within fifteen days after Lender requests it, deliver to Lender or its designee a new lease of the Premises on the following terms:

a. The new lease will be for the remainder of the term of the Lease, effective on the date of termination or rejection, and will contain the same terms contained in the Lease.

b. The new lease will be executed by Landlord and Lender or its designee within ten days after receipt by Lender of the new lease.

c. On execution of the new lease, the new tenant will cure all monetary defaults that existed under the Lease upon its termination or rejection.
d. Within thirty days after the execution of the new lease, the new tenant will cure all nonmonetary defaults that existed upon termination or rejection that are curable or, if any nonmonetary default is curable but cannot be cured within the thirty-day period, (i) the new tenant must notify Landlord within the thirty-day period that the new tenant intends to cure the default, (ii) the new tenant must diligently commence to cure the default, and (iii) the new tenant must diligently prosecute the cure to completion within a reasonable period of time after execution of the new lease, but not to exceed sixty days.

e. All noncurable defaults that existed under the Lease on its termination or rejection shall be waived.

f. Any new lease will have the same priority as the Lease.

g. Landlord will hold for the account of the new tenant any moneys then held by or payable to Landlord that Tenant would have been entitled to receive but for the termination or rejection of the Lease.

B.3. To the extent of any inconsistency between the terms contained in the Lease and the terms set forth in this agreement, the terms of this agreement will control.

B.4. If the ownership of the fee and leasehold interests in the Premises become vested in the same person or entity, that occurrence will not result in a merger of title as long as the Deed of Trust remains outstanding.

B.5. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the
intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

B.6. This agreement will not be affected by (a) any renewal or modification of the Obligation, (b) the invalidity or unenforceability of any document evidencing or securing the Obligation, (c) the release or other disposition of any collateral for the Obligation, (d) the exercise or nonexercise of any right or remedy with respect to the Obligation, or (e) any waiver, consent, release, delay or other action, inaction, or omission with respect to the Obligation.

[Name of landlord]

[Name of tenant]

[Name of lender]
Form 8-12

Insurance and Indemnity Agreement

Basic Information

Date:

Borrower:

Borrower’s Mailing Address:

Lender:

Lender’s Mailing Address:

Obligation

Note

Date:

Original principal amount:

Borrower:

Lender:

Maturity date:

Other Debt: [describe other debt]

Property (including any improvements):
A. **Borrower’s Covenants**

Borrower agrees to—

A.1. comply with the requirements set forth in the attached Insurance Addendum;

A.2. **INDEMNIFY, DEFEND, AND HOLD LENDER AND ITS SHAREHOLDERS, MEMBERS, PARTNERS, AGENTS, CONTRACTORS, OFFICERS, AND EMPLOYEES HARMLESS FROM (a) ANY HARM TO OR IMPAIRMENT OR LOSS OF PROPERTY OR ITS USE, (b) HARM TO OR DEATH OF A PERSON, OR (c) “PERSONAL AND ADVERTISING INJURY” AS DEFINED IN THE FORM OF LIABILITY INSURANCE BORROWER IS REQUIRED TO MAINTAIN (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY’S FEES AND OTHER FEES AND COURT AND OTHER COSTS), OCCURRING IN ANY PORTION OF THE PROPERTY DURING THE PERIOD THE OBLIGATION IS OUTSTANDING. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH IS (a) INDEPENDENT OF BORROWER’S INSURANCE, (b) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER WORKERS’ COMPENSATION OR SIMILAR EMPLOYEE BENEFIT ACTS, (c) WILL SURVIVE REPAYMENT OF THE OBLIGATION OR FORECLOSURE OF THE PROPERTY BY LENDER OR EXECUTION BY BORROWER OF A DEED IN LIEU OF FORECLOSURE WITH RESPECT TO THE PROPERTY, AND (d) WILL APPLY EVEN IF THE HARM, IMPAIRMENT, LOSS, OR INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE INTENDED BENEFICIARY OF THE INDEMNITY, BUT WILL NOT APPLY TO THE EXTENT THE HARM, IMPAIRMENT, LOSS, OR INJURY IS CAUSED BY THE SOLE OR GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE INTENDED BENEFICIARY OF THE INDEMNITY.**

B. **General Provisions**

B.1. When the context requires, singular nouns and pronouns include the plural.

B.2. The term *Note* includes all extensions, modifications, and renewals of the Note.
B.3. This agreement binds, benefits, and may be enforced by the successors in interest of all parties.

B.4. Borrower agrees to pay reasonable attorney’s fees, trustee’s fees, and court and other costs of enforcing Lender’s rights under this agreement if this agreement is placed in the hands of an attorney for enforcement.

B.5. If any provision of this agreement is determined to be invalid or unenforceable, the validity or enforceability of any other provision will not be affected.

[Name of borrower]
Addendum to Insurance and Indemnity Agreement

Texas law prohibits additional insured coverage in a construction contract, or in an agreement collateral to or affecting a construction contract, except that pertaining to a single family house, townhouse, duplex, or directly related land development, or to a public works project of a municipality. Tex. Ins. Code ch. 151. See section 17.2:4 in this manual.

Insurance and Indemnity Agreement

Date:

Borrower:

Lender:

This addendum is part of the Insurance and Indemnity Agreement.

A. Borrower agrees to maintain (or, if applicable, cause Borrower’s third-party manager, lessee, general contractor, or third-party design professional to maintain) the property and/or liability insurance policies below (mark applicable boxes) containing contractual liability coverage for broad-form indemnities, plus any other coverages and increased coverages as Lender may reasonably require:

FROM BORROWER AND BORROWER’S THIRD-PARTY MANAGER

Type of Insurance or Endorsement | Minimum Policy or Endorsement Limit

Liability Policies Required of Both Borrower and Borrower’s Third-Party Manager in All Situations:

☐ Commercial general liability (occurrence basis) Per occurrence: $___________

General aggregate: $___________

Or
Insurance and Indemnity Agreement

☐ Business owner’s policy or commercial package coverage policy

Per occurrence: $____________

General aggregate: $____________

Required Endorsements to Both Borrower’s and Borrower’s Third-Party Manager’s Commercial General Liability or Business Owner’s Policy:

☐ Designated location(s) general aggregate limit $____________

☐ ______________________________ $____________

Include any other desired endorsements. See chapter 17.

Additional Liability Insurance Policies Required of Borrower or Borrower’s Third-Party Manager:

☐ Workers’ compensation $500,000

☐ Employer’s liability $____________

☐ Business automobile liability $____________

☐ Liquor law or dramshop liability $____________

☐ Garagekeepers liability $____________

☐ Hotel safe deposit box legal liability $____________

☐ Innkeepers liability $____________

☐ Bailee customer’s liability $____________

☐ Comprehensive crime insurance

(or, in the alternative, a fidelity bond) $____________

☐ Excess liability $____________

Or

☐ Umbrella liability

(occurrence basis) $____________

Additional Liability Insurance Policies Required during Construction Period:

FROM GENERAL CONTRACTOR
# Form 8-12  Insurance and Indemnity Agreement

<table>
<thead>
<tr>
<th>Type of Insurance or Endorsement</th>
<th>Minimum Policy or Endorsement Limit</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>General Liability Insurance Policy Required of General Contractor:</strong></td>
<td></td>
</tr>
<tr>
<td>☐ Commercial general liability (occurrence basis)</td>
<td>Per occurrence: $__________  General aggregate: $__________</td>
</tr>
<tr>
<td><strong>Required Endorsements to General Contractor’s Commercial General Liability Policy:</strong></td>
<td></td>
</tr>
<tr>
<td>☐ Designated construction project(s) general aggregate limit</td>
<td>$__________</td>
</tr>
<tr>
<td>☐ __________________________________</td>
<td>$__________</td>
</tr>
</tbody>
</table>

Include any other desired endorsements. See chapter 17.

## Additional Liability Insurance Policies Required of General Contractor:

<table>
<thead>
<tr>
<th>Type of Insurance or Endorsement</th>
<th>Minimum Policy or Endorsement Limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ Workers’ compensation</td>
<td>$500,000</td>
</tr>
<tr>
<td>☐ Employer’s liability</td>
<td>$__________</td>
</tr>
<tr>
<td>☐ Business automobile liability</td>
<td>$__________</td>
</tr>
<tr>
<td>☐ Professional liability</td>
<td>$__________</td>
</tr>
<tr>
<td>☐ Excess liability</td>
<td>$__________</td>
</tr>
<tr>
<td><strong>Or</strong></td>
<td></td>
</tr>
<tr>
<td>☐ Umbrella liability (occurrence basis)</td>
<td>$__________</td>
</tr>
</tbody>
</table>

FROM DESIGN PROFESSIONAL (ARCHITECT, ENGINEER, ETC.)

<table>
<thead>
<tr>
<th>Type of Insurance or Endorsement</th>
<th>Minimum Policy or Endorsement Limit</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Professional Liability Insurance Policy Required:</strong></td>
<td></td>
</tr>
<tr>
<td>☐ Professional liability</td>
<td>$__________</td>
</tr>
</tbody>
</table>
Property Insurance Policies If No Construction Is Contemplated or, If Construction Is Contemplated, for the Period After Construction Is Completed:

- Causes of loss—special form
  - 100 percent of replacement cost of the Property
  
  Or

- Business owner’s policy
  - 100 percent of replacement cost of the Property

Required Endorsements to Causes of Loss or Business Owner’s Policy:

- Business income and additional expense
  - Sufficient limits to address reasonably anticipated business interruption losses for a period of ____ months

- Boiler and machinery
  - $__________

- Flood (if Property is located within a 100-year floodplain (FEMA Flood Zone “A” or any subdesignation of Zone “A”))
  - $__________

- Earth movement
  - $__________

- Ordinance or law coverage
  - $__________

- Terrorism coverage (if Property is valued over $__________)
  - $__________

- Glass
  - Sufficient limits to cover plate glass

- Signs
  - Sufficient limits to cover exterior signage

Include any other desired endorsements. See chapter 17.

Property Insurance Policy during Construction Period:

- Builder’s risk on a “completed value” basis
  - 100 percent of replacement cost of the improvements to be constructed

Required Endorsements to Builder’s Risk Insurance:

- Additional expenses due to delay in completion
  - Sufficient limits to address reasonably anticipated business interruption losses for a period of ____ months
Form 8-12

Insurance and Indemnity Agreement

☐  Agreed value $____________
☐  Agreed penalty $____________
☐  Damage arising from error, omission, or deficiency in design, specifications, workmanship, or materials, including collapse $____________
☐  Debris removal additional limit $____________
☐  Earthquake $____________
☐  Expediting expenses $____________
☐  Flood $____________
☐  Freezing $____________
☐  Ordinance or law $____________
☐  Pollutant cleanup and removal $ 1,000,000
☐  Preservation of property $____________
☐  Replacement cost $____________
☐  Testing $____________

B. Borrower agrees to comply with the following additional insurance requirements:

B.1. The commercial general liability (or business owner’s policy or commercial package coverage policy) must be endorsed to name Lender as an “additional insured” and must not be endorsed to exclude the partial, contributory, or comparative negligence of Lender from the definition of “insured contract.”

B.2. Additional insured endorsements must not exclude coverage for the sole or contributory ordinary negligence of Lender.

B.3. Property insurance policies must contain waivers of subrogation of claims against Lender.

B.4. Evidence of insurance and copies of any additional insured endorsements with respect to Borrower’s insurance must be delivered by Borrower to Lender in a form acceptable to Lender at least ten days before the expiration of the policies; the original of each pol-
icy, coincident with the execution of the documents representing the Obligation; and the
original of each renewal policy, not less than ten days before the expiration of the initial pol-
icy or each immediately preceding renewal policy. In case of Borrower’s failure to keep the
Property insured or to provide evidence that the Property is insured, as required herein,
Lender, after notice to Grantor, at its option may acquire the Required Insurance Coverages at
Grantor’s sole expense.

B.5. COLLATERAL PROTECTION INSURANCE NOTICE

In accordance with the provisions of section 307.052(a) of the Texas Finance Code,
the Beneficiary hereby notifies the Grantor as follows:

(A) the Grantor is required to:

(i) keep the collateral insured against damage in the amount the
    Lender specifies;

(ii) purchase the insurance from an insurer that is authorized to do
    business in the state of Texas or an eligible surplus lines insurer;
    and

(iii) name the Lender as the person to be paid under the policy in the
    event of a loss;

(B) the Grantor must, if required by the Lender, deliver to the Lender a
    copy of the policy and proof of the payment of premiums; and

(C) if the Grantor fails to meet any requirement listed in Paragraph (A) or
    (B), the Lender may obtain collateral protection insurance on behalf of the
    Grantor at the Grantor’s expense.
B.6. Certificates of insurance and copies of any additional insured endorsements with respect to a third-party manager’s, contractor’s, subcontractor’s, or design professional’s insurance must be delivered by Borrower to Lender before such party enters the Property and thereafter at least ten days before the expiration of the policies.

C. Borrower agrees to obtain the approval of Lender with respect to the following: the forms of Borrower’s (or third-party manager’s, general contractor’s, or design professional’s) insurance policies, endorsements, and certificates and other evidence of insurance; the amounts of any deductibles or self-insured retentions amounts under Borrower’s (or third-party manager’s, general contractor’s, or design professional’s) insurance; and the creditworthiness and ratings of the insurance companies issuing Borrower’s (or third-party manager’s, general contractor’s, or design professional’s) insurance.
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Chapter 9

Security Agreements

§ 9.1 Introduction

Chapter 9 of the Texas Business and Commerce Code, titled “Secured Transactions,” governs consensual security interests in personal property and fixtures.

Important Reminder: This chapter presents an overview of chapter 9. It is necessarily limited in scope. It does not address a number of specialized areas of secured transactions within the scope of chapter 9. The rules for creating and perfecting a security interest are complex. Accordingly, in the context of any particular transaction to which chapter 9 is relevant, the practitioner should consult the statutory text, the official comments, secondary sources, and any relevant case law.

§ 9.2 Scope of Chapter 9

§ 9.2:1 Generally


§ 9.2:2 Form of Transaction Irrelevant

The form of the transaction or the label that the parties give to the transaction is irrelevant for determining whether chapter 9 applies. Rather, whether chapter 9 governs a transaction is based on the economic reality of the transaction. The parties may characterize a transaction as a sale or a lease of goods, but if in economic reality a security interest is created, chapter 9 governs. Tex. Bus. & Com. Code § 9.109(a)(1). The parties are not required to provide in their documents that a “security interest” is being created under a “security agreement.” The parties may use other terms, such as assignment, hypothecation, conditional sale, trust deed, and so forth. Chapter 9 governs if a security interest in personal property is created. Tex. Bus. & Com. Code § 9.109(a)(1) (“regardless of its form”). Similarly, it is generally irrelevant whether title to collateral is in the name of the debtor or the secured party. Tex. Bus. & Com. Code § 9.202.

§ 9.2:3 Exclusions from Scope

Chapter 9 governs most consensual security interests in personal property and fixtures. Certain consensual interests in personal property collateral are not governed by chapter 9. These interests include common-law bailments and true leases of personal property, the latter being governed by Texas UCC chapter 2A (see Tex. Bus. & Com. Code ch. 2A). True consignments,

Chapter 9 also excludes from its scope certain security interests on personal property collateral.


**Security Interest Granted by State or Foreign Government or Governmental Unit:** A security interest granted by a state or foreign government or governmental unit is included within the scope of chapter 9 if no other state or foreign statute governs security interests created by that entity. Tex. Bus. & Com. Code § 9.109(c)(2), (3); see also Tex. Bus. & Com. Code § 9.102(a)(45) (defining “governmental unit”), § 9.102(a)(77) (defining “state”). Texas Government Code chapter 1208 governs creation, validity, and perfection of security interests granted by Texas governmental subdivisions; security interests granted by Texas political subdivisions are not governed by chapter 9. See Tex. Gov’t Code ch. 1208.

**Certain Sales of Payment Intangibles and Promissory Notes:** Chapter 9 govern sales of accounts, chattel paper, payment intangibles, and promissory notes but excludes from its scope sales of these types of collateral for collection or in satisfaction of preexisting debt. Tex. Bus. & Com. Code § 9.109(d)(5), (7).

**Insurance Claims; Health-Care Insurance Receivables:** With one exception, chapter 9 excludes transfers of insurance claims as original collateral. Chapter 9 governs transfers of insurance claims, as original collateral, arising out of the provision of health-care goods and services. Tex. Bus. & Com. Code § 9.102(a)(46) (defining “health care insurance receivable”), § 9.109(d)(8).

**Commercial Tort Claims:** Noncommercial tort claims, such as consumer personal injury claims, are excluded from chapter 9. Chapter 9 does govern security interests in commercial tort claims. Tex. Bus. & Com. Code § 9.102(a)(13) (defining “commercial tort claim”), § 9.109(d)(12).


**Real Property Interests:** Chapter 9 contains a real property interest exclusion. With an exception for fixtures, the creation or transfer of an interest in or a lien on real property, including a lease or rents (as defined in Tex. Prop. Code § 64.001) thereunder, is not governed by chapter 9. Tex. Bus. & Com. Code § 9.109(d)(11). The Texas UCC contains a nonuniform expansion to this exclusion and also excludes from chapter 9 “the interest of a vendor or vendee in a contract for deed to purchase an

**Effect of Exclusion:** Even though a type of property may be excluded from chapter 9, a secured party may be able to obtain a security interest in property of that type using other federal or Texas statutes or common law.

§ 9.3 **Definitions**

§ 9.3:1 **Security Interest, Security Agreement, Collateral**


A security agreement is an “agreement that creates or provides for a security interest.” Tex. Bus. & Com. Code § 9.102(a)(74).

Collateral is “the property subject to a security interest.” Tex. Bus. & Com. Code § 9.102(a)(12). To conform the scope of the term collateral to the scope of the term security interest, the definition of the term collateral includes “proceeds . . . accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and goods [under] a consignment.” Tex. Bus. & Com. Code § 9.102(a)(12).

§ 9.3:2 **Parties**


**Secondary Obligor:** A secondary obligor is a person who is secondarily obligated on the secured obligation or who has a right of recourse against others with respect to the secured obligation. Tex. Bus. & Com. Code § 9.102(a)(72). For example, a guarantor is a secondary obligor.

§ 9.3:3 **Collateral Categories**

Chapter 9 classifies collateral into categories.
Goods: Goods are all things that are movable at the time the security interest attaches, including fixtures. Tex. Bus. & Com. Code § 9.102(a)(44). Money, documents, instruments, investment property, accounts, chattel paper, general intangibles, deposit accounts, letter-of-credit rights, and minerals before extraction are not goods. Software embedded in goods and customarily viewed as a part of the goods (for example, the computer chip in the airbag in an automobile) is considered goods. There are four subcategories of goods: consumer goods, inventory, farm products, and equipment. Tex. Bus. & Com. Code § 9.102(a)(23), (33), (34), (48).

Consumer goods are goods used or bought for use primarily for personal, family, or household purposes. Tex. Bus. & Com. Code § 9.102(a)(23).

Inventory consists of goods, other than farm products, held by a person for sale or lease or consisting of raw materials, work in process, or materials consumed in business. Tex. Bus. & Com. Code § 9.102(a)(48).

Farm products are crops, livestock, or other supplies produced or used in farming operations, and they include products of crops or livestock in their unmanufactured state. For goods to be farm products, the debtor has to be engaged in farming operations with respect to the goods. Farming operations include aquacultural operations. See Tex. Bus. & Com. Code § 9.102(a)(34), (35).

Equipment is the residual subcategory of goods. It consists of goods that are not consumer goods, inventory, or farm products. Tex. Bus. & Com. Code § 9.102(a)(33).


Other Semi-Intangibles: Certain writings or records represent other rights of the debtor. These are defined in chapter 9 as documents, instruments, and chattel paper.

Documents: A document is a document of title, such as a bill of lading or warehouse receipt, including a deemed warehouse receipt under Business and Commerce Code section 7.201(b). Tex. Bus. & Com. Code § 9.102(a)(30); see also Tex. Bus. & Com. Code §§ 1.201(b)(16), 7.102(a)(5), 7.201(b).


Instruments: An instrument is a negotiable instrument governed by Texas UCC chapter 3 or another writing evidencing a right to the payment of money that, in the ordinary course of business, is transferred by delivery with any necessary endorsement or assignment. A negotiable instrument or other writing is not an instrument, as defined, if it is a lease or investment property. Tex. Bus. & Com. Code § 9.102(a)(47). A credit card slip is not an instrument. Tex. Bus. & Com. Code § 9.102(a)(47)(iii). The Texas legislature has adopted nonuniform language providing that a nonnegotiable certificate of deposit is not an instrument. Tex. Bus. & Com. Code § 9.102(a)(47)(iv).

The term promissory note is a subcategory of the collateral category “instrument.” Tex. Bus. & Com. Code § 9.102(a)(66). A promissory note is an instrument evidencing a promise to pay (rather than an order to pay, such as a check). An instrument,
such as a certificate of deposit, by a bank acknowledging receipt of funds is not a promissory note. Tex. Bus. & Com. Code § 9.102(a)(66).


**Letter-of-Credit Rights:** Chapter 9 uses the term letter-of-credit right to mean a right to payment or performance under a letter of credit, whether the letter of credit is written or electronic. The term does not include the debtor’s drawing rights as beneficiary under the letter of credit. Tex. Bus. & Com. Code § 9.102(a)(51). A letter-of-credit right may be a supporting obligation (see the discussion in this section below) or original collateral.

**Other Intangibles:** Pure intangibles that are not investment property are accounts, deposit accounts, commercial tort claims, or general intangibles.

**Accounts:** “Account” is defined to include a right to payment, whether earned by performance or not, for property (real or personal, tangible and intangible, not just goods) sold; for services rendered; for intellectual property licensed; for a suretyship obligation incurred; for a policy of insurance issued; arising out of the use of a credit card; and as government sponsored or licensed lottery winnings. A charter for the lease or hire of a vessel is an account. In addition, a health-care-insurance receivable is a subcategory of the collateral category account. Tex. Bus. & Com. Code § 9.102(a)(2).

A health-care-insurance receivable is an interest in or claim under a policy of insurance that is a right to payment of a monetary obligation for health-care goods or services provided. Tex. Bus. & Com. Code § 9.102(a)(46).

**Deposit Accounts:** A deposit account is a demand, time, savings, passbook, or similar account maintained with a bank (see Tex. Bus. & Com. Code § 9.102(a)(8), defining “bank”) but does not include investment property or an account evidenced by an instrument. Tex. Bus. & Com. Code § 9.102(a)(29). As defined, a deposit account includes an uncertificated certificate of deposit, for which there is no separate writing evidencing the bank’s obligation to pay. The Texas legislature has adopted non-uniform changes to the definition of deposit account to include a nonnegotiable certificate of deposit and to the definition of instrument to exclude from the latter a nonnegotiable certificate of deposit. Tex. Bus. & Com. Code § 9.102(a)(29), (47). The Texas UCC also has a definition for the term nonnegotiable certificate of deposit. See Tex. Bus. & Com. Code § 9.102(a)(59). Accordingly, the official comment 12 to Tex. Bus. & Com. Code § 9.102 is not accurate for a nonnegotiable certificate of deposit governed by the Texas UCC’s version of revised chapter 9.

**Commercial Tort Claims:** A commercial tort claim is a claim of an organization (see Tex. Bus. & Com. Code § 1.201(b)(25), defining “organization”) arising in tort. Tex. Bus. & Com. Code § 9.102(a)(13)(A). A commercial tort claim is also a claim of an individual arising in tort if the claim arose out of the individual’s business and does not include damages for death or personal injury. Tex. Bus. & Com. Code § 9.102(a)(13)(B). After a commercial tort claim is contractually settled, it ceases to be a commercial tort claim. A right to payment of the contractually settled commercial tort claim may be evidenced by an instrument, chattel paper, or the settlement agreement itself. In the latter case, the right to payment is a payment intangible. See Tex. Bus. & Com. Code § 9.109 cmt. 15.
General Intangibles: General intangibles are any personal property other than goods, accounts, chattel paper, commercial tort claims, deposit accounts, documents, instruments, investment property, letter-of-credit rights, or money. Tex. Bus. & Com. Code § 9.102(a)(42). There are two special subcategories within the category of general intangibles: payment intangibles and software.


Software is a computer program and includes related supporting information. However, software embedded in goods and customarily viewed as a part of the goods is treated as part of the goods and not as software under chapter 9. Tex. Bus. & Com. Code § 9.102(a)(76).

Not all intangible personal property included in the collateral category of a general intangible is a payment intangible or software. Intangible personal property exists that is neither a payment intangible nor software that nevertheless is a general intangible.

Proceeds: Proceeds are generally not considered a separate category of collateral. Rather, a secured party has a claim to proceeds that is derived from the secured party’s security interest in other collateral. Proceeds include whatever is acquired on the sale, lease, license, exchange, or other disposition of collateral (Tex. Bus. & Com. Code § 9.102(a)(65)(A)) and also include collections of and distributions with respect to collateral (Tex. Bus. & Com. Code § 9.102(a)(65)(B)), rights arising out of collateral (Tex. Bus. & Com. Code § 9.102(a)(65)(C)), and claims, including insurance payable, for loss, defects, or damage to collateral (Tex. Bus. & Com. Code § 9.102(a)(65)(D), (E)). Cash proceeds are a subcategory of proceeds and consist of proceeds that are money, checks, deposit accounts, or the like. Tex. Bus. & Com. Code § 9.102(a)(9).

Supporting Obligations: A supporting obligation is a credit enhancement, such as a guaranty and letter-of-credit right, that supports underlying collateral consisting of an account, chattel paper, a document, a general intangible, an instrument, or investment property. Tex. Bus. & Com. Code § 9.102(a)(78). A supporting obligation is incident to the collateral it supports. Collections of and distributions with respect to a supporting obligation are proceeds of the underlying collateral and of the supporting obligation itself. This characterization as proceeds has significance under the priority rules for proceeds.

§ 9.4 Creation and Attachment of Security Interest

§ 9.4:1 Generally


1. value has been given (see section 9.4:2 below);
2. the debtor has rights in the collateral (see section 9.4:3 below); and
3. one of these conditions is met:
   a. the debtor has authenticated a security agreement that contains a description of the collateral (see section 9.4:4 below);
   b. under a security agreement with the debtor, the secured party has possession of the collateral (other than a certificated security) (see section 9.4:5 below); or
c. the secured party has control of the collateral if the collateral is investment property, a deposit account, electronic chattel paper, a letter-of-credit right, or an electronic document (see section 9.4:6 below).


§ 9.4:2 Value

Value includes any consideration sufficient to support a simple contract. Examples include lending money, making a binding commitment to lend money, issuing a guarantee, or acting as an accommodation party. Value also includes satisfaction, in whole or in part, of a preexisting claim. Tex. Bus. & Com. Code § 1.204.

§ 9.4:3 Rights in Collateral

A debtor may grant a security interest only in those rights in collateral that the debtor holds. Similarly, a secured party may not enjoy greater rights in the collateral than the debtor holds, unless the Texas UCC provides otherwise. Tex. Bus. & Com. Code § 9.203(b) cmt. 6. The power of a debtor to transfer collateral is sufficient to satisfy the rights-in-the-collateral requirement. Tex. Bus. & Com. Code § 9.203(b)(2). Attachment of a security interest is conditioned on the debtor’s having rights in the collateral or the power to transfer rights in the collateral to a secured party. Limited rights in collateral, short of full ownership, are sufficient for a security interest to attach. A security interest attaches only to those rights a debtor has in collateral, however broad or limited those rights may be.


§ 9.4:4 Security Agreement

Purpose and Effect: A debtor’s authentication of a security agreement describing the collateral provides evidence, similar to the evidence required to satisfy the statute of frauds, that the parties intend to create a security interest in the described collateral. That action also renders the security interest enforceable against the debtor and results in the security interest attaching to the described collateral. Tex. Bus. & Com. Code § 9.203(a), (b)(3)(A).

Authenticated by Debtor: A security agreement must be authenticated by the debtor. Tex. Bus. & Com. Code § 9.203(b)(3)(A). The term authenticated includes a signature on a writing; a process of adopting or accepting a retrievable electronic transmission; and attaching to or logically associating with a retrievable electronic record an electronic sound, symbol, or process with the intent of adopting or accepting that record. Tex. Bus. & Com. Code § 9.102(a)(7), (70).


Future Advances and Cross-Collateralization: A security interest under chapter 9 may secure future advances, and the security agreement may provide for cross-collateralization of obligations. Tex. Bus. & Com. Code § 9.204(c). Comment 5 to section 9.204 expressly rejects the holdings of cases that require future advances to be of the same type or otherwise related to the original advance. Tex. Bus. & Com. Code § 9.204 cmt. 5.

§ 9.4:5 Possession

Possession of collateral by a secured party pursuant to a security agreement with (but not necessarily authenticated by) a debtor also evidences that the parties intend to create a security interest in the possessed collateral. If a secured party so possesses the collateral, the security interest is enforceable against the debtor and attaches. Tex. Bus. & Com. Code § 9.203(a), (b)(3)(B), (C). A secured party may possess the collateral itself or through a third party who possesses the collateral. Generally, a secured party will not rely on possession of the collateral pursuant to an unauthenticated security agreement with the debtor to create an enforceable, attached security interest in collateral. Rather, secured parties will generally obtain an authenticated security agreement, as described in section 9.4:4 above. In addition to being a means of causing a security interest to attach to collateral, possession is also a means of perfecting a security interest. Perfection by possession is more likely to occur than attachment by possession. Therefore, a more detailed discussion of the requirements of possession is contained at section 9.5:4 below, which discusses perfection by possession.

§ 9.4:6 Control

Control under chapter 9, as a method of attachment and perfection of a security interest, applies to investment property, deposit accounts, electronic chattel paper, electronic documents, and letter-of-credit rights. Tex. Bus. & Com. Code § 9.203(b)(3)(D). Control under chapter 9 does not have its common, colloquial meaning. Rather, control as used in chapter 9 has specific meanings, and specified actions must be taken to obtain control. Moreover, different actions are required to obtain control of different types of collateral. The actions to obtain control of a deposit account are set forth in section 9.104, of electronic chattel paper in section 9.105 (see also Tex. Bus. & Com. Code § 9.102(a)(31), defining “electronic chattel paper”), of investment property in sections 9.106 and 8.106, of electronic documents in section 7.106, and of letter-of-credit rights in section 9.107. Additionally, the secured party must have control of the collateral pursuant to the debtor’s security agreement. Tex. Bus. & Com. Code § 9.203(b)(3)(D). Another agreement with a third party—for example, a bank for a deposit account or a broker for a securities account—may be the agreement that establishes control of the collateral. Although attachment by control without a debtor-authenticated security agreement is possible, secured parties generally will obtain a debtor-authenticated security agreement as described in section 9.4:4 above and rely on control for perfection of the security interest, not attachment. Perfection by control is discussed in section 9.5:5 below.
§ 9.5 Perfection of Security Interest

§ 9.5:1 Generally

An unperfected security interest is subordinate to the rights of a person who becomes a lien creditor before the security interest is perfected. Tex. Bus. & Com. Code § 9.317(a)(2). Stated another way, a perfected security interest prevails over a judgment creditor using the judicial process to obtain a judgment lien on the collateral, including a trustee in bankruptcy that has the status of a lien creditor on the commencement of a bankruptcy proceeding for the debtor. Only an attached security interest may be a perfected security interest. Tex. Bus. & Com. Code § 9.308(a).

§ 9.5:2 Methods of Perfection

There are four basic methods of perfecting an attached security interest. First, a properly completed financing statement (see Tex. Bus. & Com. Code § 9.102(a)(39)) may be filed in the appropriate UCC filing offices. Second, the collateral may be in the possession of the secured party. Third, the secured party may have control of the collateral. Fourth, in a few cases, attachment of a security interest automatically perfects the security interest. For a specific category of collateral, there may be only one method of perfection or several.

§ 9.5:3 Perfection by Filing

A security interest in many types of collateral may be perfected by filing a properly completed financing statement or statements in the appropriate UCC filing offices. For certain types of collateral, a properly completed financing statement must be filed in the appropriate UCC filing offices to perfect a security interest in that collateral. Tex. Bus. & Com. Code § 9.310(a). Filing a properly completed financing statement is the only method of perfecting a security interest in accounts, a commercial tort claim, and general intangibles except for a security interest arising out of certain sales of accounts or payment intangibles. Filing a properly completed financing statement is an alternative method of perfecting a security interest in goods (other than goods governed by a certificate of title or another form of registration), negotiable documents, instruments, chattel paper, and investment property. If filing a financing statement is an alternative method of perfecting a security interest in collateral, then, with certain exceptions for goods, generally a secured party that perfects its security interest by another method can obtain priority over the secured party who perfects by filing.

Contents of Financing Statement: A financing statement under chapter 9 must (1) set forth the debtor’s name (rules for determining a debtor’s name are contained in Tex. Bus. & Com. Code § 9.503(a); see also section 9.14:2 below); (2) set forth the debtor’s mailing address; (3) indicate whether the debtor is an individual or an organization; (4) if the debtor is an individual, indicate the debtor’s surname; (5) indicate the name of the secured party or the secured party’s representative; (6) list the mailing address of the secured party or its representative; and (7) indicate the collateral covered by the financing statement. Tex. Bus. & Com. Code §§ 9.502(a), 9.516(b)(3), (4), (5). If the collateral is timber to be cut, as-extracted collateral (defined in Tex. Bus. & Com. Code § 9.102(a)(6)), or fixtures, additional information must be included on the financing statement. Tex. Bus. & Com. Code §§ 9.502(b), (c), 9.516(b)(3)(D). A secured party may file a financing statement without the debtor’s signature if the debtor authorizes the filing. Tex. Bus. & Com. Code § 9.509(a)(1). By entering into a security agreement, a debtor automatically authorizes the filing of a financing statement covering collateral described in the security agreement. Tex. Bus. & Com. Code § 9.509(b). A secured party needs separate, express authorization from the debtor to file a financing statement before the debtor has entered into a security agreement. Even though an all-asset collateral description is insufficient in a security agreement, an indication in a financing statement that the collateral is all assets or all personal property is

Where to File in a State: Chapter 9 contains choice-of-law rules to determine the jurisdiction in which filings must be made. Those rules are discussed in section 9.6 below. Chapter 9, like the official text of Uniform Commercial Code article 9, generally requires that financing statements be filed in only one office in a jurisdiction. For Texas, that is the office of the secretary of state. Local filings are required only for as-extracted collateral (defined in section 9.102(a)(6)), timber to be cut, or fixtures. Tex. Bus. & Com. Code § 9.501(a)(1). The local filing office is the real estate recording office for a mortgage on the related real property.


Under section 9.520(a) of the Texas Business and Commerce Code, a filing office may refuse to accept a financing statement or an amendment or other record related to a financing statement only for a reason set forth in section 9.516(b). If a filing office could reject the filing, but nevertheless accepts it, the filing is effective if the financing statement contains sufficient information under sections 9.502(a) and (b). Tex. Bus. & Com. Code § 9.520(c). If a filing office refuses to accept a financing statement or other record for filing for an impermissible reason, the financing statement or record is deemed as effective as if it were filed, except against a purchaser for value of the collateral that reasonably relies on the absence of the filing. Tex. Bus. & Com. Code § 9.516(d).

How Filings Are Indexed: Filings under chapter 9 are to be indexed according to the name of the debtor so they can be located by subsequent searchers. Tex. Bus. & Com. Code § 9.519(c)(1), (f)(1). Once an initial filing is made, the filing office is required to index any amendment, assignment, or continuation statement relating to the initial filing in a way that links it to the initial filing. Tex. Bus. & Com. Code § 9.519(c)(1), (f)(2). The filing office may not delete its records pertaining to any financing statement until at least one year after the financing statement has lapsed. Tex. Bus. & Com. Code § 9.522(a).


Bogus Filings: There used to be no nonjudicial means for a debtor to correct a financing statement filed against the debtor that the debtor believed was wrongful, a so-called bogus or fraudulent filing. Chapter 9 permits a debtor who believes that a
filing concerning the debtor is inaccurate or was wrongfully filed to file an information statement containing the basis for the debtor’s belief that the record is inaccurate or was wrongfully filed. The information statement becomes part of the filing record but does not affect the effectiveness of an initial financing statement or other filed record. Tex. Bus. & Com. Code § 9.518. Texas has adopted a nonuniform additional section in chapter 9 that permits an owner of property covered by a fraudulent filing to recover civil penalties against the filer and to sue to request release of the filing. Tex. Bus. & Com. Code § 9.5185. Certain financing statements by inmates and their representatives are presumptively fraudulent. For special restrictions on filings by such parties, see Tex. Civ. Prac. & Rem. Code §§ 12.001–.007 and Tex. Gov’t Code §§ 51.901, 405.022. See also the section titled “Fraudulent Filings” in chapter 2 of this manual for a description of criminal and other civil actions that may be brought against a fraudulent filer.

**Other Filing Provisions:** Additional details concerning financing statements and the UCC filing system are contained in subchapter E of chapter 9.

### § 9.5:4 Perfection by Possession

A secured party may perfect a security interest by having possession, by itself or through a third party, of the collateral. Types of collateral that may or must be perfected by possession are summarized in the following paragraphs.

**Money:** The only way a secured party may perfect its security interest in money (defined in Texas Business and Commerce Code section 1.201(b)(24)) is by possession. Tex. Bus. & Com. Code § 9.312(b)(3).

**Instruments:** A secured party may perfect a security interest in an instrument by either filing or possession. Tex. Bus. & Com. Code §§ 9.312(a), 9.313(a). The priority of a security interest in an instrument differs depending on whether perfection is by filing or possession. There is a separate perfection rule for a sale of an instrument that is a promissory note. Such a sale is a security interest under section 1.201(b)(35) and section 9.109(a)(3). A security interest arising out of a sale of a promissory note is perfected automatically, without additional action, when it attaches. Tex. Bus. & Com. Code § 9.309(4).

Even though a secured party may perfect a security interest in an instrument by merely obtaining possession of the instrument without obtaining an endorsement of the instrument, a secured party will want to obtain an endorsement to be entitled to holder-in due-course status under Texas UCC chapter 3. Tex. Bus. & Com. Code §§ 3.302(a), 3.201 (defining “negotiation”).

**Letter-of-Credit Rights:** Under chapter 9, possession of a written letter of credit does not perfect a security interest in proceeds under the letter of credit. Instead, a security interest in a letter-of-credit right that is a supporting obligation (defined in Tex. Bus. & Com. Code § 9.102(a)(78)) is automatically perfected if the security interest in the related collateral is perfected. Tex. Bus. & Com. Code § 9.308(d). If a letter-of-credit right is original collateral, and not a supporting obligation to other collateral, a security interest therein may be perfected only by control. Tex. Bus. & Com. Code § 9.312(b)(2).

**Certificated Securities:** Under chapter 9, a secured party’s taking delivery of a certificated security under section 8.301 and Tex. Bus. & Com. Code § 9.313(a) perfects its security interest. Like mere possession of an instrument, a secured party’s taking delivery of a certificated security under section 8.301, without an endorsement, perfects the secured party’s security interest in the certificated security. The secured party will want to obtain an endorsement to be entitled to “protected purchaser” status under Texas UCC chapter 8 (see Tex. Bus. & Com. Code §§ 8.303, 8.106(b)(1)) and the priority status afforded a secured party in control of a certificated security. Tex. Bus. & Com. Code § 9.328(1), (5).
If the collateral is a certificated security in registered form, attachment of a security interest occurs when the certificated security is delivered to the secured party under Texas Business and Commerce Code section 8.301. Tex. Bus. & Com. Code §§ 9.203(b)(3)(C), 9.313(e). Delivery of a certificated security to a secured party occurs when the secured party acquires possession of the certificated security, when a third party (who is not a securities intermediary) acquires possession of the certificated security on behalf of the secured party, or when a third party (who is not a securities intermediary) who already has possession of the certificated security acknowledges that it holds the certificated security for the secured party. Tex. Bus. & Com. Code § 8.301(a)(1), (2).

Delivery of a certificated security to a secured party for purposes of attaching and perfecting a security interest in the security certificate by possession also occurs when a securities intermediary (for example, a securities broker), acting on behalf of the secured party, acquires possession of the security certificate. The certificate must be in registered form and registered in the name of the secured party, payable to the order of the secured party, or endorsed to the secured party, not to the securities intermediary or in blank. Tex. Bus. & Com. Code § 8.301(a)(3).

Certificated securities are seldom endorsed on the back in the space provided for an endorsement by the registered owner to a purchaser, including a secured party. Rather, the general practice is for the registered owner to sign a stock power with respect to the certificated security. Frequently stock powers are signed in blank, that is, without designating the transferee of the certificate. If a secured party intends to perfect a security interest in a certificated security by possession, which occurs by delivery of the certificated security to a securities intermediary or broker that acts on behalf of the secured party, the secured party should take care to ensure that the security is in registered form and is appropriately endorsed, either on the back of the certificate or by an appropriate stock or bond power.

If a secured party intends to perfect its security interest by delivery of a certificated security to a securities intermediary, as described above, the secured party should also take steps to ensure that the securities intermediary retains possession of the certificated security. After a securities intermediary acquires a certificated security for a customer, in this case for the secured party, the securities intermediary often credits the security to a securities account held by the securities intermediary for its customer. The securities intermediary usually will not retain possession of the certificated security but rather will transfer the certificated security to the securities intermediary’s clearing corporation. The records of the securities intermediary will reflect the securities credited to its customer’s account. The secured party in such a situation would have to rely on “control” (see section 9.5.5 below) as the method of maintaining the perfected status of its security interest, even if the security certificate was appropriately delivered to the securities intermediary to initially perfect the secured party’s security interest by possession.


**Other Collateral:** Other collateral that may be perfected by the secured party’s taking possession of the collateral includes goods and tangible negotiable documents. Tex. Bus. & Com. Code § 9.313(a).

**Possession by Third Parties:** A secured party desiring to perfect a security interest in collateral by possession when the collateral (other than a certificated security or goods covered by a document) is in the possession of a third party must obtain an authenticated record (for example, a signed writing) from the possessor of the collateral acknowledging that it is holding the collateral for the secured party. Tex. Bus. & Com. Code § 9.313(c)(1) (compare with Tex. Bus. & Com. Code §§ 8.106(a), (b), 8.301(a)(2) for certificated securities). The third party in possession of the collateral may not be the debtor or a lessee in
the ordinary course from the debtor. Tex. Bus. & Com. Code § 9.313(c). If a secured party or a third party on behalf of the
secured party has possession of collateral, possession is not relinquished if the collateral is delivered with appropriate instruc-
tions to a possible purchaser of the collateral (other than the debtor or an ordinary-course lessee of the collateral) for inspec-

§ 9.5:5 Perfection by Control

Perfection of a security interest by control applies to investment property, deposit accounts, electronic chattel paper, electronic

Investment Property: A security interest in investment property may be perfected by control or filing. Tex. Bus. & Com.
Code §§ 9.312(a), 9.314(a). A secured party that has control of investment property has priority over another secured party
that perfects its security interest in the same property by filing a financing statement. Tex. Bus. & Com. Code § 9.328(1). Gen-
erally, chapter 9 defers to Texas UCC chapter 8 to set forth the requirements for control of investment property. Tex. Bus. &
Com. Code § 9.106(a). Control of investment property includes delivery, with endorsement, of a certificated security to the
secured party; an agreement by the issuer of an uncertificated security that the issuer will honor instructions from the secured
party without further consent of the debtor; and an agreement by a bank, broker, or other securities intermediary holding a
securities account or by a commodity intermediary that it will honor instructions from the secured party concerning the
account without further consent of the debtor. Many banks, brokers, and other securities intermediaries that regularly hold
securities accounts for their customers have their own form of a so-called control agreement for the latter instance. Control
also includes registering a security, a securities account, or a commodity account in the name of the secured party. If a secured
party is the debtor’s securities intermediary or commodity intermediary, the secured party automatically has control. Tex. Bus.

Deposit Accounts: A secured party may perfect a security interest in a deposit account as original collateral only by obtain-
ing control of the deposit account. Tex. Bus. & Com. Code §§ 9.312(b)(1), 9.314(a). Filing a financing statement does not per-
fect a security interest in a deposit account as original collateral. Tex. Bus. & Com. Code § 9.312 cmt. 5. A secured party has
control of a deposit account if it is the depositary bank or if the deposit account is in the secured party’s name. A secured party
also has control if the depositary bank agrees to comply with instructions from the secured party concerning the deposit

Electronic Chattel Paper: A security interest in electronic chattel paper may be perfected by filing or by control. Tex. Bus.


Letter-of-Credit Rights: A secured party may perfect its security interest in a letter-of-credit right that is not a supporting
obligation for other collateral only by obtaining control of the letter-of-credit right. Tex. Bus. & Com. Code §§ 9.312(b)(2),
9.314(a). A secured party has control of a letter-of-credit right if the issuer or nominated person has consented to an assign-
§ 9.107.

Electronic Documents: A security interest in an electronic document of title may be perfected by filing or by control. Tex.
§ 9.5:6 Automatic Perfection

In some cases, a security interest is automatically perfected if it has attached; no additional action other than attachment is necessary to perfect the security interest. Tex. Bus. & Com. Code § 9.309.

Automatic Perfection: The security interests that are automatically perfected on attachment under chapter 9 are—

1. a purchase-money security interest in consumer goods;
2. a sale of payment intangibles and promissory notes;
3. an assignment of accounts that does not, alone or in conjunction with other assignments to the same assignee, transfer a significant part of the outstanding accounts of the assignor;
4. an assignment of payment intangibles that does not, alone or in conjunction with other assignments to the same assignee, transfer a significant part of the payment intangibles of the assignor;
5. a security interest arising under Texas UCC chapter 2, 2A, or 4;
6. a security interest in investment property created by a securities intermediary or commodity intermediary;
7. for a temporary period, a security interest in instruments, certificated securities, and negotiable documents;
8. an assignment of a health-care-insurance receivable to the health-care provider;
9. for a temporary period, a security interest in proceeds;
10. a sale by an individual of lottery winnings; and
11. a security interest in favor of an issuer or nominated person in documents presented to the issuer or nominated person for draw under a letter of credit.


Supporting Obligation: If a security interest in an account, chattel paper, document, general intangible, instrument, or investment property is perfected, a security interest in a supporting obligation for that collateral is automatically perfected. Tex. Bus. & Com. Code §§ 9.203(f), 9.308(d). A supporting obligation is a letter-of-credit right or secondary obligation, such as a guaranty, that supports the payment or performance of an account, chattel paper, document, general intangible, instrument, or investment property. Tex. Bus. & Com. Code § 9.102(a)(78).

§ 9.5:7 Other Perfection Provisions under Chapter 9

The temporary automatic perfection periods for instruments, certificated securities, and negotiable documents is twenty days (Tex. Bus. & Com. Code § 9.312(e)), as is the temporary perfection period of a security interest in proceeds. Tex. Bus. & Com. Code § 9.315(d). A financing statement must be filed to perfect a security interest in a beneficiary’s interest in a common-law trust. Tex. Bus. & Com. Code § 9.309(13). A security interest in titled-goods inventory held for sale or lease by a dealer in the business of selling goods of that kind is perfected by filing, not by notation of the security interest on the certifi-
cate of title. A security interest in titled-goods inventory held for sale or lease by a person in the business of leasing such goods is perfected by notation on the certificate of title and not by filing. Tex. Bus. & Com. Code § 9.311(d).

§ 9.5:8 Other Means of Perfection

Federal and state statutes may provide a means of perfecting a security interest in vessels, aircraft, intellectual property, and titled goods (such as motor vehicles that are not inventory of a dealer). Compliance with these forms of perfection constitutes perfection by filing under chapter 9. Tex. Bus. & Com. Code § 9.311(a), (b).

§ 9.6 Choice of Law

§ 9.6:1 Generally

Chapter 9 contains choice-of-law provisions that determine which jurisdiction’s law governs attachment of a security interest, perfection of a security interest, and priority over another interest. If a dispute occurs in a UCC jurisdiction, the choice-of-law rules in chapter 9 of the forum jurisdiction determine which jurisdiction’s laws the forum jurisdiction is required to apply. The choice-of-law rules in the UCC do not address which law a non-UCC jurisdiction would apply.

§ 9.6:2 Contract Choice of Law

If a security agreement specifies a governing law, and if the transaction has a reasonable relationship with the chosen jurisdiction, the forum jurisdiction should apply the law of the jurisdiction specified in the security agreement to determine the contractual rights and obligations of the debtor and the secured party. Tex. Bus. & Com. Code § 1.301(a). Regardless of the jurisdiction chosen by the parties to govern their rights and obligations, the secured party and the debtor by their contract may not vary the mandatory choice-of-law rules in chapter 9 concerning perfection and priority of a security interest. Tex. Bus. & Com. Code § 1.301(b). See also Tex. Bus. & Com. Code ch. 271.

§ 9.6:3 Perfection

General Rule—Location of Debtor: Except as noted below, the law of the jurisdiction in which the debtor is located governs perfection of a security interest in collateral. Tex. Bus. & Com. Code § 9.301(1). For a debtor with multistate operations, if a security interest in collateral is perfected by filing, the jurisdiction in which the debtor is located is the filing jurisdiction. Because of the importance of the location of the debtor to the choice-of-law rule, chapter 9 provides rules to determine a debtor’s location.

Other Debtors. If the debtor is an individual, the debtor is located at his residence. If the debtor is an organization but is not a registered organization, the debtor is located at the debtor’s place of business if the debtor has only one place of business or at the debtor’s chief executive office if the debtor has more than one place of business. Tex. Bus. & Com. Code § 9.307(b).

Foreign Debtors. If the debtor is located in a jurisdiction outside the United States and that jurisdiction does not provide for a public filing system for nonpossessory security interests for a secured party to prevail over a subsequent lien creditor, the debtor is deemed to be located in the District of Columbia. Tex. Bus. & Com. Code § 9.307(c).

Possessory Security Interests: If a security interest is perfected by possession, the law of the jurisdiction in which the collateral is located governs perfection (that is, the requirements of possession) and priority of that security interest. Tex. Bus. & Com. Code § 9.301(2).

Fixtures: If a security interest in fixtures is perfected by a fixture filing, the law of the jurisdiction in which the fixtures are located governs whether perfection has occurred and the priority of conflicting security interests. Tex. Bus. & Com. Code § 9.301(3)(A).

Titled Goods: If goods are covered by a certificate of title (defined in Tex. Bus. & Com. Code § 9.102(a)(10)) issued by a particular jurisdiction, the law of the certificate-issuing jurisdiction governs whether perfection occurs. Tex. Bus. & Com. Code § 9.303(c). An exception to this rule for certificate-of-title goods applies if the goods are inventory. If titled goods are inventory, the law of the jurisdiction of the debtor’s location determines whether a security interest is perfected. Tex. Bus. & Com. Code § 9.301. Under section 9.311(d), titled goods that are inventory of a person in the business of selling such goods are treated as ordinary goods for determining whether a security interest in such goods is perfected; a notation on a certificate of title for titled goods that are inventory of such a person is not necessary or effective to perfect a security interest. See Tex. Bus. & Com. Code § 9.303 cmt. 5.

Agricultural Liens: The law of the jurisdiction in which the farm products are located governs whether an agricultural lien on the farm products is perfected. Tex. Bus. & Com. Code § 9.302.

Investment Property: If a security interest in investment property is perfected by filing, the law of the jurisdiction in which the debtor is located governs perfection. Tex. Bus. & Com. Code § 9.305(c)(1). If a security interest in investment property collateral is perfected by a means other than filing, (1) if the collateral is a security certificate, the law of the jurisdiction in which the security certificate is located determines whether a security interest in the certificated security is perfected (Tex. Bus. & Com. Code § 9.305(a)(1)); (2) if the collateral is an uncertificated security, the law of the jurisdiction under which the issuer of the uncertificated security is organized governs whether a security interest in the uncertificated security is organized governs perfection of a security interest in the uncertificated security or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer (Tex. Bus. & Com. Code § 8.110(d)); (3) if the collateral is a security account or a security entitlement, the agreement of the parties to the account or entitlement determines the jurisdiction governing perfection for the security account or security entitlement; if, however, the parties do not provide for a jurisdiction, the jurisdiction is determined by sections 8.110(e) and 9.305(a)(3) of the Texas Business and Commerce Code; and (4) if the collateral is a commodity account, the agreement of the parties to the account determines the jurisdiction governing perfection for the commodity account; if, however, the parties do not provide for a jurisdiction, the jurisdiction is determined by Tex. Bus. & Com. Code § 9.305(b).

**Letter-of-Credit Rights:** The law of the jurisdiction of the issuer or nominated person of a letter of credit generally governs perfection of a security interest in a letter-of-credit right, other than a letter-of-credit right that is a supporting obligation. The issuer’s or nominated person’s jurisdiction is determined under section 5.116 of the Texas Business and Commerce Code. Tex. Bus. & Com. Code § 9.306. If the issuer’s or nominated person’s jurisdiction is not a state (defined in Tex. Bus. & Com. Code § 9.102(a)(77)), the law of the debtor’s location determines perfection of a security interest in a letter-of-credit right. See Tex. Bus. & Com. Code § 9.306 cmts. 2, 3.

§ 9.6:4    Effect of Perfection or Nonperfection and Priority

The jurisdiction whose law governs the effect of perfection or nonperfection and priority of a security interest is sometimes different from the jurisdiction whose law governs perfection.

**Tangible Negotiable Documents, Goods, Instruments, Money, and Tangible Chattel Paper:** The jurisdiction whose law governs the effect of perfection or nonperfection and priority of a nonpossessory security interest (for example, one perfected by filing) is the jurisdiction in which the collateral is located. Tex. Bus. & Com. Code § 9.301(3)(C).

**Certificated Securities:** The jurisdiction whose law governs the effect of perfection or nonperfection and priority of a security interest in a certificated security is the jurisdiction in which the security certificate is located. Tex. Bus. & Com. Code § 9.305(a)(1).

**Uncertificated Securities:** The jurisdiction whose law governs the effect of perfection or nonperfection and priority of a security interest in an uncertificated security is the jurisdiction of the issuer of the uncertificated security. Tex. Bus. & Com. Code § 9.305(a)(2).

**Security Entitlements, Security Accounts, Commodity Contracts, and Commodity Accounts:** The jurisdiction whose law governs the effect of perfection or nonperfection and priority of a security interest in a security entitlement, security account, commodity contract, or commodity account is the jurisdiction of the securities intermediary or commodity intermediary. Tex. Bus. & Com. Code § 9.305(a)(3), (4).

**Other Collateral:** Otherwise, generally the jurisdiction whose law governs perfection of a security interest also governs the effect of perfection or nonperfection and priority of that security interest. See section 9.301(1) for accounts, commercial tort claims, and general intangibles; section 9.301(2) for possessory security interests; section 9.301(3)(A) for fixtures; section 9.301(3)(B) for timber to be cut; section 9.301(4) for as-extracted collateral; section 9.302 for farm products; section 9.303(c) for certificate-of-title goods that are not inventory; and section 9.304 for deposit accounts.

§ 9.7    Cautions

This chapter of the manual does not cover all the issues involved in complex secured transactions. Rather, this chapter provides forms and analysis to create, attach, and perfect a security interest in straightforward secured transactions.

Certain types of collateral are subject to statutes that require other steps for perfecting the security interest and are beyond the scope of this manual. See Tex. Bus. & Com. Code §§ 9.109(c), (d), 9.311(a). The following are examples.

*Titled Vehicles.* If the title to the collateral is created by a certificate of title, such as for a car, boat, or trailer, proper perfection is by registering the lien on the title.
Patents, Copyrights, and Trademarks. The federal patent office registers liens on patent, copyright, and trademark rights.

Ships and Aircraft. Federal statutes govern perfection requirements for large ships and aircraft.

Additionally, issues not applicable to other types of collateral arise if the collateral consists of fixtures or farm products.

§ 9.7:1 Fixtures

Goods are fixtures if they become so related to particular real estate that an interest in them arises under the real property law of the state in which the real property is situated. Tex. Bus. & Com. Code § 9.102(a)(41). Texas cases have generally held that personalty becomes a fixture if it is affixed to realty in such a manner that it cannot be removed without damage to the realty. The intent of the “annexing party” is a major factor in the determination. Building materials incorporated into realty are not fixtures. Tex. Bus. & Com. Code § 9.334(a).

If the secured party has a deed-of-trust lien on real property, the secured party does not need a separate security interest in the fixtures on that real property or a separate financing statement filed in the real property records. A recorded deed of trust creates and perfects a lien on the fixtures as an interest in real property if the deed of trust contains certain information. Tex. Bus. & Com. Code § 9.502(c). The deed of trust as a security agreement and financing statement is discussed at section 8.9 in this manual.

Fixtures have characteristics of both real and personal property. This dual nature accounts for the special treatment of fixtures in the security agreement and the financing statement. In the security agreement, forms 9-1 through 9-4 in this chapter, the debtor warrants that the collateral is not a fixture except as provided in the agreement. The debtor also covenants to give the secured party certain rights if the collateral becomes a fixture.

In priority conflicts involving fixtures, the parties competing with the secured party are those with real estate interests, such as a lien on the real property to which the goods are affixed. See Tex. Bus. & Com. Code § 9.334 cmt. 4. If fixtures were treated like other personalty and if the financing statements were filed with the secretary of state, parties with real estate interests would not learn of the security interest by a title search. Thus, a security agreement and financing statement covering fixtures must describe the real estate, and the financing statement must be filed in the real property records. Tex. Bus. & Com. Code § 9.502(b).

If there is any doubt about whether collateral is or may become a fixture, the secured party should file a Uniform Commercial Code fixture filing. Sections 9.5:3 above and 9.14:5 below discuss additional rules for filing.

§ 9.7:2 Farm Products and Agricultural Liens

Creating and perfecting a security interest in farm products collateral requires action under two separate and distinct systems. Creating and perfecting a security interest against competing creditors is governed by Texas Business and Commerce Code chapter 9. Perfection of that same security interest in farm products against buyers in the ordinary course of business requires compliance with the federal Food Security Act of 1985. 7 U.S.C. § 1631.

Perfection under chapter 9 is normally accomplished by the execution of a security agreement and the filing of an appropriate financing statement. In Texas, perfection against buyers in the ordinary course of business under 7 U.S.C. § 1631 (so-called “superperfection”) requires the creditor to deliver notice of the security interest to the purchaser of the farm product at any
time within one year before the sale occurs. To determine which potential buyers must receive this notice, the secured party may require the debtor to list likely purchasers of the farm products collateral (see form 9-7 in this chapter). Texas has no central filing system for farm products liens under the Food Security Act. To be effective, the superperfection prenotification notice must be delivered to the farm products buyer before the sale of the farm products. The notice remains effective for only one year after it is delivered. Secured creditors should exercise diligence to determine that their prenotification notices are timely delivered and remain effective. Farm products are not infrequently sold under forward contracts. The date of a sale under a forward contract may be ambiguous. Additionally, farm products are often warehoused after harvest for an extended period. A notice may expire during the period that farm products are warehoused. A new notice, with its new one-year effectiveness, may have to be delivered to the farm products buyer of warehoused farm products.

The required contents of a prenotification notice are unique to the Food Security Act and are much more extensive than the information contained in a financing statement. See the prenotification statement at form 9-6 for the contents of the notice.

In addition, the perfection and priority of agricultural liens may be subject to rules outside of chapter 9 of the Texas Uniform Commercial Code. For example, notwithstanding the provisions of chapter 9, an agricultural lien granted under subchapter E of Texas Property Code chapter 70 has priority over certain prior liens if certain conditions are met. See Tex. Prop. Code § 70.4045. Similarly, the statutory trust created upon acceptance of commodities to which the Perishable Agricultural Commodities Act applies may also have priority over certain previously filed UCC liens. See 7 U.S.C. §§ 499a–499s; see, e.g., Bocchi Americas Associates, Inc. v. Commerce Fresh Marketing, Inc., 515 F.3d 383 (5th Cir. 2008).

§ 9.7:3 Federal Tax Liens

A federal tax lien notice covering all personal property of a debtor may be filed in an office that is different from the office in which a financing statement against the debtor is filed. All personal property of a taxpayer that is a corporation or partnership is deemed located where the principal place of the business is located; for other taxpayers, at the taxpayer’s residence; and for a taxpayer located outside of the United States, in the District of Columbia. 26 U.S.C. § 6323(f)(2)(B). Under section 14.002 of the Texas Property Code, a notice of a federal tax lien should be filed in the office of the secretary of state for a corporation or partnership whose principal executive office is in Texas and, in all other cases, in the office of the county clerk in the county in which the person against whom the lien applies resides when the notice is filed. Tex. Prop. Code § 14.002.

As referenced in Texas Property Code section 14.002, “corporation” may refer to any entity taxed as a corporation for federal income tax purposes, and “partnership” may refer to any entity treated as a partnership for federal income tax purposes. A single-member limited liability company that does not elect to be taxed as a corporation for federal income tax purposes and is disregarded for federal income tax purposes may also be disregarded for purposes of federal tax lien notice filings. A notice of a federal tax lien filing may be made against such a limited liability company under the name of its single-member owner, and the federal tax lien may attach to the otherwise (for state law purposes) separate property of the limited liability company. Searches for outstanding liens against a debtor should also be made in the offices in which a federal tax lien notice may have been filed.

§ 9.8 Deed of Trust as Security Agreement and Financing Statement

In addition to creating a lien on the real property conveyed, the deed of trust can be modified to create a security interest in other collateral. See form 8-1 in this manual. See also section 8.11, which describes the use of a deed of trust as security agreement and financing statement.
§ 9.9 Instructions for Completing Security Agreement Forms

In the following instructions for completing the security agreement, forms 9-1 through 9-4 in this chapter, different classifications of collateral are considered separately if appropriate; otherwise, the remarks apply to all classifications of collateral. Form 9-1 is designed for use if the collateral is consumer goods or documents with respect to goods, equipment, or inventory. If addendum form 9-5 is attached, form 9-1 may also be used if the collateral is farm products. Form 9-2 is designed for use if the collateral is accounts, chattel paper, general intangibles, or a commercial tort claim. Form 9-3 is designed for use if the collateral is instruments, including a promissory note, or investment property. Form 9-4 is designed for use if the collateral is a debtor’s interest as a partner in a general or limited partnership or as a member in a limited liability company.

Parties and Name of Debtor: For general information about designation of parties and the name of the debtor, see sections 9.5:3 and 9.14:2 and chapter 3 in this manual.

Classification of Collateral: The secured party should list all classifications of the collateral subject to the security agreement. If the debtor and the secured party agree that the collateral is or may become a fixture, that fact should be noted in the classification, with language such as “equipment to become a fixture,” and the security agreement should include a legal description of the real property. See section 9.3:3 above for a list of the classifications.

Collateral: Any description of personal property or real estate is sufficient, whether it is specific or not, if it reasonably identifies what is described. Tex. Bus. & Com. Code § 9.108. In a consumer transaction, however, a description by collateral type alone is not sufficient if the collateral is consumer goods, a security entitlement, a security account, or a commodity account. Tex. Bus. & Com. Code § 9.108(e). A description by type alone is also not sufficient for a commercial tort claim. Tex. Bus. & Com. Code § 9.108(e). Several examples of alternate clauses are included in the security agreement forms, but the attorney may use any description that meets the requirements of section 9.108. See Tex. Bus. & Com. Code § 9.108 cmt. 2.

Debtor’s Representations Concerning Debtor and Locations: The security agreement forms have the debtor representing the location of the collateral, the location of the debtor’s records concerning the collateral, and the location of the debtor. If a secured party has to enforce its security interest, the secured party will need to know where the collateral and records pertaining to the collateral are located. The debtor’s location is important because under chapter 9 the filing jurisdiction generally depends on the location of the debtor. See Tex. Bus. & Com. Code § 9.301(1) and section 9.6:3 above. The filing jurisdiction under chapter 9 may be different from the jurisdiction in which the collateral is located. The security agreement may show the location where the debtor intends to keep the collateral and records concerning the collateral; the location of the debtor’s place of business or chief executive office if the debtor has more than one place of business; if the debtor is an individual, the location of the debtor’s place of business or chief executive office if the debtor has more than one place of business and the location of the debtor’s residence; and, if the debtor is a registered organization, the jurisdiction in which the debtor is organized. For most purposes, a street address or other unambiguous location should be sufficient.

The remaining representations concerning the debtor deal with information needed to complete the financing statement form.

If the collateral is or will become timber to be cut, this part of the agreement should describe the land where the collateral is or will be located. Tex. Bus. & Com. Code § 9.203(b)(3)(A). The secured party should file a financing statement in the real property records to perfect its security interest in timber to be cut, as-extracted collateral, or fixtures. Tex. Bus. & Com. Code § 9.501(a)(1). Financing statements for these types of collateral require a description of the real property. Tex. Bus. & Com. Code § 9.502(b)(3). For general information about property descriptions, see section 3.7 in this manual.
Security agreement form 9-1 is drafted for consumer goods, equipment, or inventory. With addendum form 9-5, form 9-1 can also provide coverage for farm products. By appropriately wording paragraph H.14., the parties may incorporate the addendum into the agreement. Use of the addendum for farm products to security agreement form 9-1 together with additional forms for listing of potential buyers, commission merchants, and selling agents (form 9-7) and the prenotification statement (form 9-6) allows compliance with the federal Food Security Act (7 U.S.C. § 1631).

There are two methods for documenting a security interest in a note secured by real property. One method, use of the security agreement, is discussed in the following paragraphs. The other method, use of the collateral transfer of note and lien, is discussed in section 9.18 below.

Use of security agreement form 9-3, with appropriate alternate clauses, will create a security interest in the note. Chapter 9 provides that it governs a security interest in a secured obligation (such as a note secured by real property) notwithstanding that the underlying collateral (for example, the real property) is not governed by chapter 9. Tex. Bus. & Com. Code § 9.109(b). Furthermore, if a security interest attaches under chapter 9 to a secured obligation, the security interest automatically attaches to the security interest, mortgage, or other lien that secures the secured obligation. Tex. Bus. & Com. Code § 9.203(g). Additionally, perfection of the security interest in the secured obligation automatically perfects a security interest in the security interest, mortgage, or other lien that secures the secured obligation. Tex. Bus. & Com. Code § 9.308(e). If the note is secured by real property, a properly completed transfer-of-lien form should be filed in the real property records of the county clerk in the county in which the real property is located. See form 9-1. The transfer of lien provides notice to anyone searching the real property records of the secured party’s interest in the real property. If the note is secured by personal property, a properly completed UCC3 financing statement amendment (form 9-14) should be filed in the appropriate place for the type of collateral covered. The assignment provides notice to anyone searching the personal property records of the secured party’s interest in the personal property. See section 9.12 below for further discussion.

A secured party may perfect its security interest in a note by either filing a financing statement or obtaining possession of the note. Tex. Bus. & Com. Code §§ 9.312(a), 9.313(a). A secured party that has possession of an instrument may have priority over a secured party that perfects its security interest in the instrument by filing. Tex. Bus. & Com. Code § 9.330(d). For the secured party to become a holder or a holder in due course of the note, with all the benefits that entails under chapter 3 of the Texas Business and Commerce Code, the payee or, if different, the current holder of the note must endorse the note to the secured party. Among the advantages of a secured party becoming a holder in due course of the note is that the secured party also becomes the person entitled to enforce the note. Tex. Bus. & Com. Code § 3.301. The note transferred may be endorsed as follows:

[Date of transfer]

Pay to the order of [name of secured party] as collateral in accordance with the security agreement dated [date].

[Name of payee/holder]

Additionally, notice of the security interest may be given to the maker of the note to prevent a prepayment of the note to the payee.
§ 9.10 Additional Clauses

§ 9.10:1 After-Acquired Property

The Texas Business and Commerce Code authorizes and validates a security interest in after-acquired property if the security agreement so provides. See Tex. Bus. & Com. Code § 9.204(a). The secured party may include the parenthetical language whether now owned and all after-acquired collateral of the same classification on forms 9-1 through 9-4 in this chapter, under the heading “Collateral,” to include after-acquired property. No security interest attaches to after-acquired consumer goods (other than accessions) if they are given as additional security, unless the debtor acquires rights in the goods within ten days after the secured party gives value. Tex. Bus. & Com. Code § 9.204(b). Additionally, a security interest in a commercial tort claim attaches only to such a claim that exists when the security agreement is entered into and not to an after-acquired claim. Tex. Bus. & Com. Code § 9.204(b).

§ 9.10:2 Other Debt/Future Advances

The Texas Business and Commerce Code provides that a security interest secures future advances to the debtor if the security agreement so provides. See Tex. Bus. & Com. Code § 9.204(c). To secure future advances, include the appropriate optional language under the heading “Obligation” in forms 9-1 through 9-4 in this chapter or use a modified form of the all-indebtedness or other-indebtedness clauses in form 8-6 in this manual.

§ 9.10:3 Purchase-Money Security Interest


§ 9.10:4 Attorney’s Fee Provision

The attorney’s fee provision in forms 9-1, 9-2, 9-3, and 9-4 in this chapter is in paragraph D.2. If the loan transaction to which the security agreement relates is governed by Texas Finance Code chapter 342, then section 502 of that chapter limits attorney’s fees that may be charged and assessed to those assessed by a court. Tex. Fin. Code § 342.502(b)(2). A loan is governed by chapter 342 if it is made by a lender engaged in the business of making, arranging, or negotiating loans governed by that chapter; the interest rate exceeds 10 percent per year; the loan proceeds will be used for personal, family, or household use; and either the loan is not secured by a lien on real property or the loan is a secondary mortgage loan. Tex. Fin. Code § 342.005. See also the commentary on promissory notes at section 6.2:7 in this manual. If the related loan is governed by chapter 342, the attorney’s fee clause should be modified as indicated.

§ 9.11 Additional Documents

For almost all transactions involving a security agreement, at least two other documents are necessary. The promissory note is described in chapter 6 in this manual, and the UCC1 financing statement, form 9-11, is described in section 9.13 below.
If a security agreement, like form 9-4, covers a debtor’s interest as a partner in a general or limited partnership or as a member in a limited liability company, the secured party may need the consent of other partners, managers, or members, as applicable, to be able to create, attach, perfect, enforce, and foreclose its security interest. For entities formed under Texas law, a limited partnership agreement may restrict assignability of a partner’s partnership interest in the limited partnership (see Tex. Bus. Orgs. Code § 153.251); a general partnership does not have to give effect to a transfer or assignment of a partner’s partnership interest that is prohibited by its partnership agreement (see Tex. Bus. Orgs. Code § 152.405); and the regulations of a limited liability company may restrict assignability of a member’s membership interest in the limited liability company (see Tex. Bus. Orgs. Code § 101.108(a)).

Partnership agreements and regulations of limited liability companies frequently contain provisions prohibiting any assignment, including a grant of a security interest, of a partner’s or member’s interest in the applicable entity and stating that any such purported assignment or grant of a security interest is void. Sometimes assignment of an interest is permitted after obtaining consent. The requirements for consent may vary widely. The attorney for the secured party should review the applicable partnership agreement, limited liability company regulations, or comparable document for an entity formed under the laws of another jurisdiction to determine the assignability of the debtor’s interest in the entity and what consents may be required. Restrictions on assignability of personal property as security for an obligation are disfavored under chapter 9.

Generally, the interest of a partner in a general or limited partnership or of a member in a limited liability company is a general intangible under chapter 9 and not a security, certificated or uncertificated, under chapter 8. See Tex. Bus. & Com. Code § 8.103(c). Under chapter 9, a term in an agreement relating to a general intangible that prohibits, restricts, or requires consent to the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the general intangible is ineffective to impair the creation, attachment, or perfection of a security interest or to render such creation, attachment, or perfection a default or breach of the agreement. Tex. Bus. & Com. Code § 9.408(a). Section 9.408 does not, however, apply to an interest in a partnership or a limited liability company. Tex. Bus. & Com. Code § 9.408(c). Thus, restrictions on assignability in a partnership agreement, in regulations of a limited liability company, or in comparable documents for partnership or limited liability companies formed under laws of other states are effective to prevent the creation, attachment, or perfection of a security interest in a partner’s or member’s interest in the entity and to render such creation, attachment, or perfection a default under the partnership agreement, limited liability company agreement, or other comparable document if so provided in the entity’s documents.

Moreover, even if a security interest is created, attached, and perfected in a person’s interest in such an entity and there are anti-assignment provisions in the entity’s organizational documents, neither the entity nor its partners or members owe any duty to the secured party and the secured party may not enforce its security interest. Tex. Bus. & Com. Code § 9.408(d). Depending on the bargaining position of the parties and more likely depending on the relative ownership interest of the debtor in the entity, the secured party may be able to obtain the consent by the entity or other owners of the entity to the creation, attachment, perfection, and enforcement of its security interest. The required consent should come from the persons whose consent is required under the organizational documents of the entity to an outright assignment of an owner’s interest in the entity. In paragraph C.5. of security agreement form 9-4, the debtor represents that it has obtained the consent of all persons necessary to authorize the secured party to exercise its rights under the security agreement. This provision should be modified if such a consent is required under the organizational documents of the entity in which the debtor has an interest but is not obtained. A form of a consent is at form 9-10.
§ 9.12 Assignment of Security Interest

The secured party may assign the security interest created by the security agreement either before or after the interest is perfected, in accordance with section 9.514 of the Texas Business and Commerce Code.

If the financing statement is not filed before assignment of the security interest, the financing statement may show the assignment by giving the assignee’s name and address. Tex. Bus. & Com. Code § 9.514. One way to show the assignment is to prepare a form UCC1Ad financing statement addendum (form 9-12 in this chapter) to the UCC1 financing statement (form 9-11) to reflect the assignee of the secured party. The financing statement addendum should be attached to and filed with the financing statement.

If the financing statement is filed before the assignment, the parties should prepare a form UCC3 financing statement amendment (form 9-14), including the financing statement’s file number and date of filing, the assignor’s name, and the assignee’s name and address. The financing statement amendment should be filed in the same filing office or offices as the assigned original financing statement. Tex. Bus. & Com. Code § 9.514. See section 9.15:2 below for additional instructions concerning the UCC3 financing statement amendment.

The assigning secured party should endorse the note and deliver it, the original security agreement, and the filing officer’s acknowledgment copy of the original financing statement to the assignee.

§ 9.13 Financing Statement and Other UCC Forms

§ 9.13:1 General Considerations


Filing a financing statement will not perfect a security interest in certain classifications of collateral. See section 9.5 above for an explanation of the different methods of perfecting a security interest and the type of collateral that may be perfected under each method.

Another exception to the financing statement requirement is a purchase-money security interest in consumer goods, which is perfected automatically. Even though this automatic perfection protects the retailer’s rights against the consumer, retailers selling expensive merchandise often file a financing statement to protect themselves in case a debtor sells to another consumer. Without a financing statement on file, the subsequent sale would destroy the retailer’s interest in the collateral. Tex. Bus. & Com. Code §§ 9.309, 9.320(b).

§ 9.13:2 Cautions

A financing statement is constructive notice to all parties of a secured party’s rights in collateral. To give constructive notice of a security interest, the financing statement must be filed in the proper office. If there is doubt about the proper filing place, the attorney should file the financing statement in every place that might be appropriate. See Tex. Bus. & Com. Code § 9.501(a).

Certain types of collateral, such as motor vehicles and manufactured housing, are covered by other statutes and may require additional documentation, such as certificates of title. Other examples of such collateral include patents, trademarks, rolling stock, ships, and aircraft. See Tex. Bus. & Com. Code § 9.311(b).

§ 9.14 Instructions for Completing Form UCC1

§ 9.14:1 General Considerations

Nonstandard forms of financing statements should not be used in Texas. Texas filing offices may reject tendered written filings that are not on a standard form adopted by rule by the Texas secretary of state. Tex. Bus. & Com. Code § 9.5211.

See section 9.19 below for how to obtain a UCC1 and other financing statement forms. The attorney should review section 9.310(b) for a listing of collateral for which a financing statement is either unnecessary or ineffective in perfecting a security interest. See also section 9.5 above for a discussion of perfection of a security interest.

§ 9.14:2 Blocks 1, 2, and 3: Names of Debtor and Secured Party

For general information about designation of parties, see chapter 3 in this manual.

The debtor’s correct name is crucial to the validity of the financing statement because records are indexed on that basis. The names of the debtor and of the secured party should appear on this form exactly as they appear on the security agreement. If the debtor is a registered organization, the debtor’s name is the name stated to be the registered organization’s name on the public organic record most recently filed with, issued by, or enacted by the debtor’s jurisdiction of organization that states, amends, or restates the debtor’s name. Tex. Bus. & Com. Code § 9.503(a)(1). For a Texas filing entity (as defined in Tex. Bus. Orgs. Code § 1.002(22)), this means that the debtor’s name is the name stated to be the name of the filing entity on its certificate of formation or a restated certificate of formation and all amendments to an original or restated certificate of formation. Special rules apply for an entity that is a trust or a decedent’s estate. Tex. Bus. & Com. Code § 9.503(a)(1), (2), (3), (f), (h). If the debtor is an individual, the financing statement must use the name of the debtor as shown on the most recently issued unexpired Texas driver’s license or most recently issued unexpired Texas Department of Public Safety–issued identification certificate and indicate the debtor’s surname. Tex. Bus. & Com. Code §§ 9.503(a)(4), (g), 9.516(b)(3). If the debtor does not have a driver’s license or identification certificate, the financing statement must provide the individual name of the debtor or the surname and first personal name of the debtor. Tex. Bus. & Com. Code § 9.503(a)(5). A trade name is not a sufficient name of a debtor. Tex. Bus. & Com. Code § 9.503(c). Any name used for a debtor other than the correct name renders the financing statement insufficient and seriously misleading unless the name used is so similar to the debtor’s correct name that a search under the debtor’s correct name, using the filing office’s standard search logic, would disclose the filing with the incorrect name. Tex. Bus. & Com. Code § 9.506(c).
If the debtor’s name changes and the change renders the original form seriously misleading, the secured party must file a UCC3 financing statement amendment (form 9-14 in this chapter) with the correct name within four months of the change to continue the security interest. Tex. Bus. & Com. Code § 9.507(c). A filing is seriously misleading if a search under the changed, now correct name, using the filing office’s standard search logic, would not disclose the filing under the former, now incorrect, name. Tex. Bus. & Com. Code § 9.506(c).

§ 9.14:3 Block 4: Classification and Description of Collateral

For a general discussion of the significance of classification of collateral, see section 9.3:3 above.


A financing statement that correctly describes the original collateral continues perfection in after-acquired property, proceeds, and future advances without specific reference to these interests in the financing statement. If a financing statement is recorded and the general description in the financing statement shows that a security interest exists, any affected creditor should contact the secured party to determine if the security interest extends to such after-acquired property, proceeds, or future advances.

If the collateral is timber to be cut, fixtures, or as-extracted collateral, the description in the financing statement must include a description of both the collateral and the real property where it is located. Tex. Bus. & Com. Code § 9.502(b). The real property description must be “sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in . . . a mortgage.” Tex. Bus. & Com. Code § 9.502(b)(3). For a general discussion of property descriptions, see section 3.7 in this manual.

§ 9.14:4 Concluding the Form

Block 3 of the form designates the secured party or its assignee. If the financing statement has been filed before assignment of the interest, the assignor should prepare a written assignment and also complete a form UCC3 financing statement amendment (form 9-14 in this chapter) for each UCC1 on file. Tex. Bus. & Com. Code § 9.514(b). See section 9.12 above for further suggestions.

A financing statement may be filed without the debtor’s signature on it if the debtor authorizes the filing. See Tex. Bus. & Com. Code § 9.509(a)(1). By entering into a security agreement a debtor automatically authorizes the filing of a financing statement covering the collateral described in the security agreement. Tex. Bus. & Com. Code § 9.509(b). If a secured party wants to file a financing statement before the debtor has entered into a security agreement, the secured party needs separate express authorization from the debtor. One way to evidence the debtor’s authorization is to have the debtor sign the financing statement. However, the UCC1 financing statement standard form does not provide a space for the debtor’s signature. Another way to evidence the debtor’s authorization is to have the debtor sign a statement, to which a copy of the completed form UCC1 is attached, authorizing the filing of the form.
§ 9.14:5  Filing

If Texas is the correct state in which to file a financing statement and no other statutory perfection rules apply, the proper office in which to file is determined by the classification of the collateral. Generally, the secretary of state’s office in Austin is the proper place to file a financing statement.

Exceptions to this general rule involve collateral significantly related to real property. For timber to be cut or as-extracted collateral, or if the financing statement is filed as a fixture filing, the proper place to file is in the real property records of the county clerk in the county in which the related real property is located. However, if the secured party has a deed-of-trust lien on the real property and a security interest in the timber to be cut, as-extracted collateral, or fixtures, the secured party does not need to file a separate financing statement in the real property records, assuming that the deed of trust otherwise meets the requirements of a financing statement. Tex. Bus. & Com. Code § 9.502(b), (c).

The secretary of state accepts electronic filing of UCC financing statements through its website, [www.sos.state.tx.us/ucc/uccforms.shtml](http://www.sos.state.tx.us/ucc/uccforms.shtml).

A party in doubt about the proper place to file should file the statement in every possible place.

These rules apply only to Texas transactions. Filings may be required in other jurisdictions. See the discussion of perfection at section 9.6:3 above.

§ 9.15  Additional Documents

A typical security interest transaction requires a note, discussed in chapter 6 in this manual; a security agreement, forms 9-1 through 9-4 in this chapter; and a financing statement. Other documents that may be necessary include a form UCC1Ad financing statement addendum (form 9-12), a form UCC3 financing statement amendment (form 9-14), a form UCC3Ad financing statement amendment addendum (form 9-15), and a form UCC11 information request (form 9-16).

§ 9.15:1  Financing Statement Addendum

The form UCC1Ad financing statement addendum, form 9-12 in this chapter, serves several purposes.

The financing statement addendum may be used to identify an additional debtor, if there are more than two (the first two may be identified on the form UCC1 financing statement) (see item 11 of the form UCC1Ad); identify an additional secured party (see item 12 of the form); and reflect an assignment by the initial secured party to an assignee (see item 12 of the form). The form may also be used to indicate if the financing statement covers timber to be cut, as-extracted collateral, or fixtures (see item 13 of the form); if so the form provides space to include a description of the real estate (see item 14 of the form) and the name of the record owner (if the debtor does not have a record interest) (see item 15 of the form). The form also provides space for an expanded description of the collateral (see item 16 of the form). The form may be used to indicate whether the debtor is a trust, a trustee for property held in trust, a decedent’s estate (see item 17 of the form), or a transmitting utility (see item 18 of the form) or to indicate whether the filing is for a manufactured housing transaction or a public finance transaction (see item 18 of the form).
The name of the first debtor, identified in item 1 on the form UCC1 financing statement, should be inserted in item 9 of the related financing statement addendum to relate the financing statement addendum to the financing statement. The remaining items of the form should be completed only if appropriate.

The form UCC1Ad financing statement addendum should be attached to and filed with its related form UCC1 financing statement and not filed separately.

§ 9.15:2 Financing Statement Amendment

The form UCC3 financing statement amendment, form 9-14 in this chapter, serves several purposes, some of which are discussed in sections 9.9, 9.12, 9.14:2, and 9.14:4 above, in relation to the security agreement and financing statement.

The form provides for continuation of a security interest beyond the five-year duration of the original filing (Tex. Bus. & Com. Code § 9.515); assignment of a security interest if the assignment is made after the original financing statement is filed (Tex. Bus. & Com. Code § 9.514(b)); termination of a security interest, which is a required procedure for the secured party if “there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value” (Tex. Bus. & Com. Code § 9.513(a)(1), (c)(1)); partial release of collateral; and amendment of the financing statement.

A separate form UCC3 should be used for each form UCC1 already filed, and each form UCC3 should relate to a particular financing statement by giving the financing statement’s file number and, because the Texas secretary of state does not use a unique number system that distinguishes among filings made in different years, the date of filing. The form UCC3 does not provide a separate block for the filing date of the related initial financing statement. The date of filing should be inserted in block 1a after the initial financing statement file number. The form UCC3 financing statement amendment should be filed in the same filing office or offices as the original financing statement to which it relates.

If, after a financing statement is filed in the correct state, the jurisdiction of the location of the debtor changes (for example, for a registered organization, the debtor changes its jurisdiction of organization; or for an organization that is not a registered organization, the debtor changes the state in which its place of business is located or, if the debtor has more than one place of business, the state in which its chief executive office is located; or for an individual debtor, the debtor changes his state of residence), the original filing is effective for only four months after the move. Tex. Bus. & Com. Code § 9.316(a)(2). The financing statement becomes ineffective to continue a perfected security interest unless the secured party files a form UCC3 in the state in which the debtor has relocated within the four-month period. Tex. Bus. & Com. Code § 9.316(a), (b). A mere change of an address within a state of the location of the collateral, the location of a debtor’s place of business or chief executive office, or the location of an individual’s residence does not render an original filing ineffective.

If, after a financing statement is filed using the debtor’s then-correct name, the debtor’s name changes and the change renders the original filed financing statement seriously misleading, a UCC3 financing statement amendment with the changed, now correct name of the debtor must be filed within four months of the name change to continue the perfection by filing of the security interest. Tex. Bus. & Com. Code § 9.507(c). An original filing becomes seriously misleading if a search under the changed, now correct name, using the filing office’s standard search logic, would not disclose the filing under the former, now incorrect name. Tex. Bus. & Com. Code § 9.506(c).
§ 9.15:3  Financing Statement Amendment Addendum

The form UCC3Ad financing statement amendment addendum, form 9-15 in this chapter, is used to indicate additional information that cannot be included in the spaces provided in the form UCC3 financing statement amendment, form 9-14. It should be attached to and filed with the related form UCC3 financing statement amendment and not filed separately.

§ 9.15:4  Financing Statement Search

The form UCC11 information request, form 9-18 in this chapter, is the device commonly used to search for records of other secured interests in the property that may have priority over the interest being created. See Tex. Bus. & Com. Code § 9.523(c). To expedite this process, the attorney may use a private service that can complete a search quickly or an online service that can immediately verify the existence of a financing statement.

Like form UCC1, form UCC11 provides adequate instructions on its reverse side for completing the form.

§ 9.16  Extension and Termination

Most financing statements are effective for five years, after which they automatically expire. Tex. Bus. & Com. Code § 9.515(a). A financing statement filed in connection with a manufactured-home transaction or a public-finance transaction that indicates that fact is effective for thirty years from the date it is filed. Tex. Bus. & Com. Code § 9.515(b). The secured party may file a form UCC3 financing statement amendment (form 9-14 in this chapter) as a continuation statement not earlier than six months before the termination date. See sections 9.15:2 and 9.15:3 above. Once a financing statement has expired, the previous priority position is gone and a refiling of the financing statement will be effective on the date of refiling. Tex. Bus. & Com. Code § 9.515(c). The secretary of state accepts electronic filing of continuation and termination financing statements through its website, www.sos.state.tx.us/ucc/uccforms.shtml.

If after a financing statement is filed there is no longer an obligation secured by the collateral covered by the financing statement and there is no commitment to make an advance, incur an obligation, or otherwise give value, a termination statement on form UCC3 should be filed. Tex. Bus. & Com. Code § 9.513(a), (c). When a termination statement is filed the related financing statement ceases to be effective. Tex. Bus. & Com. Code § 9.513(d).

§ 9.17  Prefiling Financing Statement

A financing statement may be filed at any time, even before the security agreement is made. Tex. Bus. & Com. Code § 9.502(d). To fully protect the secured party, a financing statement can be filed, and then, after the filing office confirms that the secured party has the desired priority position, the funds can be advanced. The debtor must authorize the secured party to file a financing statement before a security agreement is made. See sections 9.5:3 and 9.14:4 above.

§ 9.18  Collateral Transfer of Note and Lien

§ 9.18:1  General Considerations

In most secured transactions, the collateral (for example, the equipment) is the source of the security. However, in a transaction involving the pledge of a note secured by real property, the note itself may not be the primary source of security; the
underlying real property may be the actual collateral. Therefore, the secured party and the attorney must carefully review the underlying transaction to understand the value of the collateral. The title policy, deed of trust, survey, financial reports, engineering reports, appraisals, and environmental reports may contain critical information.

§ 9.18:2 Instructions for Completing Collateral Transfer of Note and Lien

Parties: For general information about designation of parties, see chapter 3 in this manual.

Collateral Note: The collateral transfer of note and lien, form 9-8 in this chapter, contains a sample description of the note being pledged to the secured party. The description must be drafted to cover the actual note.

Current Balance: The current balance is that of the underlying collateral note. It is part of the debtor’s representations in the agreement.

Collateral Note Security: The form contains a sample description of the deed of trust on the underlying collateral note. The description must be drafted to cover the actual deed of trust and other collateral documents.

Property Description: For general information on property descriptions, see chapter 3.

Obligation: The agreement should identify the note that the collateral secures.

The subheading “Other obligation” is appropriate if the form secures an obligation other than a note, such as the performance of a guaranty or indemnity or performance under a lease agreement.

Collateral Note Payments: Two alternate example clauses are shown on the agreement.

§ 9.18:3 Perfection

The security interest may be perfected by possession or by filing a financing statement covering the collateral note. A secured party that perfects its security interest in a collateral note by possession has priority over a secured party that perfects its security interest in the collateral note by filing a financing statement.

§ 9.18:4 Recording

It is recommended that the secured party record the collateral transfer of note and lien as soon as possible in the real property records, to put all parties dealing with the real property on notice of the secured party’s interest in the collateral note and the real property securing the collateral note. Merely recording the collateral transfer of note and lien in the real property records does not perfect the secured party’s security interest if the secured party (or a third party on its behalf) does not obtain possession of the collateral note or file a financing statement covering the note.

§ 9.18:5 Endorsement

To obtain the rights of a holder and of a holder in due course under Texas Business and Commerce Code chapter 3, the secured party must secure the payee’s (or, if different, the current holder’s) endorsement on the collateral note. Among the advantages of a secured party becoming a holder in due course of the collateral note is that the secured party also becomes the person entitled to enforce the collateral note. Tex. Bus. & Com. Code § 3.301. The endorsement may read as follows:
Pay to the order of [name of secured party] as collateral in accordance with collateral transfer of note and lien dated [date].

After the debt is repaid, the secured party should return the collateral note to the debtor. Additionally, either the secured party should endorse the collateral note to the debtor, or the debtor, on reacquiring the collateral note, may cancel its endorsement to the secured party. Tex. Bus. & Com. Code § 3.207. If the collateral transfer of note and lien has been recorded, the secured party should sign a release of collateral transfer of note and lien (see form 10-21 in this manual), and that document should be recorded.

§ 9.18:6 Collateral Note Maker’s Estoppel Certificate

As additional security for the loan, the secured party should consider requiring the collateral note maker to sign the certificate set forth as form 9-9 in this chapter.

§ 9.19 Obtaining UCC Forms

The UCC forms in this manual are available in a fill-in-the-blank format over the Internet from the Texas secretary of state at www.sos.state.tx.us/ucc/uccforms.shtml.
Security Agreement

Basic Information

Date:

Debtor:

Debtor’s Mailing Address:

Secured Party:

Secured Party’s Mailing Address:

Classification of Collateral: [select one or more of the following: Documents covering goods/Equipment/Equipment to become a fixture/Inventory/Consumer goods/Farm products]

Collateral (including all accessions):

All of Debtor’s interest in the following personal property and all proceeds [include if a purchase-money security interest in inventory is involved: , including chattel paper or instruments constituting proceeds of the inventory and in proceeds of such chattel paper and instruments.] of such property, including [describe the specific collateral or select one or more of the following: documents, including documents of title, warehouse receipts, and bills of lading, covering equipment and/or inventory; equipment; inventory; consumer goods consisting of [describe goods]; and farm products [, wherever located]] [include if applicable: , and [all after-acquired collateral of the same classification/all products, increase, and offspring of the collateral]].
Obligation

Note

Date:

Original principal amount:

Borrower (Obligor):

Other debt/Future advances: The security interest also secures all other present and future debts and liabilities of Debtor and/or Obligor to Secured Party, including future advances.

Other obligation[s]:

A. **Debtor’s Representations Concerning Debtor and Locations**

   A.1. The collateral is located solely at [**address, city, state**].

   Include one or more of the following paragraphs as applicable and modify paragraph numbers as appropriate.

   A.2. [Debtor’s place of business/Debtor’s chief executive office] is located at [**address, city, state**].

   Include the following if the debtor is an individual.

   A.3. Debtor’s residence is located at [**address, city, state**].

   Include the following if the debtor is a corporation, limited partnership, or limited liability company.
A.3. Debtor’s state of organization is [Texas/[state]], and Debtor’s name, as shown in its public organic record, as amended, is exactly as set forth above.

A.4. Debtor’s records concerning the Collateral are located at [address, city, state].

B. Granting Clause

Debtor grants to Secured Party a security interest in the Collateral and all its proceeds to secure the Obligation and all renewals, modifications, and extensions of the Obligation. Debtor authorizes Secured Party to file a financing statement describing the Collateral.

C. Debtor Represents the Following:

C.1. No financing statement covering the Collateral is filed in any public office [include if the secured party has prefiled a financing statement or otherwise has a financing statement on file: except any financing statement in favor of Secured Party].

C.2. Debtor owns the Collateral and has the authority to grant this security interest, free from any setoff, claim, restriction, security interest, or encumbrance except liens for taxes not yet due.

C.3. None of the Collateral is an accession to any goods, is commingled with other goods, is or will become an accession or part of a product or mass with other goods, or is or will become covered by a document except as provided in this agreement.

C.4. All information about Debtor’s financial condition is or will be accurate when provided to Secured Party.

C.5. None of the Collateral is affixed to real estate.
C.6. The Obligation was not incurred primarily for personal, family, or household purposes.

C.7. The collateral was not acquired and will not be held primarily for personal, family, or household purposes.

D. Debtor Agrees to—

D.1. Defend the Collateral against all claims adverse to Secured Party’s interest; pay all taxes imposed on the Collateral or its use; keep the Collateral free from liens, except for liens in favor of Secured Party or for taxes not yet due; keep the Collateral in Debtor’s possession and ownership except as otherwise provided in this agreement; maintain the Collateral in good condition; and protect the Collateral against waste, except for ordinary wear and tear.

D.2. Pay all Secured Party’s expenses, including reasonable attorney’s fees and legal expenses [include for a loan transaction subject to Texas Finance Code section 342.502: assessed by a court], incurred to (a) obtain, preserve, perfect, defend, or enforce this agreement; (b) retake, hold, prepare for disposition, dispose, collect, or enforce the Collateral; or (c) collect or enforce the Obligation. These expenses will bear interest from the date of advance at the rate stated in the Note for matured, unpaid amounts and are payable on demand at the place where the Obligation is payable. These expenses and interest are part of the Obligation and are secured by this agreement.

D.3. Sign and deliver to Secured Party any documents or instruments that Secured Party considers necessary to obtain, maintain, and perfect this security interest in the Collateral. This includes a certificate of title for any Collateral covered by a certificate of title so that Secured Party may have the certificate of title reissued with its lien noted thereon.
D.4. Notify Secured Party immediately of any event of default and of any material change (a) in the Collateral, (b) in Debtor’s Mailing Address, (c) in the location of any Collateral, (d) in any other representation in this agreement, or (e) that may affect this security interest, or of any change (f) in Debtor’s name or (g) of any location set forth above to another state.

D.5. Use the Collateral primarily according to the stated classification.

D.6. Maintain accurate records of the Collateral at the address set forth above, furnish Secured Party any requested information related to the Collateral, and permit Secured Party to inspect and copy all records relating to the Collateral.

D.7. Permit Secured Party to inspect the Collateral.

D.8. Deliver to Secured Party on receipt all chattel paper or instruments constituting proceeds of the inventory and, at Secured Party’s request, deposit all checks, items, and other cash proceeds of the inventory in a special bank account designated by Secured Party, who alone will have power of withdrawal.

E. Debtor Agrees Not to—

E.1. Sell, transfer, or encumber any of the Collateral, except in the ordinary course of Debtor’s business.

E.2. Except as permitted in this agreement, permit the Collateral to be affixed to any real estate, to become an accession to any goods, to be commingled with other goods, to become a fixture, accession, or part of a product or mass with other goods, or to be covered by a document, except a document in the possession of Secured Party.
E.3. Change its name or jurisdiction of organization, merge or consolidate with any person, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is a corporation, limited partnership, or limited liability company.

E.3. Change the state in which Debtor’s place of business (or chief executive office if Debtor has more than one place of business) is located, change its name, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is an entity other than a corporation, limited partnership, or limited liability company.

E.3. Change Debtor’s name or state of residence without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is an individual.

E.4. Deliver any item of inventory to a buyer before the buyer delivers to Debtor a check, another item, money, an instrument, or chattel paper in full payment therefor or commingle any check, item, money, or other cash proceeds from the sale or lease of an item of inventory with any of Debtor’s other funds or property.
F. Insurance and Risk of Loss

F.1. Debtor will insure the Collateral in accordance with Secured Party’s reasonable requirements regarding choice of carrier, risks insured against, and amount of coverage. Policies must be written in favor of Debtor, be endorsed to name Secured Party as an additional insured or as otherwise directed in writing by Secured Party, and provide that Secured Party will receive at least ten days’ notice before cancellation. Debtor must provide copies of the policies or evidence of insurance to Secured Party.

F.2. COLLATERAL PROTECTION INSURANCE NOTICE

In accordance with the provisions of section 307.052(a) of the Texas Finance Code, the Secured Party hereby notifies the Debtor as follows:

(A) the Debtor is required to:

(i) keep the collateral insured against damage in the amount the Secured Party specifies;

(ii) purchase the insurance from an insurer that is authorized to do business in the state of Texas or an eligible surplus lines insurer; and

(iii) name the Secured Party as the person to be paid under the policy in the event of a loss;

(B) the Debtor must, if required by the Secured Party, deliver to the Secured Party a copy of the policy and proof of the payment of premiums; and
(C) if the Debtor fails to meet any requirement listed in Paragraph (A) or
(B), the Secured Party may obtain collateral protection insurance on behalf of the
Debtor at the Debtor’s expense.

F.3. Debtor assumes all risk of loss to the Collateral.

F.4. Debtor appoints Secured Party as attorney-in-fact to collect any returned
unearned premiums and proceeds of any insurance on the Collateral and to endorse and
deliver to Secured Party any payment from such insurance made payable to Debtor. Debtor’s
appointment of Secured Party as Debtor’s agent is coupled with an interest and if Debtor is an
individual will survive any disability of Debtor.

G. Default and Remedies

G.1. A default exists if—

a. Debtor, Obligor, or any secondary obligor fails to timely pay or perform
any obligation or covenant in any written agreement between Secured
Party and any of Debtor, Obligor, or secondary obligor;

b. any representation in this agreement or in any other written agreement
between Secured Party and any of Debtor, Obligor, or secondary obligor is
materially false when made;

c. a receiver is appointed for Debtor, Obligor, any secondary obligor, or any
Collateral;

d. any Collateral is assigned for the benefit of creditors;

e. a bankruptcy or insolvency proceeding is commenced by Debtor, a part-
nership in which Debtor is a general partner, Obligor, or any secondary
obligor;
f. a bankruptcy or insolvency proceeding is commenced against Debtor, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor, and the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered;

g. any of the following parties is terminated, begins to wind up its affairs, is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of any of the following parties: Debtor; a partnership of which Debtor is a general partner; Obligor; or any secondary obligor; or

h. any Collateral is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly replaced with collateral of like kind and quality or restored to its former condition.

G.2. If a default exists, Secured Party may—

a. demand, collect, convert, redeem, settle, compromise, receipt for, realize on, sue for, and adjust the Collateral either in Secured Party’s or Debtor’s name, as Secured Party desires, or take control of any proceeds of the Collateral and apply the proceeds against the Obligation;

b. take possession of any Collateral not already in Secured Party’s possession, without demand or legal process, and for that purpose Debtor grants Secured Party the right to enter any premises where the Collateral may be located;
c. without taking possession, sell, lease, or otherwise dispose of the Collateral at any public or private sale in accordance with law; or

d. exercise any rights and remedies granted by law or this agreement.

G.3. Foreclosure of this security interest by suit does not limit Secured Party’s remedies, including the right to sell the Collateral under the terms of this agreement. Secured Party may exercise all remedies at the same or different times, and no remedy is a defense to any other. Secured Party’s rights and remedies include all those granted by law and those specified in this agreement.

G.4. Secured Party’s delay in exercising, partial exercise of, or failure to exercise any of its remedies or rights does not waive Secured Party’s rights to subsequently exercise those remedies or rights. Secured Party’s waiver of any default does not waive any other default by Debtor. Secured Party’s waiver of any right in this agreement or of any default is binding only if it is in writing. Secured Party may remedy any default without waiving it.

G.5. Secured Party has no obligation to clean or otherwise prepare the Collateral for sale.

G.6. Secured Party has no obligation to satisfy the Obligation by attempting to collect the Obligation from any other person liable for it. Secured Party may release, modify, or waive any collateral provided by any other person to secure any of the Obligation. If Secured Party attempts to collect the Obligation from any other person liable for it or releases, modifies, or waives any collateral provided by any other person, that will not affect Secured Party’s rights against Debtor. Debtor waives any right Debtor may have to require Secured Party to pursue any third person for any of the Obligation.
G.7. If Secured Party must comply with any applicable state or federal law requirements in connection with a disposition of the Collateral, such compliance will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.8. Secured Party may sell the Collateral without giving any warranties as to the Collateral. Secured Party may specifically disclaim any warranties of title or the like. This procedure will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.9. If Secured Party sells any of the Collateral on credit, Debtor will be credited only with payments actually made by the purchaser and received by Secured Party for application to the indebtedness of the purchaser. If the purchaser fails to pay for the Collateral, Secured Party may resell the Collateral and Debtor will be credited with the proceeds of the sale.

G.10. If Secured Party purchases any of the Collateral being sold, Secured Party may pay for the Collateral by crediting the purchase price against the Obligation.

G.11. Secured Party has no obligation to marshal any assets in favor of Debtor or against or in payment of the Note, any of the Other Obligation[s], or any other obligation owed to Secured Party by Debtor or any other person.

G.12. If the Collateral is sold after default, recitals in the bill of sale or transfer will be prima facie evidence of their truth and all prerequisites to the sale specified by this agreement and by law will be presumed satisfied.

H. General

H.1. Secured Party may at any time—
a. take control of proceeds of insurance on the Collateral and reduce any part of the Obligation accordingly or permit Debtor to use the funds to repair or replace the Collateral and

b. purchase single-interest insurance coverage that will protect only Secured Party if Debtor fails to maintain insurance, and premiums for the insurance will become part of the Obligation.

H.2. Notice is reasonable if it is mailed, postage prepaid, to Debtor at Debtor’s Mailing Address at least ten days before any public sale or ten days before the time when the Collateral may be otherwise disposed of without further notice to Debtor.

H.3. This security interest will attach to after-acquired consumer goods only to the extent permitted by law.

H.4. This security interest will neither affect nor be affected by any other security for any of the Obligation. Neither extensions of any of the Obligation nor releases of any of the Collateral will affect the priority or validity of this security interest.

H.5. This agreement binds, benefits, and may be enforced by the successors in interest of Secured Party and will bind all persons who become bound as debtors to this agreement. Assignment of any part of the Obligation and Secured Party’s delivery of any part of the Collateral will fully discharge Secured Party from responsibility for that part of the Collateral. If such an assignment is made, Debtor will render performance under this agreement to the assignee. Debtor waives and will not assert against any assignee any claims, defenses, or setoffs that Debtor could assert against Secured Party except defenses that cannot be waived. All representations and obligations are joint and several as to each Debtor.

H.6. This agreement may be amended only by an instrument in writing signed by Secured Party and Debtor.
H.7. The unenforceability of any provision of this agreement will not affect the enforceability or validity of any other provision.

H.8. This agreement will be construed according to Texas law, without regard to choice-of-law rules of any jurisdiction. This agreement is to be performed in [include if applicable in a consumer transaction: , and has been signed by Debtor in,] the county of Secured Party’s Mailing Address.

H.9. Interest on the Obligation secured by this agreement will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Obligation or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Obligation or, if the principal of the Obligation has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Obligation.

H.10. In no event may this agreement secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

H.11. When the context requires, singular nouns and pronouns include the plural.

H.12. Any term defined in sections 1.101 to 9.709 of the Texas Business and Commerce Code and not defined in this agreement has the meaning given to the term in the Code.

H.13. Except for inventory collateral, if the Obligation includes purchase money for the Collateral, Debtor’s repayment of the Obligation will be applied on a first-in-first-out basis with the effect that the portion of the Obligation used to purchase a particular item of Collateral will be paid in the chronological order in which Debtor purchased the Collateral.
H.14. The farm products addendum is attached to this agreement and incorporated into it for all purposes. [Attach form 9-5 in this chapter.]

H.15. Debtor waives and surrenders to Secured Party (a) Debtor’s power to authorize anyone (other than Secured Party or Debtor) to pay ad valorem taxes on the Collateral and (b) Debtor’s power to authorize a taxing entity to transfer its tax lien on the Collateral to anyone other than Secured Party. Debtor agrees and declares that any authorization from Debtor to another (other than Secured Party) to pay the taxes and transfer a tax lien on the Collateral is void.

[Name of debtor]
Form 9-2

Security Agreement
[Accounts, Chattel Paper, General Intangibles, Commercial Tort Claims]

Basic Information

Date:

Debtor:

Debtor’s Mailing Address:

Secured Party:

Secured Party’s Mailing Address:

Classification of Collateral: [select one or more of the following: [Accounts/Chattel paper/
General intangibles/Commercial tort claim]]

Collateral:

All of Debtor’s interest in the following personal property and all supporting obligations and proceeds of such property [describe the specific collateral or select one or more of the following: accounts; chattel paper; general intangibles; commercial tort claims arising out of Debtor’s claim against [name] and other persons; and all rights to payment arising out of a judgment or settlement of such commercial tort claim, including under any instrument, chattel paper, or settlement agreement] [include if applicable: and all after-acquired collateral of the same classification].

Obligation

Note
Date:

Original principal amount:

Borrower (Obligor):

Other debt/Future advances: The security interest also secures all other present and future debts and liabilities of Debtor and/or Obligor to Secured Party, including future advances.

Other obligation[s]:

A. Debtor’s Representations Concerning Debtor and Locations

A.1. The chattel paper collateral is located solely at [address, city, state].

A.2. [Debtor’s place of business/Debtor’s chief executive office] is located at [address, city, state].

A.3. Debtor’s residence is located at [address, city, state].

A.3. Debtor’s state of organization is [Texas/[state]], and Debtor’s name, as shown in its public organic record, as amended, is exactly as set forth above.

A.4. Debtor’s records concerning the Collateral are located at [address, city, state].
B. Granting Clause

Debtor grants to Secured Party a security interest in the Collateral and all its proceeds to secure the Obligation and all renewals, modifications, and extensions of the Obligation. Debtor authorizes Secured Party to file a financing statement describing the Collateral.

C. Debtor Represents the Following:

C.1. No financing statement covering the Collateral is filed in any public office [include if the secured party has prefiled a financing statement or otherwise has a financing statement on file: except any financing statement in favor of Secured Party].

C.2. Debtor owns the Collateral and has the authority to grant this security interest, free from any setoff, claim, restriction, security interest, or encumbrance except liens for taxes not yet due.

C.3. All information about Debtor’s financial condition is or will be accurate when provided to Secured Party.

C.4. Each account and chattel paper in the Collateral is and will be the valid, legally enforceable obligation of a third-party account debtor or obligor.

C.5. If any Collateral or proceeds include obligations of third parties to Debtor, the transactions creating those obligations conform and will conform in all respects to applicable state and federal consumer credit law.

C.6. The chattel paper Collateral is in tangible, not electronic, form and has only one original counterpart. No person, other than Debtor or Secured Party, has actual or constructive possession of any chattel paper Collateral.
D. **Debtor Agrees to**—

\[D.1.\] Defend the Collateral against all claims adverse to Secured Party’s interest; pay all taxes imposed on the Collateral; keep the Collateral free from liens, except for liens in favor of Secured Party or for taxes not yet due; and keep the Collateral in Debtor’s possession and ownership except as otherwise provided in this agreement.

\[D.2.\] Pay all Secured Party’s expenses, including reasonable attorney’s fees and legal expenses [**include for a loan transaction subject to Texas Finance Code section 342.502:** assessed by a court], incurred to (a) obtain, preserve, perfect, defend, or enforce this agreement; (b) retake, hold, prepare for disposition, dispose, collect, or enforce the Collateral; or (c) collect or enforce the Obligation. These expenses will bear interest from the date of advance at the rate stated in the Note for matured, unpaid amounts and are payable on demand at the place where the Obligation is payable. These expenses and interest are part of the Obligation and are secured by this agreement.

\[D.3.\] Sign and deliver to Secured Party any documents or instruments that Secured Party considers necessary to obtain, maintain, and perfect this security interest in the Collateral.

\[D.4.\] Notify Secured Party immediately of any event of default and of any material change (a) in the Collateral, (b) in Debtor’s Mailing Address, (c) in the location of any Collateral, (d) in any other representation or warranty in this agreement, or (e) that may affect this security interest, or of any change (f) in Debtor’s name or (g) of any location set forth above to another state.

\[D.5.\] Use the Collateral primarily according to the stated classification.
D.6. Maintain accurate records of the Collateral at the address set forth above; furnish Secured Party any requested information related to the Collateral; and permit Secured Party to inspect and copy all records relating to the Collateral.

D.7. Preserve the liability of all obligors on the Collateral and preserve the priority of all security for the Collateral.

D.8. On Secured Party’s demand, hold payments, including instruments, items, and money received as proceeds of the Collateral, separate and in an express trust for Secured Party and deposit all such payments received as proceeds of the Collateral in a special bank account designated by Secured Party, who alone will have power of withdrawal.

D.9. Inform Secured Party immediately of the rejection of property, a delay in delivery or performance, or a claim made in regard to any Collateral.

D.10. As trustee for Secured Party, keep returned property segregated from Debtor’s other property until Secured Party has been paid the amount loaned against the related account and deliver the property on demand to Secured Party.

D.11. Pay Secured Party the unpaid amount of an account in the Collateral under any of the following conditions: if the account is not paid when due; if a purchaser rejects the property or services covered by the account; or if Secured Party rejects the account as unsatisfactory. Secured Party may retain the account in the Collateral and may charge any deposit account of Debtor with the unpaid amount.

D.12. Cause each chattel paper in the Collateral to have only one original counterpart and, at the request of Secured Party, (a) immediately deliver to Secured Party all current and after-acquired chattel paper Collateral in Debtor’s possession and either endorse it to Secured Party’s order or give Secured Party appropriate executed powers, (b) obtain the acknowledgment of any other person in possession of chattel paper Collateral of Secured Party’s security
interest in the Collateral, or (c) mark each chattel paper in the Collateral with a legend indicating that it is subject to a security interest under this agreement.

### E. Debtor Agrees Not to—

**E.1.** Sell, transfer, or encumber any of the Collateral, except in the ordinary course of Debtor’s business.

Select one of the following.

- Include the following if the debtor is a corporation, limited partnership, or limited liability company.

**E.2.** Change its name or jurisdiction of organization, merge or consolidate with any person, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

- Include the following if the debtor is an entity other than a corporation, limited partnership, or limited liability company.

**E.2.** Change Debtor’s name or state of residence without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

- Include the following if the debtor is an individual.

**E.2.** Change Debtor’s name or state of residence without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.
E.3. Modify any agreement related to the Collateral.

E.4. Commingle the Collateral or any proceeds with any of Debtor’s other funds or property.

F. Insurance and Risk of Loss

F.1. Debtor will insure the Collateral in accordance with Secured Party’s reasonable requirements regarding choice of carrier, risks insured against, and amount of coverage. Policies must be written in favor of Debtor, be endorsed to name Secured Party as an additional insured or as otherwise directed in writing by Secured Party, and provide that Secured Party will receive at least ten days’ notice before cancellation. Debtor must provide copies of the policies or evidence of insurance to Secured Party.

F.2. COLLATERAL PROTECTION INSURANCE NOTICE

In accordance with the provisions of section 307.052(a) of the Texas Finance Code, the Secured Party hereby notifies the Debtor as follows:

(A) the Debtor is required to:

(i) keep the collateral insured against damage in the amount the Secured Party specifies;

(ii) purchase the insurance from an insurer that is authorized to do business in the state of Texas or an eligible surplus lines insurer; and

(iii) name the Secured Party as the person to be paid under the policy in the event of a loss;
(B) the Debtor must, if required by the Secured Party, deliver to the Secured Party a copy of the policy and proof of the payment of premiums; and

(C) if the Debtor fails to meet any requirement listed in Paragraph (A) or (B), the Secured Party may obtain collateral protection insurance on behalf of the Debtor at the Debtor’s expense.

F.3. Debtor assumes all risk of loss to the Collateral.

F.4. Debtor appoints Secured Party as attorney-in-fact to collect any returned unearned premiums and proceeds of any insurance on the Collateral and to endorse and deliver to Secured Party any payment from such insurance made payable to Debtor. Debtor’s appointment of Secured Party as Debtor’s agent is coupled with an interest and if Debtor is an individual will survive any disability of Debtor.

G. Default and Remedies

G.1. A default exists if—

a. Debtor, Obligor, or any secondary obligor fails to timely pay or perform any obligation or covenant in any written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor;

b. any representation in this agreement or in any other written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor is materially false when made;

c. a receiver is appointed for Debtor, Obligor, any secondary obligor, or any Collateral;

d. any Collateral is assigned for the benefit of creditors;
e. a bankruptcy or insolvency proceeding is commenced by Debtor, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor;

f. a bankruptcy or insolvency proceeding is commenced against Debtor, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor, and the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered;

g. any of the following parties is terminated, begins to wind up its affairs, is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of any of the following parties: Debtor; a partnership of which Debtor is a general partner; Obligor; or any secondary obligor; or

h. any Collateral is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly replaced with collateral of like kind and quality or restored to its former condition.

G.2. If a default exists, Secured Party may—

a. demand, collect, convert, redeem, settle, compromise, receipt for, realize on, sue for, and adjust the Collateral either in Secured Party’s or Debtor’s name, as Secured Party desires, or take control of any proceeds of the Collateral and apply the proceeds against the Obligation;
b. take possession of any Collateral not already in Secured Party’s possession, without demand or legal process, and for that purpose Debtor grants Secured Party the right to enter any premises where the Collateral may be located;

c. without taking possession, sell, lease, or otherwise dispose of the Collateral at any public or private sale in accordance with law;

d. exercise any rights and remedies granted by law or this agreement;

e. notify obligors on the Collateral to pay Secured Party directly and enforce Debtor’s rights against such obligors; or

f. as Debtor’s agent, make any endorsements in Debtor’s name and on Debtor’s behalf.

G.3. Foreclosure of this security interest by suit does not limit Secured Party’s remedies, including the right to sell the Collateral under the terms of this agreement. Secured Party may exercise all remedies at the same or different times, and no remedy is a defense to any other. Secured Party’s rights and remedies include all those granted by law and those specified in this agreement.

G.4. Secured Party’s delay in exercising, partial exercise of, or failure to exercise any of its remedies or rights does not waive Secured Party’s rights to subsequently exercise those remedies or rights. Secured Party’s waiver of any default does not waive any other default by Debtor. Secured Party’s waiver of any right in this agreement or of any default is binding only if it is in writing. Secured Party may remedy any default without waiving it.

G.5. Secured Party has no obligation to clean or otherwise prepare the Collateral for sale.
G.6. At any time Secured Party may contact obligors on the Collateral directly to verify information furnished by Debtor.

G.7. Secured Party has no obligation to collect any of the Collateral and is not liable for failure to collect any of the Collateral, for failure to preserve any rights pertaining to the Collateral, or for any act or omission on the part of Secured Party or Secured Party’s officers, agents, or employees, except willful misconduct.

G.8. Secured Party has no obligation to satisfy the Obligation by attempting to collect the Obligation from any other person liable for it. Secured Party may release, modify, or waive any collateral provided by any other person to secure any of the Obligation. If Secured Party attempts to collect the Obligation from any other person liable for it or releases, modifies, or waives any collateral provided by any other person, that will not affect Secured Party’s rights against Debtor. Debtor waives any right Debtor may have to require Secured Party to pursue any third person for any of the Obligation.

G.9. If Secured Party must comply with any applicable state or federal law requirements in connection with a disposition of the Collateral, such compliance will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.10. Secured Party may sell the Collateral without giving any warranties as to the Collateral. Secured Party may specifically disclaim any warranties of title or the like. This procedure will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.11. If Secured Party sells any of the Collateral on credit, Debtor will be credited only with payments actually made by the purchaser and received by Secured Party for application to the indebtedness of the purchaser. If the purchaser fails to pay for the Collateral, Secured Party may resell the Collateral and Debtor will be credited with the proceeds of the sale.
G.12. If Secured Party purchases any of the Collateral being sold, Secured Party may pay for the Collateral by crediting the purchase price against the Obligation.

G.13. Secured Party has no obligation to marshal any assets in favor of Debtor or against or in payment of the Note, any of the Other Obligation[s], or any other obligation owed to Secured Party by Debtor or any other person.

G.14. If the Collateral is sold after default, recitals in the bill of sale or transfer will be prima facie evidence of their truth and all prerequisites to the sale specified by this agreement and by law will be presumed satisfied.

H. General

H.1. Secured Party may at any time—

a. take control of proceeds of insurance on the Collateral and reduce any part of the Obligation accordingly or permit Debtor to use the funds to repair or replace the Collateral and

b. purchase single-interest insurance coverage that will protect only Secured Party if Debtor fails to maintain insurance, and premiums for the insurance will become part of the Obligation.

H.2. Notice is reasonable if it is mailed, postage prepaid, to Debtor at Debtor’s Mailing Address at least ten days before any public sale or ten days before the time when the Collateral may be otherwise disposed of without further notice to Debtor.

H.3. This security interest will attach to an after-acquired commercial tort claim only to the extent permitted by law.
H.4. This security interest will neither affect nor be affected by any other security for any of the Obligation. Neither extensions of any of the Obligation nor releases of any of the Collateral will affect the priority or validity of this security interest.

H.5. This agreement binds, benefits, and may be enforced by the successors in interest of Secured Party and will bind all persons who become bound as debtors to this agreement. Assignment of any part of the Obligation and Secured Party’s delivery of any part of the Collateral will fully discharge Secured Party from responsibility for that part of the Collateral. If such an assignment is made, Debtor will render performance under this agreement to the assignee. Debtor waives and will not assert against any assignee any claims, defenses, or setoffs that Debtor could assert against Secured Party except defenses that cannot be waived. All representations and obligations are joint and several as to each Debtor.

H.6. This agreement may be amended only by an instrument in writing signed by Secured Party and Debtor.

H.7. The unenforceability of any provision of this agreement will not affect the enforceability or validity of any other provision.

H.8. This agreement will be construed according to Texas law, without regard to choice-of-law rules of any jurisdiction. This agreement is to be performed in [include if applicable in a consumer transaction: ] the county of Secured Party’s Mailing Address.

H.9. Interest on the Obligation secured by this agreement will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Obligation or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Obligation or, if the
principal of the Obligation has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Obligation.

H.10. In no event may this agreement secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

H.11. When the context requires, singular nouns and pronouns include the plural.

H.12. Any term defined in sections 1.101 to 9.709 of the Texas Business and Commerce Code and not defined in this agreement has the meaning given to the term in the Code.

[Name of debtor]
Form 9-3

Security Agreement
[Instruments, Investment Property]

Basic Information

Date:

Debtor:

Debtor’s Mailing Address:

Secured Party:

Secured Party’s Mailing Address:

Classification of Collateral: [select one or both of the following: [Instruments [and]/Investment property]]

Collateral:

All of Debtor’s interest in the following personal property and all supporting obligations and proceeds of such property: [describe the specific collateral as follows: that certain [[title of instrument]/note], dated [date], in the original face amount of $[amount], issued by [name] as maker and payable to [name] as payee/all instruments or notes acquired by or payable to Debtor arising out of Debtor’s sale of lots in the [name] subdivision otherwise known as [insert legal description]/[number] shares of [describe class or series of preferred or common] stock of [name of corporation] represented by certificate number[s] [number[s]], brokerage account number [number], maintained in the name of Debtor with [name of broker or securities intermediary]/
instruments, including promissory notes/investment property, including securities

[include if applicable: and all after-acquired collateral of the same classification].

Obligation

Note

Date:

Original principal amount:

Borrower (Obligor):

Include either or both of the following if applicable.

Other debt/Future advances: The security interest also secures all other present and future
debts and liabilities of Debtor and/or Obligor to Secured Party, including future advances.

Other obligation[s]:

Continue with the following.

A. Debtor’s Representations Concerning Debtor and Locations

Include one or more of the following paragraphs as applicable and modify paragraph numbers as appropriate.

A.1. [Debtor’s place of business/Debtor’s chief executive office] is located at [address, city, state].

Include the following if the debtor is an individual.

A.2. Debtor’s residence is located at [address, city, state].

Include the following if the debtor is a corporation, limited partnership, or limited liability company.
A.2. Debtor’s state of organization is [Texas/[state]], and Debtor’s name, as shown in its public organic record, as amended, is exactly as set forth above.

A.3. Debtor’s records concerning the Collateral are located at [address, city, state].

B. Granting Clause

Debtor grants to Secured Party a security interest in the Collateral and all its proceeds to secure the Obligation and all renewals, modifications, and extensions of the Obligation. Debtor authorizes Secured Party to file a financing statement describing the Collateral.

C. Debtor Represents the Following:

C.1. No financing statement covering the Collateral is filed in any public office [include if the secured party has prefilled a financing statement or otherwise has a financing statement on file: except any financing statement in favor of Secured Party].

C.2. Debtor owns the Collateral and has the authority to grant this security interest, free from any setoff, claim, restriction, security interest, or encumbrance except liens for taxes not yet due.

C.3. All information about Debtor’s financial condition is or will be accurate when provided to Secured Party.

C.4. Each instrument and security, certificated or uncertificated, in the Collateral is and will represent the valid, legally enforceable obligation of the issuer thereof.

C.5. The transaction under which each instrument and security, certificated or uncertificated, in the Collateral was issued and transferred to Debtor conforms and will conform in all respects to applicable state and federal law, including securities law and consumer credit law.
D. Debtor Agrees to—

D.1. Defend the Collateral against all claims adverse to Secured Party’s interest; pay all taxes imposed on the Collateral; keep the Collateral free from liens, except for liens in favor of Secured Party or for taxes not yet due; keep the Collateral in Debtor’s possession and ownership except as otherwise provided in this agreement; maintain the Collateral in good condition; and protect the Collateral against waste, except for ordinary wear and tear.

D.2. Pay all Secured Party’s expenses, including reasonable attorney’s fees and legal expenses [include for a loan transaction subject to Texas Finance Code section 342.502: assessed by a court], incurred to (a) obtain, preserve, perfect, defend, or enforce this agreement; (b) retake, hold, prepare for disposition, dispose, collect, or enforce the Collateral; and (c) collect or enforce the Obligation. These expenses will bear interest from the date of advance at the rate stated in the Note for matured, unpaid amounts and are payable on demand at the place where the Obligation is payable. These expenses and interest are part of the Obligation and are secured by this agreement.

D.3. Sign and deliver to Secured Party any documents or instruments that Secured Party considers necessary to obtain, maintain, and perfect this security interest in the Collateral and take any action requested by Secured Party for Secured Party to obtain control of investment property in the Collateral.

D.4. Notify Secured Party immediately of any event of default and of any material change (a) in the Collateral, (b) in Debtor’s Mailing Address, (c) in the location of any Collateral, (d) in any other representation or warranty in this agreement, or (e) that may affect this security interest, or of any change (f) in Debtor’s name or (g) of any location set forth above to another state.

D.5. Use the Collateral primarily according to the stated classification.
D.6. Maintain accurate records of the Collateral at the address set forth above; furnish Secured Party any requested information related to the Collateral; and permit Secured Party to inspect and copy all records relating to the Collateral.

D.7. If the Collateral is not in the possession or control of Secured Party, permit Secured Party to inspect the Collateral.

D.8. Immediately deliver to Secured Party, with an assignment or endorsement, current and after-acquired instruments and certificated securities in the Collateral.

D.9. Preserve the liability of all obligors on the Collateral and preserve the priority of all security for the Collateral.

D.10. On Secured Party’s demand, deposit all payments received as proceeds of the Collateral in a special bank account designated by Secured Party, who alone will have power of withdrawal.

D.11. Cause all obligors on the Collateral to pay and perform all their obligations and inform Secured Party immediately of the default in the payment or performance of any Collateral.

E. Debtor Agrees Not to—

E.1. Sell, transfer, or encumber any of the Collateral [include if applicable: except in the ordinary course of Debtor’s business].

Select one of the following.

Include the following if the debtor is a corporation, limited partnership, or limited liability company.
E.2. Change its name or jurisdiction of organization, merge or consolidate with any person, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is an entity other than a corporation, limited partnership, or limited liability company.

E.2. Change the state in which Debtor’s place of business (or chief executive office if Debtor has more than one place of business) is located, change its name, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is an individual.

E.2. Change Debtor’s name or state of residence without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Continue with the following.

E.3. Modify any term of any instrument or security in the Collateral.

E.4. Commingle any payment on the Collateral with any of Debtor’s other funds or property.

F. Default and Remedies

F.1. A default exists if—
a. Debtor, Obligor, or any secondary obligor fails to timely pay or perform any obligation or covenant in any written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor;

b. any representation in this agreement or in any other written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor is materially false when made;

c. a receiver is appointed for Debtor, Obligor, any secondary obligor, or any Collateral;

d. any Collateral is assigned for the benefit of creditors;

e. a bankruptcy or insolvency proceeding is commenced by Debtor, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor;

f. a bankruptcy or insolvency proceeding is commenced against Debtor, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor, and the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered;

g. any of the following parties is terminated, begins to wind up its affairs, is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of any of the following parties: Debtor; a partnership of which Debtor is a general partner; Obligor; or any secondary obligor; or
h. any Collateral is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly replaced with collateral of like kind and quality or restored to its former condition.

**F.2.** If a default exists, Secured Party may—

a. demand, collect, convert, redeem, settle, compromise, receipt for, realize on, sue for, and adjust the Collateral either in Secured Party’s or Debtor’s name, as Secured Party desires, or take control of any proceeds of the Collateral and apply the proceeds against the Obligation;

b. take possession of any Collateral not already in Secured Party’s possession, without demand or legal process, and for that purpose Debtor grants Secured Party the right to enter any premises where the Collateral may be located;

c. without taking possession, sell, lease, or otherwise dispose of the Collateral at any public or private sale in accordance with law;

d. exercise any rights and remedies granted by law or this agreement;

e. notify obligors on the Collateral to pay Secured Party directly;

f. as Debtor’s agent, make any endorsements in Debtor’s name and on Debtor’s behalf of any instruments in the Collateral and to any proceeds of the Collateral;

g. exercise and enforce all rights, including voting rights, available to an owner of the Collateral; and

h. transfer record ownership of any Collateral to Secured Party.
F.3. Foreclosure of this security interest by suit does not limit Secured Party’s remedies, including the right to sell the Collateral under the terms of this agreement. Secured Party may exercise all remedies at the same or different times, and no remedy is a defense to any other. Secured Party’s rights and remedies include all those granted by law and those specified in this agreement.

F.4. Secured Party’s delay in exercising, partial exercise of, or failure to exercise any of its remedies or rights does not waive Secured Party’s rights to subsequently exercise those remedies or rights. Secured Party’s waiver of any default does not waive any other default by Debtor. Secured Party’s waiver of any right in this agreement or of any default is binding only if it is in writing. Secured Party may remedy any default without waiving it.

F.5. Secured Party has no obligation to clean or otherwise prepare the Collateral for sale.

F.6. Other than exercising reasonable care to assure safe custody of the Collateral in its possession, Secured Party has no responsibility for the Collateral. Secured Party has no obligation to collect any of the Collateral and is not liable for failure to collect any of the Collateral, for failure to preserve any right pertaining to the Collateral, or for any act or omission on the part of Secured Party or Secured Party’s officers, agents, or employees, except willful misconduct.

F.7. Secured Party has no obligation to satisfy the Obligation by attempting to collect the Obligation from any other person liable for it. Secured Party may release, modify, or waive any collateral provided by any other person to secure any of the Obligation. If Secured Party attempts to collect the Obligation from any other person liable for it or releases, modifies, or waives any collateral provided by any other person, that will not affect Secured Party’s rights against Debtor. Debtor waives any right Debtor may have to require Secured Party to pursue any third person for any of the Obligation.
F.8. If Secured Party must comply with any applicable state or federal law requirements in connection with a disposition of the Collateral, such compliance will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

F.9. Secured Party may sell the Collateral without giving any warranties as to the Collateral. Secured Party may specifically disclaim any warranties of title or the like. This procedure will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

F.10. If Secured Party sells any of the Collateral on credit, Debtor will be credited only with payments actually made by the purchaser and received by Secured Party for application to the indebtedness of the purchaser. If the purchaser fails to pay for the Collateral, Secured Party may resell the Collateral and Debtor will be credited with the proceeds of the sale.

F.11. If Secured Party purchases any of the Collateral being sold, Secured Party may pay for the Collateral by crediting the purchase price against the Obligation.

F.12. Secured Party has no obligation to marshal any assets in favor of Debtor or against or in payment of the Note, any of the Other Obligation[s], or any other obligation owed to Secured Party by Debtor or any other person.

F.13. If the Collateral is sold after default, recitals in the bill of sale or transfer will be prima facie evidence of their truth and all prerequisites to the sale specified by this agreement and by law will be presumed satisfied.

G. General

G.1. Notice is reasonable if it is mailed, postage prepaid, to Debtor at Debtor’s Mailing Address at least ten days before any public sale or ten days before the time when the Collateral may be otherwise disposed of without further notice to Debtor.
G.2. This security interest will neither affect nor be affected by any other security for any of the Obligation. Neither extensions of any of the Obligation nor releases of any of the Collateral will affect the priority or validity of this security interest.

G.3. This agreement binds, benefits, and may be enforced by the successors in interest of Secured Party and will bind all persons who become bound as debtors to this agreement. Assignment of any part of the Obligation and Secured Party’s delivery of any part of the Collateral will fully discharge Secured Party from responsibility for that part of the Collateral. If such an assignment is made, Debtor will render performance under this agreement to the assignee. Debtor waives and will not assert against any assignee any claims, defenses, or setoffs that Debtor could assert against Secured Party except defenses that cannot be waived. All representations and obligations are joint and several as to each Debtor.

G.4. This agreement may be amended only by an instrument in writing signed by Secured Party and Debtor.

G.5. The unenforceability of any provision of this agreement will not affect the enforceability or validity of any other provision.

G.6. This agreement will be construed according to Texas law, without regard to choice-of-law rules of any jurisdiction. This agreement is to be performed in [include if applicable in a consumer transaction: , and has been signed by Debtor in,] the county of Secured Party’s Mailing Address.

G.7. Interest on the Obligation secured by this agreement will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Obligation or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Obligation or, if the
principal of the Obligation has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Obligation.

G.8. In no event may this agreement secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

G.9. When the context requires, singular nouns and pronouns include the plural.

G.10. Any term defined in sections 1.101 to 9.709 of the Texas Business and Commerce Code and not defined in this agreement has the meaning given to the term in the Code.

[Name of debtor]
Security Agreement
[Interest in Noncorporate Entity]

Basic Information

Date:

Debtor:

Debtor’s Mailing Address:

Secured Party:

Secured Party’s Mailing Address:

Classification of Collateral: General intangibles

Collateral:

All of Debtor’s interest in the following personal property and all proceeds of that property [describe the specific collateral as in the following example]:

a. Debtor’s undivided interest as a [general partner/limited partner/member] in and to that certain [general partnership/limited partnership/limited liability company] named [name of company] (the “Company”), described in the [[limited/general] partnership agreement/limited liability company [agreement/regulations]] of the Company dated [date], by and between Debtor and other [partners/members] of the Company, as amended or modified and in effect (the “Company Agreement”), together with all of Debtor’s other rights, title, and interest of every kind and character whatever in and to the Company and under the Company Agreement; and
b. all of Debtor’s share of profits, distributions, income, and surplus from the
Company and Debtor’s interest in specific properties of the Company on dis-
solution or otherwise.

Obligation

Note

Date:

Original principal amount:

Borrower (Obligor):

Include either or both of the following if applicable.

Other debt/Future advances: The security interest also secures all other present and future
debts and liabilities of Debtor and/or Obligor to Secured Party, including future
advances.

Other obligation[s]:

Continue with the following.

A. Debtor’s Representations Concerning Debtor and Locations

Include one or more of the following paragraphs as applicable
and modify paragraph numbers as appropriate.

A.1. [Debtor’s place of business/Debtor’s chief executive office] is located at [address, city, state].

Include the following if the debtor is an individual.

A.2. Debtor’s residence is located at [address, city, state].
A.2. Debtor’s state of organization is [Texas/[state]], and Debtor’s name, as shown in its public organic record, as amended, is exactly as set forth above.

A.3. The Company’s state of organization is [Texas/[state]], and the Company’s name, as shown in its organizational documents, as amended, is exactly as set forth above.

A.4. Debtor’s records concerning the Collateral are located at [address, city, state].

B. Granting Clause

Debtor grants to Secured Party a security interest in the Collateral and all its proceeds to secure the Obligation and all renewals, modifications, and extensions of the Obligation. Debtor authorizes Secured Party to file a financing statement describing the Collateral.

C. Debtor Represents the Following:

C.1. No financing statement covering the Collateral is filed in any public office [include if the secured party has prefiled a financing statement or otherwise has a financing statement on file: except any financing statement in favor of Secured Party].

C.2. Debtor owns the Collateral and has the authority to grant this security interest, free from any setoff, claim, restriction, security interest, or encumbrance except liens for taxes not yet due.

C.3. All information about Debtor’s financial condition is or will be accurate when provided to Secured Party.
C.4. An accurate copy of the Company Agreement has been delivered to Secured Party. There are no changes to the Company Agreement not reflected in the copy delivered to Secured Party.

C.5. Debtor has obtained the written consent of all persons required under the Company Agreement or otherwise to authorize the security interest created by this agreement and Secured Party’s exercise of its rights hereunder. On request of Secured Party, Debtor will deliver to Secured Party an executed original of that consent.

D. Debtor Agrees to—

D.1. Defend the Collateral against all claims adverse to Secured Party’s interest; pay all taxes imposed on the Collateral; keep the Collateral free from liens, except for liens in favor of Secured Party or for taxes not yet due; keep the Collateral in Debtor’s possession and ownership except as otherwise provided in this agreement; maintain the Collateral in good condition; and protect the Collateral against waste, except for ordinary wear and tear.

D.2. Pay all Secured Party’s expenses, including reasonable attorney’s fees and legal expenses [include for a loan transaction subject to Texas Finance Code section 342.502: assessed by a court], incurred to (a) obtain, preserve, perfect, defend, or enforce this agreement; (b) retake, hold, prepare for disposition, dispose, collect, or enforce the Collateral; or (c) collect or enforce the Obligation. These expenses will bear interest from the date of advance at the rate stated in the Note for matured, unpaid amounts and are payable on demand at the place where the Obligation is payable. These expenses and interest are part of the Obligation and are secured by this agreement.

D.3. Sign and deliver to Secured Party any documents or instruments that Secured Party considers necessary to obtain, maintain, and perfect this security interest in the Collateral.
D.4. Notify Secured Party immediately of any event of default and of any material change (a) in the Collateral, (b) in Debtor’s Mailing Address, (c) in the location of any Collateral, (d) in any other representation or warranty in this agreement, or (e) that may affect this security interest, or of any change (f) in Debtor’s name or (g) of any location set forth above to another state.

D.5. Use the Collateral primarily according to the stated classification.

D.6. Maintain accurate records of the Collateral at the address set forth above; furnish Secured Party any requested information related to the Collateral; and permit Secured Party to inspect and copy all records relating to the Collateral.

D.7. Perform all obligations to be performed by Debtor under the Company Agreement.

D.8. Notify Secured Party of any default known to Debtor of any other person under the Company Agreement and of any notice of default given under the Company Agreement.

D.9. Enforce the obligations of other persons under the Company Agreement and at Secured Party’s request, at Debtor’s expense, take action requested by Secured Party to enforce the obligations of other persons and exercise the rights of Debtor under the Company Agreement.

E. Debtor Agrees Not to—

E.1. Sell, transfer, or encumber any of the Collateral [include if applicable: , except in the ordinary course of Debtor’s business].

Select one of the following.

Include the following if the debtor is a corporation, limited partnership, or limited liability company.
E.2. Change its name or jurisdiction of organization, merge or consolidate with any person, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is an entity other than a corporation, limited partnership, or limited liability company.

E.2. Change the state in which Debtor’s place of business (or chief executive office if Debtor has more than one place of business) is located, change its name, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is an individual.

E.2. Change Debtor’s name or state of residence without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Continue with the following.

E.3. Consent to or approve any modification of the Company Agreement.

E.4. Compromise or reduce any payment or distribution to be made to Debtor on the Collateral.

F. Secured Party Not Liable

Debtor remains liable under the Company Agreement for all its obligations thereunder. Secured Party has no liability thereunder because of this agreement. Secured Party is not liable, because of this agreement, for any obligation of Debtor under the Company Agreement.
G. Default and Remedies

G.1. A default exists if—

a. Debtor, Obligor, or any secondary obligor fails to timely pay or perform any obligation or covenant in any written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor;

b. any representation in this agreement or in any other written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor is materially false when made;

c. a receiver is appointed for Debtor, Obligor, any secondary obligor, or any Collateral;

d. any Collateral is assigned for the benefit of creditors;

e. a bankruptcy or insolvency proceeding is commenced by Debtor, the Company, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor;

f. a bankruptcy or insolvency proceeding is commenced against Debtor, the Company, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor, and the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered;

g. any of the following parties is terminated, begins to wind up its affairs, is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or
winding up of the affairs of any of the following parties: Debtor; the Company; a partnership of which Debtor is a general partner; Obligor; or any secondary obligor; or

h. any Collateral is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly replaced with collateral of like kind and quality or restored to its former condition.

G.2. If a default exists, Secured Party may—

a. demand, collect, convert, redeem, settle, compromise, receipt for, realize on, sue for, and adjust the Collateral either in Secured Party’s or Debtor’s name, as Secured Party desires, or take control of any proceeds of the Collateral and apply the proceeds against the Obligation;

b. take possession of any Collateral not already in Secured Party’s possession, without demand or legal process, and for that purpose Debtor grants Secured Party the right to enter any premises where the Collateral may be located;

c. without taking possession, sell, lease, or otherwise dispose of the Collateral at any public or private sale in accordance with law;

d. exercise any rights and remedies granted by law or this agreement;

e. notify obligors on the Collateral to pay Secured Party directly;

f. as Debtor’s agent, make any endorsements in Debtor’s name and on Debtor’s behalf of any proceeds of the Collateral; or
g. exercise and enforce all rights, including voting rights, available to an owner of the Collateral.

G.3. Foreclosure of this security interest by suit does not limit Secured Party’s remedies, including the right to sell the Collateral under the terms of this agreement. Secured Party may exercise all remedies at the same or different times, and no remedy is a defense to any other. Secured Party’s rights and remedies include all those granted by law and those specified in this agreement.

G.4. Secured Party’s delay in exercising, partial exercise of, or failure to exercise any of its remedies or rights does not waive Secured Party’s rights to subsequently exercise those remedies or rights. Secured Party’s waiver of any default does not waive any other default by Debtor. Secured Party’s waiver of any right in this agreement or of any default is binding only if it is in writing. Secured Party may remedy any default without waiving it.

G.5. Secured Party has no obligation to clean or otherwise prepare the Collateral for sale.

G.6. Secured Party has no obligation to collect any of the Collateral and is not liable for failure to collect any of the Collateral, for failure to preserve any right pertaining to the Collateral, or for any act or omission on the part of Secured Party or Secured Party’s officers, agents, or employees, except willful misconduct.

G.7. Secured Party has no obligation to satisfy the Obligation by attempting to collect the Obligation from any other person liable for it. Secured Party may release, modify, or waive any collateral provided by any other person to secure any of the Obligation. If Secured Party attempts to collect the Obligation from any other person liable for it or releases, modifies, or waives any collateral provided by any other person, that will not affect Secured Party’s rights against Debtor. Debtor waives any right Debtor may have to require Secured Party to pursue any third person for any of the Obligation.
G.8. If Secured Party must comply with any applicable state or federal law requirements in connection with a disposition of the Collateral, such compliance will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.9. Secured Party may sell the Collateral without giving any warranties as to the Collateral. Secured Party may specifically disclaim any warranties of title or the like. This procedure will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.10. If Secured Party sells any of the Collateral on credit, Debtor will be credited only with payments actually made by the purchaser and received by Secured Party for application to the indebtedness of the purchaser. If the purchaser fails to pay for the Collateral, Secured Party may resell the Collateral and Debtor will be credited with the proceeds of the sale.

G.11. If Secured Party purchases any of the Collateral being sold, Secured Party may pay for the Collateral by crediting the purchase price against the Obligation.

G.12. Secured Party has no obligation to marshal any assets in favor of Debtor or against or in payment of the Note, any of the Other Obligation[s], or any other obligation owed to Secured Party by Debtor or any other person.

G.13. If the Collateral is sold after default, recitals in the bill of sale or transfer will be prima facie evidence of their truth and all prerequisites to the sale specified by this agreement and by law will be presumed satisfied.

H. General

H.1. Notice is reasonable if it is mailed, postage prepaid, to Debtor at Debtor’s Mailing Address at least ten days before any public sale or ten days before the time when the Collateral may be otherwise disposed of without further notice to Debtor.
H.2. This security interest will neither affect nor be affected by any other security for any of the Obligation. Neither extensions of any of the Obligation nor releases of any of the Collateral will affect the priority or validity of this security interest.

H.3. This agreement binds, benefits, and may be enforced by the successors in interest of Secured Party and will bind all persons who become bound as debtors to this agreement. Assignment of any part of the Obligation and Secured Party’s delivery of any part of the Collateral will fully discharge Secured Party from responsibility for that part of the Collateral. If such an assignment is made, Debtor will render performance under this agreement to the assignee. Debtor waives and will not assert against any assignee any claims, defenses, or setoffs that Debtor could assert against Secured Party except defenses that cannot be waived. All representations and obligations are joint and several as to each Debtor.

H.4. This agreement may be amended only by an instrument in writing signed by Secured Party and Debtor.

H.5. The unenforceability of any provision of this agreement will not affect the enforceability or validity of any other provision.

H.6. This agreement will be construed according to Texas law, without regard to choice-of-law rules of any jurisdiction. This agreement is to be performed in [include if applicable in a consumer transaction: , and has been signed by Debtor in,] the county of Secured Party’s Mailing Address.

H.7. Interest on the Obligation secured by this agreement will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Obligation or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Obligation or, if the
principal of the Obligation has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Obligation.

H.8. In no event may this agreement secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

H.9. When the context requires, singular nouns and pronouns include the plural.

H.10. Any term defined in sections 1.101 to 9.709 of the Texas Business and Commerce Code and not defined in this agreement has the meaning given to the term in the Code.

[Name of debtor]
Addendum to Security Agreement
[Farm Products]

Basic Information

Date:

Debtor:

Secured Party:

Date of Security Agreement:

This addendum applies to and is incorporated in the security agreement.

A. Supplemental Description of Farm Products Collateral

A.1. Type and description of farm products collateral: [describe collateral and specify farm products collateral type according to USDA classification system at 9 C.F.R. § 205.206(a)].

A.2. Amount of farm products collateral:

A.3. Crop year of farm products collateral:

A.4. [County/Counties] where farm products collateral located:

A.5. Real property where farm products collateral located:

A.6. Additional collateral:

The Collateral includes, with respect to both the Collateral and all products, increase, or offspring of the Collateral, the following: all seed, seed plants, and propagative materials of crops or plants; all sale or other proceeds; all insurance proceeds for loss, damage, or theft; all claims or causes of action relating to use, sale, lease, damage, or loss; all contracts, warehouse
receipts, bills of lading, assignments, receipts, claims, drafts, checks, or causes of action relating to or representing any sale of the Collateral; all fees, charges, or things of value earned by livestock for reproductive services or uses of any kind; all copyrights and patents in any way relating to or arising out of the Collateral; all future-acquired property of Debtor of the same type or kind as the Collateral; and all additions to or replacement of the Collateral.

B. Debtor Agrees:

B.1. Conditions for Sale of Collateral. This security interest may not be waived or released unless the sale or other disposition is approved in advance in writing by Secured Party for the full value of the Collateral and the consideration from the sale or other disposition is actually delivered to Secured Party and finally paid. Debtor may not transfer or encumber the Collateral or engage in any transaction involving the Collateral with any buyer, commission merchant, or selling agent without seven days’ prior written notice to Secured Party and without securing the prior written consent of Secured Party. Debtor may make no sale or other disposition of any of the Collateral unless the proceeds are paid by an instrument jointly payable to Debtor and Secured Party and delivered to Secured Party. Debtor will immediately remit to Secured Party all proceeds of the sale or other disposition or as much of the proceeds as necessary to fully discharge the Obligation.

B.2. Conditions for Collateral Storage. The Collateral may not be placed in storage at any storage facility issuing warehouse receipts for the Collateral without seven days’ prior written notice to Secured Party. Any warehouse receipts issued for the Collateral must be nonnegotiable warehouse receipts naming Secured Party as the person entitled to possession of the Collateral. Debtor must immediately deliver all such receipts to Secured Party. Before placing any of the Collateral in storage, Debtor must advise the storage facility of the security interest of Secured Party in the Collateral.

B.3. Compliance with Federal Food Security Act. Debtor agrees to furnish Secured Party a list of the names and addresses of every buyer, commission merchant, and selling
agent to or through whom Debtor may make any sale or other disposition of the Collateral. “Commission merchant” and “selling agent” have those meanings set out in 7 U.S.C. section 1631. Debtor agrees to notify Secured Party in writing of the identity of any buyer, selling agent, or commission merchant for any of the Collateral at least seven days before the sale or other disposition of any part of the Collateral as may be authorized by the security agreement. If Debtor makes an unauthorized sale or transfer of the Collateral, Debtor must account to Secured Party for the proceeds of the sale or other disposition within ten days.


B.4. Additional Defaults. In addition to the defaults listed in the security agreement, a default exists if—

a. the Collateral is not maintained, preserved, or protected according to the standards of the industry or good agricultural husbandry; or

b. Debtor makes any sale or other disposition of any of the Collateral without complying with the provisions of this addendum.

B.5. Additional Remedies on Default. If a default exists, Secured Party, in addition to the remedies provided in the security agreement, may—

a. complete any and all growing, grazing, fattening, or other farming or ranching operations in connection with the Collateral reasonable to its sale or other disposition; or

b. incur reasonable expenses on behalf of Debtor in connection with the retaking, holding, storing, growing, nurturing, fattening, or grazing of the Collateral and in preparation of the Collateral for sale or other disposition.
Form 9-6

Prenotification Statement
[Notice of Security Interest]

Basic Information

To: [name of buyer, commission merchant, or selling agent]

Date:

Debtor:

Debtor’s Mailing Address:

Debtor’s Social Security No. or Federal Tax ID No.:

Secured Party:

Secured Party’s Mailing Address:

Collateral:

1. Type and description of farm products collateral: [describe collateral and specify farm products collateral type according to USDA classification system at 9 C.F.R. § 205.206(a)].

2. Amount of farm products collateral:

3. Crop year of farm products collateral:

4. [County/Counties] where farm products collateral located:

5. Real property where farm products collateral located:

6. Additional collateral:
The Collateral includes, with respect to both the Collateral and all products, increase, or offspring of the Collateral, the following: all seed, seed plants, and propagative materials of crops or plants; all sale or other proceeds; all insurance proceeds for loss, damage, or theft; all claims or causes of action relating to use, sale, lease, damage, or loss; all contracts, warehouse receipts, bills of lading, assignments, receipts, claims, drafts, checks, or causes of action relating to or representing any sale of the Collateral; all fees, charges, or things of value earned by livestock for reproductive services or uses of any kind; all copyrights and patents in any way relating to or arising out of the Collateral; all future-acquired property of Debtor of the same type or kind as the Collateral; and all additions to or replacement of the Collateral.

Conditions for Waiver or Release of Security Interest

The security interest may not be waived or released unless the sale or other disposition is approved in advance in writing by Secured Party for the full value of the Collateral to be sold (as that value may be determined by Secured Party) and the consideration from the sale or other disposition is actually delivered to Secured Party and finally paid. Debtor may not transfer or encumber the Collateral or engage in any transaction involving the Collateral with any buyer, commission merchant, or selling agent without seven days’ prior written notice to Secured Party and without securing the prior written consent of Secured Party. Any contract or agreement for the sale or other disposition of any of the Collateral must provide that the sales proceeds will be paid by an instrument jointly payable to Debtor and Secured Party and delivered to Secured Party. Debtor will immediately remit to Secured Party all proceeds of the sale or other disposition or as much of the proceeds as necessary to fully discharge the obligation.

Notice of Security Interest

Debtor or Secured Party has identified you as a potential buyer, commission merchant, or selling agent of the Collateral. You are hereby given notice pursuant to the Food Security
Act of 1985 that Debtor has given a security interest in the Collateral to Secured Party. This security interest covers the Collateral wherever located.

You will be subject to the security interest in the Collateral unless the Conditions for Waiver or Release of Security Interest are satisfied.

Satisfaction of the Conditions for Waiver or Release of Security Interest will not affect the security interest of the Secured Party in any proceeds from the sale or other disposition of the Collateral.

[Name of secured party]
Form 9-7

Listing of Potential Buyers, Commission Merchants, and Selling Agents

Basic Information

Date:

Debtor:

Debtor’s Mailing Address:

Debtor’s Social Security No. or Federal Tax ID No.:

Secured Party:

Secured Party’s Mailing Address:

Collateral:

1. Type and description of farm products collateral: [describe collateral and specify farm products collateral type according to USDA classification system at 9 C.F.R. § 205.206(a)].

2. Amount of farm products collateral:

3. Crop year of farm products collateral:

4. [County/Counties] where farm products collateral located:

5. Real property where farm products collateral located:

6. Additional collateral:

The Collateral includes, with respect to both the Collateral and all products, increase, or offspring of the Collateral, the following: all seed, seed plants, and propagative materials of crops or plants; all sale or other proceeds; all insurance proceeds for loss, damage, or theft; all
claims or causes of action relating to use, sale, lease, damage, or loss; all contracts, warehouse receipts, bills of lading, assignments, receipts, claims, drafts, checks, or causes of action relating to or representing any sale of the Collateral; all fees, charges, or things of value earned by livestock for reproductive services or uses of any kind; all copyrights and patents in any way relating to or arising out of the Collateral; all future-acquired property of Debtor of the same type or kind as the Collateral; and all additions to or replacement of the Collateral.

**Debtor Agrees**

Debtor is giving to Secured Party this list of potential buyers, commission merchants, and selling agents to or through whom Debtor may make a sale or other disposition of the Collateral. “Selling agent” and “commission merchant” have those meanings set out in 7 U.S.C. section 1631. Debtor is aware that any sale or other disposition of the Collateral to or through anyone not on this list is illegal unless Debtor notifies Secured Party in writing of the identity of the buyer, commission merchant, or selling agent at least seven days before the sale or other disposition or Debtor accounts to Secured Party for the proceeds of the sale within ten days after the sale or other disposition. Debtor agrees to keep this list current and to promptly notify Secured Party of any changes to this list. Debtor and Secured Party intend that the terms of this listing of potential buyers, commission merchants, and selling agents become part of the security agreement between the parties.

Debtor agrees that the Collateral may not be sold or otherwise disposed of free of the security interest of Secured Party unless the conditions for waiver or release of the security interest are satisfied.

**List**

List of Potential Buyers, Commission Merchants, and Selling Agents: [list, including names, addresses, and telephone numbers].

[Name of debtor]
Collateral Transfer of Note and Lien

Form 9-8

Basic Information

Date:

Debtor:

Debtor’s Mailing Address:

Secured Party:

Secured Party’s Mailing Address:

Classification of Collateral: Instrument

Collateral (including all accessions): All of Debtor’s interest in the Collateral Note and the Collateral Note Security.

Collateral Note: $[amount] Note executed by [maker] and payable to the order of [payee] dated [date].

Current balance:

Collateral Note Security: Deed of Trust dated [date], recorded in [recording data].

Property description:

Obligation

Note in the amount of $[amount] executed by [maker] and payable to the order of [payee] dated [date].
Other debt/Future advances: The security interest also secures all other present and future debts and liabilities of Debtor to Secured Party, including future advances.

Other obligation:

Collateral Note Payments: All payments on the Collateral Note are to be made directly [to Secured Party/to Debtor until after the occurrence of an event of default, at which time Secured Party may notify the Collateral Note maker to make all future payments to Secured Party].

A. Granting Clause

Debtor grants to Secured Party a security interest in the Collateral and all its proceeds to secure Debtor’s Obligation and all renewals of any of the Obligation.

B. Deliveries

Simultaneously with Debtor’s execution and delivery to Secured Party of this agreement, Debtor has endorsed and delivered to Secured Party the original Collateral Note, thereby making Secured Party the person entitled to enforce the Collateral Note.

C. Debtor Represents the Following:

C.1. Debtor [include if applicable: owns the Collateral and] has the authority to grant this security interest, free from any setoff, claim, restriction, security interest, or encumbrance except liens for taxes not yet due.

C.2. All information about Debtor’s financial condition is or will be accurate when provided to Secured Party.
C.3. The current balance of the Collateral Note is correct.

C.4. The Collateral Note has not been modified and is not in default.

C.5. There are no defenses or offsets to the Collateral Note.

C.6. The lien of the Collateral Note Security is a first lien.

C.7. The Collateral represents the valid, legally enforceable obligation of the Collateral Note maker.

C.8. Debtor will keep the records of payments on the Collateral Note at Debtor’s Mailing Address.

D. Debtor Agrees to—

D.1. Defend the Collateral against all claims adverse to Secured Party’s interest and keep the Collateral free from liens.

D.2. Pay all of Secured Party’s expenses incurred, including reasonable attorney’s fees and legal expenses [include the following for a loan subject to Texas Finance Code section 342.502: assessed by a court], to (a) obtain, preserve, perfect, defend, or enforce this agreement; (b) dispose of, collect, or enforce the Collateral; or (c) collect or enforce the Obligation. These expenses will bear interest from the date of advance at the highest rate allowed by law and are payable on demand at the place where the Obligation is payable. These expenses and interest will become part of the Obligation and will be secured by this agreement.

D.3. Sign any documents that Secured Party considers necessary to obtain, maintain, and perfect this security interest.
D.4. Notify Secured Party immediately of any material change in the Collateral; change in Debtor’s name, address, or location; change in any representation in this agreement; change that may affect this security interest; or any default.

D.5. Maintain accurate records of the Collateral; furnish Secured Party any requested information related to the Collateral; and allow Secured Party to inspect and copy all records relating to the Collateral.

D.6. Perform all obligations required under the Collateral Note Security.

D.7. Preserve the liability of all obligors on the Collateral and preserve the priority of all security for the Collateral.

D.8. On Secured Party’s demand, deposit all payments received as proceeds of the Collateral in a special bank account designated by Secured Party, who alone will have power of withdrawal.

D.9. Cause the Collateral Note maker to pay and perform all obligations under the Collateral Note and the Collateral Note Security and inform Secured Party immediately of default in the payment or performance of the Collateral Note.

E. Debtor Agrees Not to—

E.1. Renew, extend, or modify the Collateral Note or grant releases of any part of the property securing the Collateral Note.


E.3. Commingle any payments on the Collateral with any of Debtor’s other funds or property.
F. Default and Remedies

F.1. A default exists if—

a. Debtor fails to timely pay or perform any Obligation, covenant, or liability in any written agreement between Debtor and Secured Party;

b. any representation in this agreement is materially false when made;

c. a receiver is appointed for Debtor or any of the Collateral;

d. the Collateral is assigned for the benefit of creditors;

e. to the extent permitted by law, a bankruptcy or insolvency proceeding is commenced against or by any of the following parties: Debtor; the Collateral Note maker; any partnership of which Debtor is a general partner; or any maker, drawer, acceptor, endorser, guarantor, surety, accommodation party, or other person liable on or for any part of the Obligation;

f. any of the following parties is terminated: Debtor; the Collateral Note maker; any partnership of which Debtor is a general partner; or any maker, drawer, acceptor, endorser, guarantor, surety, accommodation party, or other person liable on or for any part of the Obligation; or

g. default exists under the Collateral Note or the Collateral Note Security.

F.2. Secured Party may at any time—

a. take control of any proceeds of the Collateral;

b. release any Collateral in Secured Party’s possession to any debtor, temporarily or otherwise;
Form 9-8  Collateral Transfer of Note and Lien

c. take control of proceeds of insurance on the Collateral Note Security and reduce any part of the Obligation accordingly or permit Debtor to use such funds to repair or replace damaged or destroyed Collateral covered by insurance;

d. demand, collect, convert, redeem, settle, compromise, receipt for, realize on, sue for, and adjust the Collateral either in Secured Party’s or Debtor’s name, as Secured Party desires; or

e. exercise all other rights available to an owner of such Collateral.

F.3. If a default exists, Secured Party may—

a. declare the unpaid principal and earned interest of the Obligation immediately due in whole or part;

b. enforce the Obligation; and

c. exercise any rights and remedies granted by law or this agreement.

F.4. Foreclosure of this security interest by suit does not limit Secured Party’s remedies, including the right to sell the Collateral under the terms of this agreement. Secured Party may exercise all remedies at the same or different times, and no remedy is a defense to any other. Secured Party’s rights and remedies include all those granted by law or otherwise, in addition to those specified in this agreement.

F.5. If the Collateral is sold after default, recitals in the bill of sale or transfer will be prima facie evidence of their truth and all prerequisites to the sale specified by this agreement and by law will be presumed satisfied.
G. **Collateral Note/Enforcement of Power of Sale**

**G.1.** Debtor has endorsed and delivered the Collateral Note to Secured Party. Secured Party is the holder of the Collateral Note, the person entitled to enforce the Collateral Note, and the sole party with power to appoint a substitute trustee or request the trustee to act. Any foreclosure action requested by Debtor is void.

**G.2.** Any foreclosure sale under the Collateral Note Security will be at such time and on such terms as Secured Party may, in its discretion, approve. If Secured Party approves a bid from Debtor without payment in full of the Collateral Note, Debtor must provide a mortgagor’s title insurance policy with only such exceptions as Secured Party approves and execute such additional security documents as Secured Party may require.

**G.3.** Debtor assigns, transfers, and conveys to Secured Party all amounts due on the Collateral Note. Collateral Note maker is directed to make payments on the Collateral Note in accordance with the Collateral Note payments provision above.

**G.4.** Debtor indemnifies Secured Party from all claims made against or incurred by Secured Party from any action in connection with the Collateral Note or the Collateral Note Security documents.

H. **General**

**H.1.** Notice is reasonable if it is mailed, postage prepaid, to Debtor at Debtor’s Mailing Address at least ten days before any public sale or ten days before the time when the Collateral may be otherwise disposed of without further notice to Debtor.

**H.2.** This security interest will neither affect nor be affected by any other security for any of the Obligation. Neither extensions of any of the Obligation nor releases of any of the Collateral will affect the priority or validity of this security interest as to any third person.
H.3. This agreement binds, benefits, and may be enforced by the successors in interest of the parties, except as otherwise provided. Assignment of any part of the Obligation and Secured Party’s delivery of any part of the Collateral will fully discharge Secured Party from responsibility for that part of the Collateral. All representations and obligations are joint and several as to each Debtor.

H.4. Secured Party’s delay in exercising, partial exercise of, or failure to exercise any of its remedies or rights does not waive Secured Party’s rights to subsequently exercise those remedies or rights. Secured Party’s waiver of any default does not waive any further default by Debtor. Secured Party’s waiver of any right in this agreement or of any default is binding only if it is in writing. Secured Party may remedy any default without waiving it.

H.5. This agreement may be amended only by an instrument in writing signed by Secured Party and Debtor.

H.6. The unenforceability of any provision of this agreement will not affect the enforceability or validity of any other provision.

H.7. This agreement will be construed according to Texas law. This agreement is to be performed in the county of Secured Party’s Mailing Address.

H.8. Interest on the Obligation secured by this agreement will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Obligation or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Obligation or, if the principal of the Obligation has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Obligation.
H.9. In no event may this agreement secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

H.10. When the context requires, singular nouns and pronouns include the plural.

__________________________________________________________________________________________________________________________ ...
__________________________________________________________________________________________________________________________

[Name of debtor]
Collateral Note Maker’s Estoppel Certificate

Basic Information

Date:

Debtor:

Debtor’s Mailing Address:

Secured Party:

Secured Party’s Mailing Address:

Collateral Note: Note dated [date], in the original principal amount of $[amount], executed by Collateral Note Maker and payable to Debtor as therein provided.

Collateral Note Maker:

Collateral Note Maker’s Mailing Address:

Deed of Trust: Deed of trust securing Collateral Note, recorded in [recording data] of the real property records of [county] County, Texas.

Real Property:

A. Reason for and Reliance on Certificate

Debtor has requested that Secured Party make a loan to be secured by the Collateral Note, and Secured Party has agreed to do so. As a condition for this loan, Secured Party requires Collateral Note Maker to verify the following information concerning the Collateral
Note. Collateral Note Maker understands that Secured Party is relying on this information in connection with the closing of the loan.

B. Representations

Collateral Note Maker represents to Secured Party that—

B.1. True and complete copies of the Collateral Note and Deed of Trust are attached as Exhibits [exhibit numbers/letters].

B.2. The Collateral Note and Deed of Trust have not been modified.

B.3. The present unpaid balance of the Collateral Note is $[amount].

B.4. The amount of accrued unpaid interest on the Collateral Note is $[amount].

B.5. Collateral Note Maker has no claims, setoffs, or defenses to payment of the Collateral Note or against Debtor.

B.6. No default presently exists under the terms of the Collateral Note or Deed of Trust or any other loan documents.

Select one of the following.

B.7. No amount is being held in escrow by Debtor.

Or

B.7. The amount of $[amount] is presently being held in escrow by Debtor for the payment of taxes, insurance, or both, under the terms of the Collateral Note and Deed of Trust.

Continue with the following.
C. Agreement

Collateral Note Maker agrees with Secured Party that—

C.1. The Collateral Note and Deed of Trust will not be modified without Secured Party’s prior written consent.

C.2. Collateral Note Maker has been furnished with a copy of the collateral transfer of note and lien dated [date] executed by Debtor to Secured Party and agrees to abide by its terms.

C.3. Secured Party is the current holder of the Collateral Note and is the only party entitled to receive payments on the Collateral Note.

C.4. Collateral Note Maker will make regularly scheduled monthly payments on the Collateral Note only to Debtor. On written request of Secured Party, Collateral Note Maker will make all payments on the Collateral Note directly to Secured Party.

D. Debtor’s Consent

Debtor joins in this agreement to evidence its consent to Collateral Note Maker’s obligations hereunder.

[Name of collateral note maker]
[Name of debtor]

Include acknowledgments and attach exhibits.
Consent and Agreement Form 9-10

Basic Information

Date:

Secured Party:

Secured Party’s Mailing Address:

Debtor:

Company:

Company’s Mailing Address:

Company is a [[general/limited] partnership/limited liability company] organized under the laws of the state of [Texas/[state]].

A. Background

Debtor and Secured Party are entering into a security agreement covering Debtor’s interest in the Company.

The [partnership agreement/regulations/limited liability company agreement] of the Company (the “Company Agreement”) contains terms restricting assignment of interests in the Company by its [partners/members] and conditioning effectiveness of any such assignment on the consent of the [general partner/managing general partner/general partner and a majority in interest of the limited partners/partners/manager/managing member/majority in interest of the members/members] of the Company. The undersigned and the Company are the persons whose consent must be obtained under the terms of the Company Agreement.
B. Agreement

The Company and the undersigned severally agree for the benefit of Secured Party as follows:

B.1. The Company and each of the undersigned consent to the creation, attachment, and perfections of a security interest in Debtor’s interest in the Company and other collateral under Debtor’s security agreement with Secured Party.

B.2. The Company agrees that if Secured Party delivers to the Company a notice stating that a default exists under Debtor’s security agreement with Secured Party and directing the Company to deliver to Secured Party any profits, income, distributions (whether in money, specific property of the Company, or other assets), withdrawal, liquidation, and redemption proceeds, and any other proceeds payable to Debtor from time to time in respect of Debtor’s interest in the Company, the Company will comply with that directive. The Company is not required to inquire as to or determine the validity of the factual matters in any such notice or the genuineness of any such notice. The undersigned consent to the Company’s compliance with any such notice.

B.3. The undersigned consent to Secured Party’s exercise of any of its rights and remedies under Debtor’s security agreement with Secured Party, including the right to exercise any voting, consensual, or other management rights of Debtor and the right to sell or otherwise dispose of any of the collateral granted by Debtor under Debtor’s security agreement with Secured Party. The undersigned agree that on Secured Party’s exercise of any of its rights and remedies under Debtor’s security agreement with Secured Party, any acquirer (whether by foreclosure or otherwise) of the [partnership/membership] interest of Debtor will become, without further consent by any of the undersigned, a substitute [partner/member] of the Company under the Company Agreement and the Company’s other organizational documents,
entitled to exercise any of the rights and remedies of Debtor thereunder; provided that such acquirer will not be liable for obligations of Debtor to contribute capital to the Company that arose before the acquirer’s acquisition of Debtor’s [partnership/membership] interest.

COMPANY:

[Name of company]

By: ______________________________

[Name and capacity]

[Name and capacity]
# UCC1 Financing Statement

**Form 9-11**

**UCC1 Financing Statement**

**FILING OFFICE COPY — UCC FINANCING STATEMENT (Form UCC1) (Rev. 04/2011)**

International Association of Commercial Administrators (IACA)
Instructions for UCC Financing Statement (Form UCC1)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions, especially Instruction 1; use of the correct name for the Debtor is crucial.

Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

Send completed form and any attachments to the filing office, with the required fee.

ITEM INSTRUCTIONS

A and B. To assist filing offices that might wish to communicate with filer, filer may provide information in item A and item B. These items are optional.

C. Complete item C if filer desires an acknowledgment sent to them. If filing in a filing office that returns an acknowledgment copy furnished by filer, present simultaneously with this form the Acknowledgment Copy or a carbon or other copy of this form for use as an acknowledgment copy.

1. Debtor's name. Carefully review applicable statutory guidance about providing the debtor's name. Enter only one Debtor name in item 1 -- either an organization's name (1a) or an individual's name (1b). If any part of the Individual Debtor's name will not fit in line 1b, check the box in item 1, leave all of item 1 blank, check the box in item 9 of the Financing Statement Addendum (Form UCC1Ad) and enter the Individual Debtor name in item 10 of the Financing Statement Addendum (Form UCC1Ad). Enter Debtor's correct name. Do not abbreviate words that are not already abbreviated in the Debtor's name. If a portion of the Debtor's name consists of only an initial or an abbreviation rather than a full word, enter only the abbreviation or the initial. If the collateral is held in a trust and the Debtor name is the name of the trust, enter trust name in the Organization's Name box in item 1a.

1a. Organization Debtor Name. "Organization Name" means the name of an entity that is not a natural person. A sole proprietorship is an organization, even if the individual proprietor does business under a trade name. If Debtor is a registered organization (e.g., corporation, limited partnership, limited liability company), it is advisable to examine Debtor's current filed public organic records to determine Debtor's correct name. Trade name is insufficient. If a corporate ending (e.g., corporation, limited partnership, limited liability company) is part of the Debtor's name, it must be included. Do not use words that are not part of the Debtor's name.

1b. Individual Debtor Name. "Individual Name" means the name of a natural person; this includes the name of an individual doing business as a sole proprietorship, whether or not operating under a trade name. The term includes the name of a decedent where collateral is being administered by a personal representative of the decedent. The term does not include the name of an entity, even if it contains, as part of the entity's name, the name of an individual. Prefixes (e.g., Mr., Mrs., Ms.) and titles (e.g., M.D.) are generally not part of an individual name. Indications of lineage (e.g., Jr., Sr., III) generally are not part of the individual's name, but may be entered in the Suffix box. Enter individual Debtor's surname (family name) in Individual's Surname box, first personal name in First Personal Name box, and all additional names in Additional Name(s)/Initial(s) box.

If a Debtor's name consists of only a single word, enter that word in Individual's Surname box and leave other boxes blank.

For both organization and individual Debtors, do not use Debtor's trade name, DBA, AK, FKA, division name, etc. in place of or combined with Debtor's correct name; filer may add such other names as additional Debtors if desired (but this is neither required nor recommended).

1c. Enter a mailing address for the Debtor named in item 1a or 1b.

2. Additional Debtor's name. If an additional Debtor is included, complete item 2, determined and formatted per Instruction 1. For additional Debtors, attach either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 for determining and formatting additional names.

3. Secured Party's name. Enter name and mailing address for Secured Party or Assignee who will be the Secured Party of record. For additional Secured Parties, attach either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP). If there has been a full assignment of the initial Secured Party's right to be Secured Party of record before filing this form, either (1) enterAssignor Secured Party's name and mailing address in item 3 of this form and file an Amendment (Form UCC3) [see item 5 of that form]; or (2) enter Assignee's name and mailing address in item 3 of this form and, if desired, also attach Addendum (Form UCC1Ad) giving Assignor Secured Party's name and mailing address in item 11.

4. Collateral. Use item 4 to indicate the collateral covered by this financing statement. If space in item 4 is insufficient, continue the collateral description in item 12 of the Addendum (Form UCC1Ad) or attach additional page(s) and incorporate by reference in item 12 (e.g., see Exhibit A). Do not include social security numbers or other personally identifiable information.

Note: If this financing statement covers timber to be cut, covers as-extracted collateral, and/or is filed as a fixture filing, attach Addendum (Form UCC1Ad) and complete the required information in items 13, 14, 15, and 16.

5. If collateral is held in a trust or being administered by a decedent's personal representative, check the appropriate box in item 5. If more than one Debtor has an interest in the described collateral and the check box does not apply to the interest of all Debtors, the filer should consider filing a separate Financing Statement (Form UCC1) for each Debtor.

6a. If this financing statement relates to a Public-Finance Transaction, Manufactured-Home Transaction, or a Debtor is a Transmitting Utility, check the appropriate box in item 6a. If a Debtor is a Transmitting Utility and the initial financing statement is filed in connection with a Public-Finance Transaction or Manufactured-Home Transaction, check only that a Debtor is a Transmitting Utility.

6b. If this is an Agricultural Lien (as defined in applicable state's enactment of the Uniform Commercial Code) or if this is not a UCC security interest filing (e.g., a tax lien, judgment lien, etc.), check the appropriate box in item 6b and attach any other items required under other law.

7. Alternative Designation. If filer desires (at filer's option) to use the designations lessee and lessor, consignee and consignor, seller and buyer (such as in the case of the sale of a payment intangible, promissory note, account or chattel paper), bailee and bailor, or licensee and licensor instead of Debtor and Secured Party, check the appropriate box in item 7.

8. Optional Filer Reference Data. This item is optional and is for filer's use only. For filer's convenience of reference, filer may enter in item 8 any identifying information that filer may find useful. Do not include social security numbers or other personally identifiable information.
# UCC Financing Statement Addendum

**Form 9-12**

## UCC1Ad Financing Statement Addendum

**UCC FINANCING STATEMENT ADDENDUM**

**FOLLOW INSTRUCTIONS**

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<tr>
<td>9. NAME OF FIRST DEBTOR:</td>
<td>Same as line 1a or 1b on Financing Statement; if line 1b was left blank because individual Debtor name did not fit, check here:</td>
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<td>10. DEBTOR’S NAME:</td>
<td>Provides only one additional Debtor name or Debtor name that did not fit in line 1a or 1b of this Financing Statement (Form UCC1) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor’s name) and enter the mailing address in line 10c:</td>
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<td>11. ADDITIONAL SECURED PARTY’S NAME or ASSIGNOR SECURED PARTY’S NAME:</td>
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<td>12. ADDITIONAL SPACE FOR ITEM 4 (Collateral):</td>
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</tbody>
</table>

**THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY**

---

13. This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS (if applicable):  
14. This FINANCING STATEMENT:  
   [ ] covers timber to be cut  
   [ ] covers as-extracted collateral  
   [ ] is filed as fixture filing

15. Name and address of a RECORD OWNER of real estate described in item 16 (if Debtor does not have a record interest):  
16. Description of real estate:  
17. MISCELLANEOUS:

---

International Association of Commercial Administrators (IACA)

**FILING OFFICE COPY — UCC FINANCING STATEMENT ADDENDUM (Form UCC1Ad) (Rev. 04/20/11)**

© STATE BAR OF TEXAS

9-12-1
Instructions for UCC Financing Statement Addendum (Form UCC1Ad)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions; use of the correct name for the Debtor is crucial. Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

ITEM INSTRUCTIONS

9. **Name of first Debtor.** Enter name of first Debtor exactly as shown in item 1 of Financing Statement (Form UCC1) to which this Addendum relates. The name will not be indexed as a separate debtor. The Debtor name in this section is intended to cross-reference this Addendum with the related Financing Statement (Form UCC1).

   If the box in item 1 of the Financing Statement (Form UCC1) was checked because Individual Debtor name did not fit, the box in item 9 of this Addendum should be checked.

10. **Additional Debtor's name.** If this Addendum adds an additional Debtor, complete item 10 in accordance with Instruction 1 of Financing Statement (Form UCC1). For additional Debtors, attach either an additional Addendum or Additional Party (Form UCC1AP) and follow Instruction 1 of Financing Statement (Form UCC1) for determining and formatting additional names.

11. **Additional Secured Party's name or Assignor Secured Party's name.** If this Addendum adds an additional Secured Party, complete item 11 in accordance with Instruction 3 of Financing Statement (Form UCC1). For additional Secured Parties, attach either an additional Addendum or Additional Party (Form UCC1AP) and complete applicable items in accordance with Instruction 3 of Financing Statement (Form UCC1). In the case of a full assignment of the Secured Party's interest before the filing of this financing statement, if filer has provided the name and mailing address of the Assignee in item 3 of Financing Statement (Form UCC1), filer may enter Assignor Secured Party’s name and mailing address in item 11.

12. **Additional Collateral Description.** If space in item 4 of Financing Statement (Form UCC1) is insufficient or additional information must be provided, enter additional information in item 12 or attach additional page(s) and incorporate by reference in item 12 (e.g., See Exhibit A). Do not include social security numbers or other personally identifiable information.

13-16. **Real Estate Record Information.** If this Financing Statement is to be filed in the real estate records and covers timber to be cut, covers as-extracted collateral, and/or is filed as a fixture filing, complete items 1-4 of the Financing Statement (Form UCC1), check the box in item 13, check the appropriate box in item 14, and complete the required information in items 15 and 16. If the Debtor does not have an interest of record, enter the name and address of the record owner in item 15. Provide a sufficient description of real estate in accordance with the applicable law of the jurisdiction where the real estate is located in item 16. If space in items 15 or 16 is insufficient, attach additional page(s) and incorporate by reference in item 15 or 16 (e.g., See Exhibit A), and continue the real estate record information. Do not include social security numbers or other personally identifiable information.

17. **Miscellaneous.** Under certain circumstances, additional information not provided on the Financing Statement (Form UCC1) may be required. Also, some states have non-uniform requirements. Use this space or attach additional page(s) and incorporate by reference in item 17 (e.g., See Exhibit A) to provide such additional information or to comply with such requirements; otherwise, leave blank. Do not include social security numbers or other personally identifiable information.
# UCC1AP Financing Statement Additional Party

**Form 9-13**

**UCC1AP**

**Financing Statement Additional Party**

**UCC FINANCING STATEMENT ADDITIONAL PARTY**

**FOLLOW INSTRUCTIONS**

<table>
<thead>
<tr>
<th>18. NAME OF FIRST DEBTOR:</th>
<th>Same as line 1a or 1b on Financing Statement; if line 1b was left blank because Individual Debtor name did not fit, check here</th>
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</thead>
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<tr>
<td>18a. ORGANIZATION'S NAME</td>
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<td>18b. INDIVIDUAL'S SURNAME</td>
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<td>FIRST PERSONAL NAME</td>
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<td>ADDITIONAL NAME(S)/INITIAL(S)</td>
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<td>SUFFIX</td>
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THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

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<thead>
<tr>
<th>19. ADDITIONAL DEBTOR'S NAME:</th>
<th>Provide only one Debtor name (19a or 19b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name)</th>
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<td>19a. ORGANIZATION'S NAME</td>
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<td>19b. INDIVIDUAL'S SURNAME</td>
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<th>20. ADDITIONAL DEBTOR'S NAME:</th>
<th>Provide only one Debtor name (20a or 20b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name)</th>
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<td>20a. ORGANIZATION'S NAME</td>
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<th>21. ADDITIONAL DEBTOR'S NAME:</th>
<th>Provide only one Debtor name (21a or 21b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name)</th>
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<td>21a. ORGANIZATION'S NAME</td>
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<td>21b. INDIVIDUAL'S SURNAME</td>
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<td>FIRST PERSONAL NAME</td>
<td></td>
</tr>
<tr>
<td>ADDITIONAL NAME(S)/INITIAL(S)</td>
<td></td>
</tr>
<tr>
<td>SUFFIX</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>22. ADDITIONAL SECURED PARTY'S NAME</th>
<th>ASSIGNOR SECURED PARTY'S NAME:</th>
<th>Provide only one name (22a or 22b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name)</th>
</tr>
</thead>
<tbody>
<tr>
<td>22a. ORGANIZATION'S NAME</td>
<td>OR</td>
<td></td>
</tr>
<tr>
<td>22b. INDIVIDUAL'S SURNAME</td>
<td>FIRST PERSONAL NAME</td>
<td>ADDITIONAL NAME(S)/INITIAL(S)</td>
</tr>
<tr>
<td>Mailing Address</td>
<td>CITY</td>
<td>STATE</td>
</tr>
<tr>
<td>SUFFIX</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>23. ADDITIONAL SECURED PARTY'S NAME</th>
<th>ASSIGNOR SECURED PARTY'S NAME:</th>
<th>Provide only one name (23a or 23b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name)</th>
</tr>
</thead>
<tbody>
<tr>
<td>23a. ORGANIZATION'S NAME</td>
<td>OR</td>
<td></td>
</tr>
<tr>
<td>23b. INDIVIDUAL'S SURNAME</td>
<td>FIRST PERSONAL NAME</td>
<td>ADDITIONAL NAME(S)/INITIAL(S)</td>
</tr>
<tr>
<td>Mailing Address</td>
<td>CITY</td>
<td>STATE</td>
</tr>
<tr>
<td>SUFFIX</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

24. MISCELLANEOUS:

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**FILING OFFICE COPY — UCC FINANCING STATEMENT ADDITIONAL PARTY (Form UCC1AP) (Rev. 08/22/11)**

© STATE BAR OF TEXAS

9-13-1
Instructions for UCC Financing Statement Additional Party (Form UCC1AP)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions; use of the correct name for the Debtor is crucial. Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

Use this form (multiple copies if needed) to continue adding additional Debtor or Secured Party names as needed when filing a UCC Financing Statement (Form UCC1).

ITEM INSTRUCTIONS

18. **Name of first Debtor.** Enter name of first Debtor exactly as shown in item 1 of Financing Statement (Form UCC1) to which this Additional Party relates. The name will not be indexed as a separate Debtor. If line 1b of the Financing Statement (Form UCC1) was left blank because the Individual Debtor name did not fit, check the box in item 18 and enter as much of the Individual Debtor name from item 10 that will fit. The Debtor name in this section is intended to cross-reference this Additional Party with the related Financing Statement (Form UCC1).

19-21. **Additional Debtor’s name.** If this Additional Party adds additional Debtors, complete items 19, 20, and 21 in accordance with Instruction 1 of Financing Statement (Form UCC1).

22-23. **Additional Secured Party’s name or Assignor Secured Party’s name.** If this Additional Party form adds additional Secured Parties, complete items 22 and 23 in accordance with Instruction 3 of Financing Statement (Form UCC1). In the case of a full assignment of the Secured Party’s interest before the filing of this financing statement, if filer has provided the name and mailing address of the Assignee in item 3 of Financing Statement (Form UCC1), filer may enter Assignor Secured Party’s name and mailing address in items 22 and 23.

24. **Miscellaneous.** Under certain circumstances, additional information not provided on the Financing Statement (Form UCC1) may be required. Also, some states have non-uniform requirements. Use this space or attach additional page(s) and incorporate by reference in item 24 (e.g., See Exhibit A) to provide such additional information or to comply with such requirements; otherwise, leave blank. Do not include social security numbers or other personally identifiable information.
UCC3 Financing Statement Amendment

FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT FILER (optional)

B. E-MAIL CONTACT AT FILER (optional)

C. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1a. INITIAL FINANCING STATEMENT FILE NUMBER

1b. This FINANCING STATEMENT AMENDMENT is to be filed (or recorded) in the REAL ESTATE RECORDS

Filer: attach Amendment Addendum (Form UCC3Ad) and provide Debtor's name in item 13

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

PARTY INFORMATION CHANGE:

ASSIGNMENT (full or partial): Provide name of Assignor in item 9a or 9b, and address of Assignor in item 9c and name of Assignee in item 7a or 7b

For partial assignment, complete items 7 and 9a or 9b and also indicate affected collateral in item 8

TERMINATION: Effectiveness of the Financing Statement identified above with respect to the security interest(s) of Secured Party authorizing this Termination Statement

CONTINUATION: Effectiveness of the Financing Statement identified above with respect to the security interest(s) of Secured Party authorizing this Continuation Statement is continued for the additional period provided by applicable law

2. This Change affects: Debtor or Secured Party of record

3. Check one of these four boxes:

ADD:\ Complete item 7a or 7b and item 7c

DELETE:\ Give record name to be deleted in item 6a or 6b

CHANGE:\ Complete item 6a or 6b; and item 7a or 7b; and item 7c

Indicate collateral:

ADD collateral
DELETE collateral
RESTATE covered collateral
ASSIGN collateral

4. CURRENT RECORD INFORMATION: Complete for Party Information Change - provide only one name (6a or 6b)

5. PARTY INFORMATION CHANGE:

Check one of these two boxes:

ADD:\ Complete item 7a or 7b; and item 7c

DELETE:\ Give record name to be deleted in item 6a or 6b

6. CURRENT RECORD INFORMATION: Complete for Party Information Change - provide only one name (6a or 6b)

5. PARTY INFORMATION CHANGE:

Check one of these two boxes:

ADD:\ Complete item 7a or 7b; and item 7c

DELETE:\ Give record name to be deleted in item 6a or 6b

6. CURRENT RECORD INFORMATION: Complete for Party Information Change - provide only one name (6a or 6b)

7. CHANGED OR ADDED INFORMATION: Complete for Assignment or Party Information Change - provide only one name (7a or 7b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name)

7. Mailing Address

8. COLLATERAL CHANGE: Check one of these four boxes:

ADD collateral
DELETE collateral
RESTATE covered collateral
ASSIGN collateral

9. NAME or SECURED PARTY or RECORD AUTHORIZING THIS AMENDMENT: Provide only one name (9a or 9b) (name of Assignor, if this is an Assignment)

If this is an Amendment authorized by a DEBTOR, check here and provide name of authorizing Debtor

10. OPTIONAL FILER REFERENCE DATA:

FILING OFFICE COPY — UCC FINANCING STATEMENT AMENDMENT (Form UCC3) (Rev. 04/2011)

© STATE BAR OF TEXAS

9-14-1
Instructions for UCC Financing Statement Amendment (Form UCC3)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions, especially Instruction 1a; correct file number of initial financing statement is crucial. Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice. Send completed form and any attachments to the filing office, with the required fee.

ITEM INSTRUCTIONS

A and B. To assist filing offices that might wish to communicate with filer, filer may provide information in item A and item B. These items are optional.

C. Complete item C if filer desires an acknowledgment sent to them. If filing in a filing office that returns an acknowledgment copy furnished by filer, present simultaneously with this form the Acknowledgment Copy or a carbon or other copy of this form for use as an acknowledgment copy.

Always complete items 1a and 9.

1a. File Number. Enter file number of initial financing statement to which this Amendment relates. Enter only one file number. In some states, the file number is not unique; in those states, also enter in item 1a, after the file number, the date that the initial financing statement was filed.

1b. If this Amendment is to be filed in the real estate records or in any other filing office where the name of current Debtor is required for indexing purposes, check the box in item 1b and enter Debtor name in item 13 of Amendment Addendum (Form UCC3Ad). If Debtor does not have an interest of record, enter the name and address of the record owner in item 16 of Amendment Addendum (Form UCC3Ad).

Note: Show purpose of this Amendment by checking box 2, 3, 4, 5, or 8 (in items 5 and 8 you must check additional boxes); also complete items 6, 7, and/or 8 as appropriate. Some but not all filing offices accept multiple actions on an Amendment. Filing offices that accept multiple actions may change an additional fee. Some filing offices that accept multiple actions may only index one of the actions requested. Consult the administrative rules of the designated filing office to determine the extent to which multiple actions will be accepted, indexed, and the applicable filing fees for multiple actions.

2. Termination. To terminate the effectiveness of the identified financing statement with respect to the security interest(s) of authorizing Secured Party, check box in item 2. See Instruction 9 below.

3. Assignment. To assign (1) some or all of Assignor’s right to amend the identified financing statement, or (2) the Assignor’s right to amend the identified financing statement with respect to some (but not all) of the collateral covered by the identified financing statement: Check box in item 3 and enter name of Assignee in item 7a or 7b; always enter the Assignee’s mailing address in item 7c. Also enter name of Assignor in item 9. If assignment affects the right to amend the financing statement with respect to some (but not all) of the collateral covered by the identified financing statement, check the ASSIGN collateral box and indicate the particular collateral covered in item 8.

4. Continuation. To continue the effectiveness of the identified financing statement with respect to the security interest(s) of authorizing Secured Party, check box in item 4. See Instruction 9 below.

5-7. Party Information Change. To indicate a party information change, check this box; also check additional boxes (as applicable) and complete items 5, 6, and/or 7 as appropriate.

To change the name and/or address of a party (items 5, 6, and 7): Check box in item 5 to indicate whether this Amendment relates to a Debtor or Secured Party of record; and check the CHANGE name and/or mailing address box in item 5 and enter name of affected party (current record name) in item 6a or 6b; and repeat or enter the new name in item 7a or 7b; always enter the party’s mailing address in item 7c.

To add a party (items 5 and 7): Check box in item 5 to indicate whether this Amendment relates to a Debtor or Secured Party of record; and check the ADD name box in item 5 and enter the added party’s name in item 7a or 7b; always enter the party’s mailing address in item 7c. For additional Debtors or Secured Parties, attach Amendment Additional Party (Form UCC3AP), using correct name format.

To delete a party (items 5 and 6): Check box in item 5 to indicate whether this Amendment relates to a Debtor or Secured Party of record; and check the DELETE name box in item 5 and enter the deleted party’s name in item 6a or 6b.

8. Collateral Change. To indicate a collateral change, check this box; also check additional box (as applicable) and describe the change in item 8. If space in item 8 is insufficient, continue collateral description in item 14 of Amendment Addendum (Form UCC3Ad). Do not include social security numbers or other personally identifiable information.

To add collateral: Check the ADD collateral box in item 8 and indicate the additional collateral.

To delete collateral: Check the DELETE collateral box in item 8 and indicate the deleted collateral. A partial release is a DELETE collateral change.

To restate covered collateral description: Check the RESTATE covered collateral box in item 8 and indicate the restated collateral.

To assign the right to amend the financing statement with respect to part (but not all) of the collateral covered by the identified financing statement: Comply with Instruction 3 above and check the ASSIGN collateral box in item 8.

If, due to a full release of collateral, filer no longer claims a security interest under the identified financing statement, check box in item 2 (Termination) and not a box in item 8 (Collateral Change).

9. Name of Authorizing Party. Enter name of party of record authorizing this Amendment. In most cases, the authorizing party is the Secured Party of record. If this is an Amendment (Assignment), enter Assignor’s name in item 9a or 9b. If this is an Amendment (Termination) authorized by a Debtor, check the box in item 9 and enter the name of the Debtor authorizing this Amendment in item 9a or 9b. If this Amendment (Termination) is to be filed or recorded in the real estate records, also enter, in item 12 of Amendment Addendum (Form UCC3Ad), the name of Secured Party of record. If there is more than one authorizing Secured Party or Debtor, enter additional name(s) in item 14 of Amendment Addendum (Form UCC3Ad).

10. Optional Filer Reference Data. This item is optional and is for filer’s use only. For filer’s convenience of reference, filer may enter in item 10 any identifying information that filer may find useful. Do not include social security numbers or other personally identifiable information.
UCC FINANCING STATEMENT AMENDMENT ADDENDUM

FOLLOW INSTRUCTIONS

11. INITIAL FINANCING STATEMENT FILE NUMBER: Same as item 1a on Amendment form

12. NAME OF PARTY AUTHORIZING THIS AMENDMENT: Same as item 9 on Amendment form

<table>
<thead>
<tr>
<th>ORGANIZATION’S NAME</th>
<th>INDIVIDUAL’S SURNAMEN</th>
<th>FIRST PERSONAL NAME</th>
<th>ADDITIONAL NAME(S)/INITIAL(S)</th>
<th>SUFFIX</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

13. Name of DEBTOR on related financing statement: (name of a current Debtor of record required for indexing purposes only in some filing offices - see Instruction item 13): Provide only one Debtor name (13a or 13b) (use exact, full names; do not omit, modify, or abbreviate any part of the Debtor’s name); see Instructions if name does not fit

<table>
<thead>
<tr>
<th>ORGANIZATION’S NAME</th>
<th>INDIVIDUAL’S SURNAMEN</th>
<th>FIRST PERSONAL NAME</th>
<th>ADDITIONAL NAME(S)/INITIAL(S)</th>
<th>SUFFIX</th>
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</thead>
<tbody>
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</tr>
</tbody>
</table>

14. ADDITIONAL SPACE FOR ITEM 8 (Collateral):

15. This FINANCING STATEMENT AMENDMENT:

- covers timber to be cut
- covers as-extracted collateral
- is filed as a fixture filing

16. Name and address of a RECORD OWNER of real estate described in item 17 (if Debtor does not have a record interest):

17. Description of real estate:

18. MISCELLANEOUS:

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International Association of Commercial Administrators (IACA)
Instructions for UCC Financing Statement Amendment Addendum (Form UCC3Ad)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions; use of the correct name for the Debtor is crucial. Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

ITEM INSTRUCTIONS

11. **File Number.** Enter file number of initial financing statement as shown in item 1a of Amendment (Form UCC3) to which this Amendment Addendum relates.

12. **Name of Authorizing Party.** Enter information exactly as shown in item 9 on Amendment (Form UCC3).

13. **Name of Debtor on related Financing Statement.** If this Amendment (Form UCC3) is to be filed in the real estate records or in any other filing office where the name of a current Debtor of record is required for indexing purposes, enter Debtor name in item 13a or 13b. Item 13 is intended to cross-reference the Amendment (Form UCC3) and Amendment Addendum with the related Financing Statement (Form UCC1). If more than one current Debtor, enter additional name(s) in item 14 or on additional Amendment Addendum (Form UCC3Ad). Do not use item 13 to change, add, or delete a Debtor name.

14. **Additional Space for Item 8 (Collateral).** If space in item 8 of Amendment (Form UCC3) is insufficient or additional information must be provided, enter additional information in item 14 or attach additional page(s) and incorporate by reference in item 14 (e.g., See Exhibit A). Do not include social security numbers or other personally identifiable information.

15-17. **Real Estate Record Information.** If this Amendment (Form UCC3) is to be filed in the real estate records, complete the required information (items 15, 16, and 17). If this Amendment (Form UCC3) covers timber to be cut, covers as-extracted collateral, and/or is filed as a fixture filing, check appropriate box in item 15. If the Debtor does not have an interest of record, enter the name and address of the record owner in item 16. Provide a sufficient description of real estate in accordance with the applicable law of the jurisdiction where the real estate is located in item 17. If space in items 16 or 17 is insufficient, attach additional page(s) and incorporate by reference in items 16 or 17 (e.g., See Exhibit A), and continue the real estate information. Do not include social security numbers or other personally identifiable information.

18. **Miscellaneous.** Under certain circumstances, additional information not provided on the Financing Statement Amendment (Form UCC3) may be required. Also, some states have non-uniform requirements. Use this space or attach additional page(s) and incorporate by reference in item 18 (e.g., See Exhibit A) to provide such additional information or to comply with such requirements; otherwise, leave blank. Do not include social security numbers or other personally identifiable information.
UCC3AP Financing Statement Amendment Additional Party

<table>
<thead>
<tr>
<th>Field</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>19.</td>
<td>Initial Financing Statement File Number: Same as Item 1a on Amendment form</td>
</tr>
<tr>
<td>20.</td>
<td>Name of Party Authorizing This Amendment: Same as Item 9 on Amendment form</td>
</tr>
<tr>
<td>20a.</td>
<td>Organization's Name</td>
</tr>
<tr>
<td>20b.</td>
<td>Individual's Surname</td>
</tr>
<tr>
<td>20c.</td>
<td>First Personal Name</td>
</tr>
<tr>
<td>20d.</td>
<td>Additional Names/Initials</td>
</tr>
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The above space is for Filing Office use only

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<td>21.</td>
<td>Additional Debtor's Name: Provide only one Debtor name (21a or 21b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name)</td>
</tr>
<tr>
<td>21a.</td>
<td>Organization's Name</td>
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<td>Individual's Surname</td>
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<td>First Personal Name</td>
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<td>21d.</td>
<td>Additional Names/Initials</td>
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<tr>
<td>21f.</td>
<td>Mailing Address</td>
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<tr>
<td>21g.</td>
<td>City</td>
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<tr>
<td>21h.</td>
<td>State</td>
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<tr>
<td>21i.</td>
<td>Postal Code</td>
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<td>21j.</td>
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<td>Additional Debtor's Name: Provide only one Debtor name (22a or 22b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name)</td>
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<tr>
<td>22a.</td>
<td>Organization's Name</td>
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<tr>
<td>22b.</td>
<td>Individual's Surname</td>
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<td>22f.</td>
<td>Mailing Address</td>
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<td>City</td>
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<td>22h.</td>
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<td>Postal Code</td>
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<tr>
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<td>Additional Debtor's Name: Provide only one Debtor name (23a or 23b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name)</td>
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<tr>
<td>23a.</td>
<td>Organization's Name</td>
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<tr>
<td>23b.</td>
<td>Individual's Surname</td>
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<td>23c.</td>
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<tr>
<td>24.</td>
<td>Additional Secured Party's Name or Assignor Secured Party's Name: Provide only one name (24a or 24b)</td>
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<td>24a.</td>
<td>Organization's Name</td>
</tr>
<tr>
<td>24b.</td>
<td>Individual's Surname</td>
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<tr>
<td>25.</td>
<td>Additional Secured Party's Name or Assignor Secured Party's Name: Provide only one name (25a or 25b)</td>
</tr>
<tr>
<td>25a.</td>
<td>Organization's Name</td>
</tr>
<tr>
<td>25b.</td>
<td>Individual's Surname</td>
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<tr>
<td>25c.</td>
<td>First Personal Name</td>
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<td>25d.</td>
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<th>Field</th>
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<tbody>
<tr>
<td>26.</td>
<td>Miscellaneous</td>
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</table>

International Association of Commercial Administrators (IACA)

Filing Office Copy — UCC Financing Statement Amendment Additional Party (Form UCC3AP) (Rev. 08/22/11)
Instructions for UCC Financing Statement Amendment Additional Party (Form UCC3AP)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions; use of the correct name for the Debtor is crucial. Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

Use this form (multiple copies if needed) to continue adding additional Debtor or Secured Party names as needed when filing a UCC Financing Statement Amendment (Form UCC3).

ITEM INSTRUCTIONS

19. **File Number.** Enter file number of initial financing statement as shown in item 1a of Amendment (Form UCC3) to which this Amendment Addendum relates.

20. **Name of Authorizing Party.** Enter information exactly as shown in item 9 on Amendment (Form UCC3).

21-23. **Additional Debtor’s name.** If this Amendment Additional Party adds additional Debtors, complete items 21, 22, and 23 in accordance with Instruction 1 of Financing Statement (Form UCC1).

24-25. **Additional Secured Party’s name or Assignor Secured Party’s name.** If this Amendment Additional Party adds additional Secured Parties, complete items 24 and 25 in accordance with Instruction 3 of Financing Statement (Form UCC1). In the case of an assignment of the Secured Party’s interest, filer may enter Secured Party and/or Assignor Secured Party’s name and mailing address information in items 24 and 25.

26. **Miscellaneous.** Under certain circumstances, additional information not provided on the Financing Statement Amendment (Form UCC3) may be required. Also, some states have non-uniform requirements. Use this space or attach additional page(s) and incorporate by reference in item 26 (e.g., See Exhibit A) to provide such additional information or to comply with such requirements; otherwise, leave blank. Do not include social security numbers or other personally identifiable information.
UCC5 Information Statement

Form 9-17

UCC5 Information Statement

FILING OFFICE COPY — INFORMATION STATEMENT (Form UCC5) (Rev. 07/19/12)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

A. NAME & PHONE OF CONTACT AT FILER (optional)

B. E-MAIL CONTACT AT FILER (optional)

C. SEND ACKNOWLEDGMENT TO: (Name and Address)

CAUTION:
This is not an amendment.

INFORMATION STATEMENT

FOLLOW INSTRUCTIONS

1. Identification of the RECORD to which this INFORMATION STATEMENT relates

1a. INITIAL FINANCING STATEMENT FILE NUMBER

1b. RECORD INFORMATION TO WHICH THIS INFORMATION STATEMENT RELATES

2. Check one of these three boxes to indicate the claim made by this INFORMATION STATEMENT

2a. RECORD IS INACCURATE. Enter in item 3 the basis for the belief by the Debtor of Record identified in item 5 that the RECORD identified in item 1 is inaccurate and indicate the manner in which the person believes the RECORD should be amended to cure the inaccuracy

2b. RECORD WAS WRONGFULLY FILED. Enter in item 3 the basis for the belief by the Debtor of Record identified in item 5 that the RECORD identified in item 1 was wrongfully filed

2c. RECORD FILED BY PERSON NOT ENTITLED TO DO SO. Enter in item 3 the basis for the belief by the Secured Party of Record that the person that filed the RECORD identified in item 1 was not entitled to do so under UCC Section 9-509

3. Basis for claim of box checked in item 2

4. If this INFORMATION STATEMENT relates to a RECORD filed [or recorded] in a filing office described in Section 9-501(a)(1) and this INFORMATION STATEMENT is filed in such a filing office, provide the date [and time] on which the INITIAL FINANCING STATEMENT identified in item 1a above was filed [or recorded]

4a. DATE

4b. TIME

5. NAME of PERSON filing this INFORMATION STATEMENT

5a. ORGANIZATION’S NAME

5b. INDIVIDUAL’S SURNAME

6. FIRST PERSONAL NAME

7. ADDITIONAL NAME(S)/INITIAL(S)

8. SUFFIX

INTERNATIONAL ASSOCIATION OF COMMERCIAL ADMINISTRATORS (IACA)

© STATE BAR OF TEXAS
Instructions for Information Statement (Form UCC5)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions, especially Instructions 1a and 1b; correct identification of the initial record to which this Information Statement relates is crucial. Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

Send completed form and any attachments to the filing office, with the required fee.

Note: A person may file an Information Statement with respect to a record indexed under that person’s name if the person believes the record was inaccurate or wrongfully filed, or a person may file an Information Statement with respect to a record if the person is a Secured Party of Record with respect to the financing statement to which the record relates and believes that the person that filed the record was not entitled to do so.

ITEM INSTRUCTIONS

A and B. To assist filing offices that might wish to communicate with filer, filer may provide information in item A and item B. These items are optional.

C. Complete item C if filer desires an acknowledgment sent to them. If filing in a filing office that returns an acknowledgment copy furnished by filer, present simultaneously with this form the Acknowledgment Copy or a carbon or other copy of this form for use as an acknowledgment copy.

Always complete items 1 and 5 and either 2a or 2b or 2c. Always complete item 3 with the basis for the box marked in item 2. You may also be required to complete item 4.

1a. File number. Enter file number of initial financing statement to which the record that is the object of this Information Statement relates. Enter only one file number.

1b. Enter record information to which this Information Statement relates. Indicate the type of record to which this Information Statement relates (e.g., Financing Statement or Amendment) or you may also insert additional information that you believe will assist in identifying the record (e.g., the record file number or the filing date of the record).

2a. Record is inaccurate. If this Information Statement is filed based upon the belief of the Debtor of Record that the record identified in item 1 is inaccurate, check box in item 2a, provide the basis for that belief in item 3, and indicate the manner in which the record should be amended to cure the inaccuracy.

2b. Record was wrongfully filed. If this Information Statement is filed based upon the belief of the Debtor of Record that the record identified in item 1 was wrongfully filed, check box in item 2b and provide the basis for that belief in item 3.

2c. Record filed by person not entitled to do so. If this Information Statement is filed based upon the belief of the Secured Party of Record that the person that filed the record identified in item 1b was not entitled to do so under Section 9-509, check box in item 2c and provide the basis for that belief in item 3.

3. Basis. Use this item to provide the basis for the box checked in item 2.

4. Filing office date and time. If this Information Statement relates to a record filed [or recorded] in a filing office described in Section 9-501(a)(1) and this Information Statement is filed in such a filing office, provide the date [and time] on which the initial financing statement identified in item 1a above was filed [or recorded].

5. Name of Authorizing Party. Enter name of the person filing this Information Statement. This name must be the same name as a Secured Party of Record or the name under which the record is indexed.
UCC11 Information Request

Form 9-18

INFORMATION REQUEST

1. DEBTOR'S NAME to be searched:  Provide only one Debtor name (1a or 1b) (use exact full name; do not omit, modify or abbreviate any part of the Debtor's name)

2. INFORMATION OPTIONS relating to UCC filings and other notices on file in the filing office that include the Debtor name identified in item 1:

2a. LISTING RELATING TO DEBTOR AT SPECIFIED CITY AND STATE ONLY — Filing office requested to furnish a search report listing all financing statements, related records, and other notices on file in filing office that include the Debtor's name identified in item 1 and show that Debtor's address in the city, state, and country indicated here.

2b. INFORMATION REQUEST RESPONSE WITH FULL COPIES (CERTIFIED) — Filing office requested to furnish a search report listing all financing statements, related records, and other notices, showing date and time of filing and name and address of each Secured Party named therein, and also furnish an exact CERTIFIED COPY of all reported records (including all attachments)

2c. INFORMATION REQUEST RESPONSE WITH PARTIAL COPIES (CERTIFIED) — Filing office requested to furnish a search report (as described in 2b) listing all reported records, but to furnish NO COPIES of reported records

2d. INFORMATION REQUEST RESPONSE WITH PARTIAL COPIES (CERTIFIED) — Filing office requested to furnish a search report (as described in 2b) and also to furnish an exact CERTIFIED COPY of the FIRST PAGE ONLY of all reported records

3. SPECIFIED COPIES ONLY — Filing office requested to furnish an exact copy of each page of the financing statements, related records, and other notices (including all attachments) that are identified below by record number. Certain filing offices require additional identifying information — please complete if required.

CERITIFIED COPY REQUEST — Filing office requested to furnish CERTIFIED copies per request indicated in this item 3

4. LISTING RELATING TO SECURED PARTY — Filing office requested to furnish a search report listing all financing statements, related records, and other notices (regardless of Debtor name) on file in filing office that include the Secured Party's name identified in item 4a or 4b. If a specified city, state, and country are being requested (optional), show that Secured Party's address is in item 4c.

5. DELIVERY INSTRUCTIONS (request will be filled by mail sent to address shown in item 5c; unless otherwise instructed here)

5a. FAX Delivery — Filing office requested to fax results of this Information Request to fax number indicated here:  (   )

5b. Pick Up

5c. Other

Specify desired method here (if available from this office; provide delivery information (e.g., delivery service's name, addressee's account # with delivery service, addressee's phone #, etc.)

FILING OFFICE COPY (1) — INFORMATION REQUEST (Form UCC11) (Texas) (Rev. 07/19/12)

Office of the Secretary of State of Texas

© STATE BAR OF TEXAS

9-18-1
Instructions for Information Request (Form UCC11) (Texas)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions, especially Instruction 1; use of the correct name for the Debtor is crucial.

Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

Send completed form parts 1 and 2 (labeled Filing Office Copy (1) and (2)) to the filing office, with the required fee.

ITEM INSTRUCTIONS

A and B. To assist filing offices that might wish to communicate with filer, filer may provide information in item A and item B. These items are optional.

C. Provide name and address of requestor in item C. This item is NOT optional.

1. Debtor's name. Enter only one Debtor name in item 1 -- either an organization's name (1a) or an individual's name (1b). Enter Debtor's correct name. Do not abbreviate words that are not already abbreviated in the Debtor's name.

1a. Organization Debtor Name. "Organization Name" means the name of an entity that is not a natural person. A sole proprietorship is not an organization, even if the individual proprietor does business under a trade name. If Debtor is a registered organization (e.g., corporation, limited partnership, limited liability company), it is advisable to examine Debtor's current filed public organic records to determine Debtor's correct name. Trade name is insufficient. If a corporate ending (e.g., corporation, limited partnership, limited liability company) is part of the Debtor's name, it must be included. Do not use words that are not part of the Debtor's name.

1b. Individual Debtor Name. "Individual Name" means the name of a natural person; this includes the name of an individual doing business as a sole proprietorship, whether or not operating under a trade name. The term includes the name of a decedent where collateral is being administered by a personal representative of the decedent. The term does not include the name of an entity, even if it contains, as part of the entity's name, the name of an individual. Prefixes (e.g., Mr., Mrs., Ms.) and titles (e.g., M.D.) are generally not part of an individual name. Indications of lineage (e.g., Jr., Sr., III) generally are not part of the individual's name, but may be entered in the Suffix box. Enter individual Debtor's surname (family name) in Individual's Surname box, first personal name in First Personal Name box, and all additional names in Additional Name(s)/Initial(s) box. If a Debtor's name consists of only a single word, enter that word in Individual's Surname box and leave other boxes blank.

For both organization and individual Debtors, Do not use Debtor's trade name, DBA, AKA, FKA, division name, etc. in place of or combined with Debtor's correct name; filer may add such other names as additional Debtors if desired (but this is neither required nor recommended).

2. Information Options.

2a. To request a "Listing Relating to Debtor at Specified City and State Only" check box 2a and enter the city, state, and country in item 2a. This type of request will introduce a search criterion that narrows the scope of the search, which may result in an incomplete search (that fails to list all filings against a named Debtor) and requestor may fail to learn information that might be of value.

2b-2d. Check appropriate box (2b, 2c, or 2d) to specify whether search response should include all copies, no copies or partial copies.

3. Specified Copies Only. To request specified copies only, check the "Specified Copies Only" box and provide the record number(s) as requested. To request certified copies for record number(s) identified in item 3, also check the "Certified Copy Request" box.

4. Listing relating to Secured Party. To request a listing for a named Secured Party, check this box. Enter only one Secured Party name in item 4 -- either an organization's name (4a) or an individual's name (4b). If a specified city, state, and country is being requested (optional), enter that Secured Party's address in item 4c.

5. Delivery Instructions. Unless otherwise instructed, filing office will mail information to the name and address in item C. Check appropriate box (5a, 5b, or 5c) if optional delivery method is being requested.

5a. To request information to be faxed to the requestor, check the "FAX Delivery" box and provide fax number in specified area.

5b. To request information to be picked up from the filing office, check the "Pick Up" box.

5c. For other than mail, pick up or FAX, check the "Other" box and specify the other delivery method that is being requested. If requesting delivery service, provide delivery service's name and requestor's account number to bill for delivery charge. Filing office will not deliver by delivery service unless prepaid waybill or account number for billing is provided.

If requesting information from a county clerk filing office, contact county clerk to determine what services are offered by that office.
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Ancillary Loan Documents

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Chapter 10
Ancillary Loan Documents

§ 10.1 General Considerations for Transfer of Note and Lien

The transfer of note and lien, form 10-1 in this chapter, is used to transfer ownership of a note or other obligation and the lien securing it to another party. This type of transfer is a real property transaction not subject to the Uniform Commercial Code provisions governing secured transactions. The transfer instrument must be filed in the real property records of the county in which the land is located, or, like other documents concerning the conveyance of real property, it is void as to a creditor or subsequent purchaser for valuable consideration without notice. Tex. Prop. Code § 13.001(a).

The holder of the note must endorse it in favor of the transferee and deliver both the transfer instrument and the note to the transferee. Any special terms included in the transfer instrument, such as a negation of recourse or of representations or warranties, should also be noted in the endorsement on the note.

If the note and lien are being pledged as collateral, the transaction is subject to the Texas Uniform Commercial Code. The proper procedure for effecting a security interest is outlined in chapter 9 in this manual.

§ 10.1:1 Cautions for Transfer of Lien

The borrower must receive actual notice of the transfer of the note and lien. If the borrower continues to make payments to the prior holder and has not received actual notice, the transferee has no recourse against the borrower. Accordingly, the transferee should either notify the borrower of the transfer or make certain that the prior holder informs the borrower of the transfer.

§ 10.1:2 Instructions for Completing Transfer of Lien

Form 10-1 in this chapter is drafted with the assumption that the parties will not wish to show the actual consideration for the transfer. However, a description of the consideration could be added at any suitable place.

The note is frequently secured by two liens, such as a vendor’s lien and a deed-of-trust lien. All liens should be listed, even if the attorney for the note holder making the transfer has access only to the recording information for the deed of trust. If recording information for all documents is available, it should be included, but a simple notation of a lien other than the one described by recording information is adequate.

For information about the property description, see section 3.7 in this manual.

§ 10.1:3 Additional Clauses: Negation of Recourse and Representations and Warranties

If the holder is being paid in full, the holder has the option to sign a release. The transferee, however, will most likely want a transfer instrument. In that case, the holder will not want to incur any liability beyond that which the holder would incur by signing a release. To do so, the holder will make the transfer without recourse. Merely making the transfer without recourse does not negate the transfer warranties of Texas Business and Commerce Code section 3.416. See Tex. Bus. & Com. Code...
§ 3.416 cmt. 3. To negate the transfer warranties, the words *without warranties* or other specific reference must be included in
the transfer instrument. See Tex. Bus. & Com. Code § 3.416 cmt. 5. The words *without recourse against or without representa-
tion or warranty by* should be added to the endorsement of the note and a statement added to the transfer of note and lien to
accomplish this purpose. There are some representations that the holder can make that will not result in liability beyond that of
signing a release. First, the holder is the correct person to make the transfer, that is, the holder is the person entitled to enforce
the note. Second, the payoff amount, the outstanding principal and interest, is correctly stated. Third, if true, the note is not
overdue. This last representation helps the transferee obtain holder-in-due-course status. See Tex. Bus. & Com. Code
§ 3.302(a)(2)(C).

§ 10.1:4 Endorsement of Note

The note transferred should be endorsed and dated, and if the transfer is without recourse against or representation or warranty
by the holder, except as stated, that fact should be noted:

[Date of transfer]

Pay to the order of [name] [without recourse against [and/or] without representation or warranty by, except as
stated in a separate transfer of note and lien, [name of holder]].

[Signature of holder]

§ 10.1:5 Confidentiality Notice

Instruments, defined as deeds and deeds of trust, transferring an interest in real property to or from an individual must contain

§ 10.2 General Considerations for Release of Lien and Partial Release of Lien

Although payment of a debt extinguishes the liens that secure it even without a formal release, the lienholder has a duty to
provide a written release. After paying the debt, the borrower may bring suit against a lienholder who refuses to provide a
release and may recover actual damages incurred because of the refusal. Bayless v. Strahan, 182 S.W.2d 262 (Tex. Civ.
App.—Amarillo 1944, writ ref’d w.o.m.).

The release should be filed in the real property records of the county in which the lien is recorded.

§ 10.2:1 Cautions for Partial Release

Only the portion of the property to be released from the lien should be described in the partial release, form 10-3 in this chap-
ter.

If the lien instrument does not authorize partial releases, the lienholder is not required to grant a partial release. If the lien-
holder nevertheless agrees to a partial release, obtaining the written consent of any junior lienholder may be considered,
although obtaining a junior lienholder’s consent is not general practice.

If the note secured by the lien has makers or guarantors who are not grantors in the lien instrument, their written consent to the
partial release is probably necessary unless the note or guaranty provides for their continuing liability after a partial release.
If the lien is insured by a mortgagee’s title policy, an endorsement of the policy should be obtained. Title companies may require a premium for endorsement. Procedural Rule P-9.b(3), Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

§ 10.2:2 Instructions for Completing Release

Notes are frequently secured by more than one lien, such as a vendor’s lien and deed-of-trust lien, and all of them should be included in the release. If recording information for all documents is available, it should be included under the heading “Note and Lien Are Described in the Following Documents.” Even if some recording information is not available, all lien documents should be described as fully as possible.

For information about the property description, see section 3.7 in this manual.

§ 10.2:3 Instructions for Completing Partial Release

A partial release should include a description of all liens securing the note. If recording information for all documents is available, it should be included under the heading “Note and Lien Are Described in the Following Documents.” Even if some recording information is not available, all lien documents should be described as fully as possible.

§ 10.2:4 Additional Clauses for Use with Partial Release

A partial release clause in a lien instrument or a prepayment clause in a note should state how any allowable prepayment will be applied. If those clauses do not adequately explain the application of a prepayment, a clause serving that purpose should be added to form 10-3 in this chapter after the sentence releasing the lien. The prepayment clauses suggested in form 6-3 in this manual may serve as appropriate models for drafting this type of clause.

§ 10.3 General Considerations for Modification and Extension Agreement

Form 10-4 in this chapter is appropriate for extending the time or manner of payment of a note secured by a deed-of-trust lien on property or for modifying the terms of the note. If instead the parties want to reinstate a note and pay it as originally written, they should use a different form. See the suggested reinstatement agreement at form 14-6 in this manual.

The legality of extensions and their effect on the statute of limitations are governed by Tex. Civ. Prac. & Rem. Code §§ 16.035–.037. The form expressly requires the obligor to assume payment of the note, even if the obligor was not the original borrower. This requirement accords with section 16.036, which provides that the extension of a note likewise extends the statute of limitations for foreclosure of a lien only if the extension is executed by the “party or parties primarily liable for a debt.” Therefore a party who buys the property subject to the lien without assuming the note should not execute this extension form, for the party would become liable for payment of the note.

Many attorneys advise their clients to obtain written consent from all junior or inferior lien claimants and holders before agreeing to an extension. Numerous cases, however, have held that junior lienholders who acquire their liens while the first lien and first-lien note are intact are bound by the terms of a valid extension agreement. See Yates v. Darby, 131 S.W.2d 95, 101 (Tex. 1939).
§ 10.3:1 Cautions for Modification and Extension Agreement

If a loan policy covers the interest of the note holder, it should be examined carefully. Policies written before March 1, 1983, limit the policy protection to the final maturity date of the note as originally written plus the applicable limitations period. There is also no loan policy endorsement available for increased value.

§ 10.3:2 Instructions for Completing Modification and Extension Agreement

The property description should match that on the note, if any, and the deed of trust.

The period of extension must be definite, or the extension will not be enforceable.

After being acknowledged, the form must be recorded in the county in which the land is located to provide notice to third parties.

If a party to a modification or extension agreement is an individual, the practitioner should consider including the confidentiality notice required by Tex. Prop. Code § 11.008 at the top of the first page of the agreement. See section 3.16 in this manual.

§ 10.4 Assignment of Rent

Texas has adopted an assignment of rents act. See Tex. Prop. Code ch. 64; Acts 2011, 82d Leg., R.S., ch. 636, § 2 (S.B. 889), eff. June 17, 2011. Under the act, an enforceable security instrument (meaning a deed of trust, mortgage, or other contract lien on an interest in real property) creates an assignment of rents arising from the real property, unless the security instrument provides otherwise or an assignment of rents is prohibited by the Texas Constitution. The assignment of rents is a security interest in all accrued and unaccrued rents, regardless of the form of the document creating the assignment of rents. The security interest is perfected upon recording the security instrument in the real property records of the county where the real property is located.

The assignee may enforce an assignment of rents by giving notice to the assignor demanding that all rents accrued but not paid and unaccrued rents be sent to the assignee when collected by the assignor. The assignee may also enforce an assignment of rents by giving notice, a form of which is included in the statute, to the tenant that all rents accrued but not paid and unaccrued rents be paid to the assignee when rent payments are due. An assignee may not enforce an assignment of rents by either of these methods if the property is a one-to-four-family residence that is the assignor’s homestead when the security instrument is entered into and when enforcement is sought. After a tenant receives notice from an assignee to pay rents to the assignee, the tenant’s obligation to pay rents is discharged by paying rents to the assignee. If a tenant is occupying the premises as his primary residence, the tenant’s obligation to pay rents is also discharged by continuing to pay rents to the assignor/landlord. For other tenants, the obligation to pay rents is not discharged by continuing to pay rents to the assignor/landlord after receipt of the notice from the assignee.

Unless otherwise agreed, an assignee that collects rents must apply the collected rents in a stipulated order. The order of application for collected rents is different than the order of application of foreclosure proceeds under the Texas Property Code. Unless otherwise agreed, a subordinate creditor that enforces its assignment of rents and collects rents before receipt of a turnover notice from an assignee with priority is not obligated to turn over to the assignee with priority rents collected before receipt of the turnover demand. If an assignee’s security interest in rents is perfected, the assignee’s security interest attaches to identifiable proceeds and is perfected as to identifiable cash proceeds.
§ 10.5  Borrowing Resolutions

Form 10-6 in this chapter provides examples of resolutions authorizing an entity to guarantee a loan or borrow funds and mortgage real property as security for the loan. These resolutions may be incorporated into one of the certificates of resolutions included in chapter 26, forms 26-9 through 26-14. The requirements for meeting and voting for for-profit corporations are found in chapter 21 of the Business Organizations Code. See Tex. Bus. Orgs. Code §§ 21.411–.416. The requirements for meeting and voting for limited liability companies are found in chapter 101 of the Business Organizations Code. See Tex. Bus. Orgs. Code §§ 101.353–.358.

§ 10.6  Collection and Payment Agreement

Form 10-7 in this chapter may be used in wraparound loan transactions. See section 8.3 in this manual for commentary on wraparound loan transactions.

§ 10.7  Homestead Affidavits

Forms 10-8 and 10-9 in this chapter designate property as a rural homestead or urban homestead. Constitutional and statutory prohibitions against mortgaging or encumbering the homestead (except for purchase money, taxes, owelty of partition, improvements, home equity loans, or reverse mortgages) and against one spouse’s selling or abandoning the homestead without the consent of the other may limit the ability to borrow against or transfer the property. The voluntary designation of homestead in the real property records may free property that is not claimed as homestead from these limitations. A purchaser or lender for value without actual knowledge is entitled to conclusively rely on an affidavit that disclaims property as homestead or designates other property as the homestead of the affiant. Tex. Const. art. XVI, § 50(d). Both spouses should join in the designation of a homestead. Form 10-8 may be used by a lender making a loan to be secured by the borrower’s nonhomestead property. See clauses 8-9-2 and 8-9-3 in this manual for homestead disclaimer and designation clauses suggested for use in a deed of trust. Form 10-9 is an example of an affidavit appropriate for loans to be secured by the borrower’s homestead.

§ 10.8  Lender’s Estoppel Certificate

A lender considering a loan to be secured by a subordinate lien on real property already encumbered by a prior lien often will require, as a condition to making the loan, that the borrower obtain an estoppel certificate from the prior lienholder. Form 10-10 in this chapter requires the prior lienholder to confirm important information regarding the prior lienholder’s note and deed of trust. Some of the provisions of this form may have to be modified or deleted to obtain the prior lienholder’s agreement to execute this form.

§ 10.9  Lienholder’s Subordination to Oil, Gas, and Mineral Lease

Form 10-11 in this chapter is used if an oil, gas, and mineral lease is given on real property already encumbered by a deed-of-trust lien or other lien. This form provides that the lease will not be affected by foreclosure of the lien if the lease is maintained according to its terms.
§ 10.10 Notice from Lender’s Attorney to Borrower

Form 10-12 in this chapter is an example of a written disclosure confirming that the lender’s attorney does not represent the borrower. As with all forms, this letter should be modified to reflect the specific details of the loan transaction. See section 1.6:4 in this manual for commentary regarding an attorney’s communications with unrepresented parties.

§ 10.11 Subordination of Lien

Form 10-13 in this chapter is used if a new deed-of-trust lien is made superior to an existing deed-of-trust lien. The new lender typically requires the subordination of existing liens to the newly created lien.

§ 10.12 Notice of Final Agreement

Loans made by banks, savings and loan associations, and credit unions in excess of $50,000 must be in writing and be signed by the party to be bound or by that party’s authorized representative. Tex. Bus. & Com. Code § 26.02(b). Written loan documents evidencing loans in excess of $50,000 may not be varied by oral agreements if the financial institution gives the obligor, on or before execution of the loan documents, a written notice stating substantially the following:

This written loan agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

The notice may be in a separate document signed by the obligor or incorporated into one or more of the loan documents and must be conspicuous. Form 10-14 in this chapter may be used by financial institutions to satisfy the requirements of section 26.02 of the Texas Business and Commerce Code.

§ 10.13 General Considerations for Guaranty

Form 10-15 in this chapter is an unconditional guaranty of payment. It allows the lender to pursue the guarantor without first pursuing the principal obligor on the default of the principal obligor. This form should be distinguished from a guaranty of collection, which requires the lender to use reasonable diligence to compel payment by the principal obligor before pursuing the guarantor. This form may be modified to become a limited guaranty by describing the guaranteed indebtedness as limited to a specific dollar amount or a specific percentage of the borrower’s debt to the lender. Although this form contains several waivers by the guarantor of various defenses to the enforcement of a guaranty, many attorneys recommend that the guarantor’s written consent be obtained at the time of any modification of the guaranteed indebtedness. If the guarantor is a corporation, the lender should require a specific resolution of the corporation’s board of directors authorizing the execution of the guaranty and declaring that the guaranty may reasonably be expected to benefit the corporation. See Tex. Bus. Orgs. Code § 2.104(c).

In Moayedi v. Interstate 35/Chisam Road, L.P., 438 S.W.3d 1, 6 (Tex. 2014), the Texas Supreme Court held that a guarantor may waive his right to offset under section 51.003 of the Texas Property Code.
§ 10.14 Home Loans

“Home loan” is defined as a loan that is made to one or more individuals for personal, family, or household purposes and secured in whole or part by either a manufactured home (as defined by Finance Code section 372.002), used or to be used as a borrower’s principal residence, or real property improved by a dwelling designed for occupancy by four or fewer families and used or to be used as a borrower’s principal residence. Tex. Fin. Code § 343.001(2). A lender, mortgage banker, or licensed mortgage broker must provide each applicant for a home loan with a notice of penalties for making false or misleading written statements. Tex. Fin. Code § 343.105. Form 10-19 in this chapter may be used to provide the statutorily required notice. As used in chapter 343 of the Finance Code, a home loan excludes a reverse mortgage or an open-end account as defined by Finance Code section 343.002. Tex. Fin. Code §§ 343.002, 343.202. Two types of home loans are addressed in the statute: low-rate home loans and high-cost home loans.

§ 10.14:1 Low-Rate Home Loans

A low-rate home loan is a home loan that at its inception carries an interest rate two percentage points or more below the yield on treasury securities having comparable periods of maturity to the loan maturity, except that if the loan’s interest rate is a discounted introductory rate or a rate that automatically steps up over time, the fully indexed rate or the fully stepped-up rate, as appropriate, is used instead of the rate at the loan’s inception to determine if the loan is a low-rate home loan. Tex. Fin. Code § 343.101(a). A lender may not replace or consolidate a low-rate home loan directly made by a governmental or nonprofit lender before the seventh anniversary of the date of the loan unless the new or consolidated loan has a lower interest rate and requires payment of a lesser amount of points and fees than the original loan or is a restructure to avoid foreclosure. Tex. Fin. Code § 343.101(b). A restructure is defined in Finance Code chapter 343 as a change in the payment schedule or other terms of a home loan as a result of the borrower’s default. Tex. Fin. Code § 343.001(3).

§ 10.14:2 High-Cost Home Loans

A high-cost home loan is a home loan that (1) has a principal amount equal to or less than one-half of the maximum conventional loan amount for first mortgages as established and adjusted by the Federal National Mortgage Association and (2) is a credit transaction described by section 226.32 of title 12 of the Code of Federal Regulations. Such a loan also includes a residential mortgage transaction, as defined by section 226.2 of title 12 of the Code of Federal Regulations, if the total loan amount is $20,000 or more and the annual percentage rate exceeds the rate indicated in section 226.32(a)(1)(i) or the total points and fees payable by the consumer at or before the loan closing will exceed the amount indicated in section 226.32(a)(1)(ii). Tex. Fin. Code § 343.201(1)(C), (E). Points and fees have the meaning assigned by section 226.32(b) of title 12 of the Code of Federal Regulations. Tex. Fin. Code § 343.201(2).

A high-cost home loan may not contain a provision for a scheduled payment that is more than twice as large as the average of earlier scheduled monthly payments unless the balloon payment becomes due not less than sixty months after the date of the loan. This prohibition does not apply if the payment schedule is adjusted to account for the seasonal or otherwise irregular income of the borrower or if the loan is a bridge loan in connection with the acquisition or construction of a dwelling intended to become the borrower’s principal dwelling. Tex. Fin. Code § 343.202.

A high-cost home loan may not provide for a payment schedule with regular periodic payments that cause the principal balance to increase except for any negative amortization as a consequence of a temporary forbearance, bridge loan, or restructure

A bridge loan under Finance Code chapter 343 refers to temporary or short-term financing that requires payment only of interest until the entire unpaid balance is due. Tex. Fin. Code § 343.001(1).

A high-cost home loan lender may also not engage in a pattern or practice of extending consumer credit based on the consumer’s collateral without regard to an obligor’s repayment ability, including an obligor’s current and expected income, current obligations, employment status, and other financial resources, other than an obligor’s equity in the dwelling that secures repayment of the loan. Tex. Fin. Code § 343.204(b). The term obligor as used in section 343.204(b) refers to all persons obligated to pay a high-cost home loan, including borrowers, cosigners, and guarantors. Tex. Fin. Code § 343.204(a).

§ 10.14:3 Credit Life, Disability, or Unemployment Insurance

Lenders must provide a statutory insurance disclosure to each home loan applicant, which must be made by hand delivery or mail not later than the third business day after the date the lender receives a home loan application. Tex. Fin. Code § 343.104. Form 10-16 in this chapter may be used to provide the statutorily required insurance disclosure.

§ 10.15 Certification of Trust

Effective September 1, 2007, a person other than a beneficiary is not required to inquire into the extent of the trustee’s powers or the propriety of the exercise of those powers if the person deals with the trustee in good faith and obtains a certification of trust. See Tex. Prop. Code § 114.081(b). Instead of providing a copy of a trust instrument to a third party, the trustee may provide a certification of trust that contains, among other things, representations about the power of the trustee to take actions on behalf of the trust. Any party without actual knowledge to the contrary may rely on the representations in the certification of trust in dealing with the trustee. A person who in good faith enters into a transaction relying on a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification of trust are correct.

Form 10-20 in this chapter provides an example of a certification of trust. The statute allows a recipient of a certification of trust to require the trustee to furnish copies of the excerpts from the original trust instrument and later amendments to the trust instrument that designate the trustee and confer on the trustee the power to act in the pending transaction. See Tex. Prop. Code § 114.086(e). The statute does not provide protection to parties with knowledge contrary to the contents of the certification.

A person making a demand for the trust instrument in addition to a certification of trust or excerpts as provided by the statute is liable for damages if the court determines that the person did not act in good faith in making the demand. Tex. Prop. Code § 114.086(i).

§ 10.16 Subordination, Nondisturbance, and Attornment Agreement

A subordination, nondisturbance, and attornment agreement (SNDA) deals with the issues of existing commercial tenants’ and lienholders’ rights as they relate to present and future financing. This agreement is an acknowledgment by a landlord, tenant, and lienholder of their respective rights and obligations, and it provides assurance to the parties that present rights and obligations will be preserved should the landlord default on its loan and the lender foreclose. The tenant agrees to continue to be a tenant of the landlord or purchaser on foreclosure, and the lienholder agrees not to foreclose the rights of the tenant on
foreclosure of the lien. Form 25-13 in this manual provides an example of a simple SNDA. Language also may be incorporated in the lease agreement if the situation warrants its incorporation. When drafting an SNDA, the attorney may also need to address various other issues applicable to the different types of commercial properties.

§ 10.17 Assumption Agreement

Form 10-22 in this chapter is an example of an assumption agreement used to document a third party’s assumption of an obligation to pay an indebtedness secured by a vendor’s lien or deed-of-trust lien on real property. Alternative paragraphs are included to distinguish between an assumption of debt where the original borrower is released or not released from liability to pay the assumed indebtedness. If the original borrower is not released from liability to pay the assumed indebtedness, a practitioner should review sections 8.6 and 8.7 in this manual concerning the use and effect of a deed of trust to secure assumption.

§ 10.18 Lender’s Rescission and Waiver of Acceleration of an Indebtedness Secured by a Lien on Real Property

A lender may use forms 10-23 and 10-24 in this chapter to rescind and waive the acceleration of an indebtedness secured by a lien on real property before the limitations period expires, following the requirements of section 16.038 of the Texas Civil Practice and Remedies Code, and to document the lender’s compliance with the written notice requirement to the borrower.

§ 10.19 Other Loan Documents

For other forms in this manual related to loan transactions, see the following:

• mechanic’s lien contract and related forms—chapter 20;
• reinstatement agreement—form 14-6; and
• closing instructions letters—forms 26-15 through 26-18.
Form 10-1

Transfer of Note and Lien

Basic Information

Date:

Holder of Note and Lien (“Holder”):

Holder’s Mailing Address:

Transferee:

Transferee’s Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

Unpaid principal and interest:

[Maturity date:]

Note and Lien Are Described in the Following Documents (“Lien Documents”): [include recording information]

Property (including any improvements):
Prior Lien(s): [include recording information]

Transfer of Note and Lien

Holder transfers the Note and the liens and security interests (“Lien”) on the Property granted in the Lien Documents to Transferee.

[Include if applicable: This transfer is without recourse against [and/or] without representation or warranty by Holder, except that] Holder represents that Holder is the person entitled to enforce the Note [include if applicable: , the Note is not overdue,] and the unpaid principal and interest on the Note are correctly stated.

Holder expressly waives and releases all present and future rights to establish or enforce the liens described in this instrument as security for payment of any future or other indebtedness.

When the context requires, singular nouns and pronouns include the plural.

[Name of holder]

Include acknowledgment.
Form 10-2

Release of Lien

Basic Information

Date:

Holder of Note and Lien:

Holder’s Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

[Maturity date:]

Note and Lien Are Described in the Following Documents (“Lien Documents”): [include recording information]

Property (including any improvements): [include legal description of real property and personal property to be released]

Release of Lien and Security Interests

Holder is the owner and holder of the Note and Lien.

Select one of the following.
Holder releases the Property from all liens and security interests held by Holder granted in the Lien Documents and any other instruments, including other instruments recorded in the official public records of the county where the Property is located.

Or

Holder releases the Property from all liens and security interests held by Holder granted in the Lien Documents.

Continue with the following.

When the context requires, singular nouns and pronouns include the plural.

[Name of holder]

Include acknowledgment.
Form 10-3

Partial Release of Lien

Basic Information

Date:

Holder of Note and Lien:

Holder’s Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

[Maturity date:]

Note and Lien Are Described in the Following Documents: [include recording information]

Property (including any improvements) to Be Released from Lien (“Property”):

Partial Release of Lien

For value received, Holder of Note and Lien releases only the Property from the Lien and from all liens held by Holder of Note and Lien, without regard to how they were created or evidenced.

When the context requires, singular nouns and pronouns include the plural.
Partial Release of Lien

__________________________________________________________

[Name of holder]

 Include acknowledgment.
Form 10-4

Modification and Extension Agreement

Basic Information

Date:

Holder of Note and Lien:

Holder’s Mailing Address:

Obligor:

Obligor’s Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

[Maturity date:]

Unpaid Principal and Interest on Note:

Lien Documents: [include recording information]

Property (including any improvements):

Extended Maturity Date of Note:
Modified Terms:

**Obligor’s Covenants and Warranties**

The Note is secured by liens against the Property. Whether Obligor is primarily liable on the Note or not, Obligor nevertheless agrees to pay the Note and comply with the obligations expressed in the Lien Documents.

For value received, Obligor renews the Note and promises to pay to the order of Holder of Note and Lien, according to the Modified Terms, the Unpaid Principal and Interest on Note. All unpaid amounts are due by the Extended Maturity Date of Note. Obligor also extends the liens described in the Lien Documents.

The Note and the Lien Documents continue as written, except as provided in this agreement.

Obligor warrants to Holder of Note and Lien that the Note and the Lien Documents, as modified, are valid and enforceable and represents that they are not subject to rights of offset, rescission, or other claims.

When the context requires, singular nouns and pronouns include the plural.

---

[Name of obligor]

[Name of holder]

Include acknowledgments.
Assignment of Rent

Basic Information

Date:

Assignor:

Assignor’s Mailing Address:

Assignee:

Assignee’s Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

Deed of Trust

Date:

Borrower:

Lender:

Trustee:
Property:

Current Leases: [include recording information if available]

Clauses and Covenants

For value received, as a supplement to the Deed of Trust, Assignor collaterally assigns to Assignee all current and future rent from the Property. Leases are not assigned.

A. Assignor’s Representations:

Assignor represents the following:

A.1. This assignment is valid and enforceable.

A.2. The Current Leases are valid, have not been modified or amended except as stated, have not been previously assigned, and are subject to no security interests.

A.3. Without the prior written consent of Assignee, Assignor will not modify any material term in any lease covering the Property, exercise or forfeit any option in a lease, or accept payment of rent more than one month before its regular monthly payment date.

A.4. Assignor will perform all the obligations of the lessor in all leases covering the Property.

A.5. Assignor will promptly inform Assignee of all material events concerning the leases covering the Property.

A.6. Assignor will keep accurate records of all aspects of leases covering the Property and on request will make them available for Assignee’s examination.
A.7. Assignor will apply all rent from the Property to payment of the Note and performance of the obligations in the Deed of Trust, but if the rent exceeds the amount due under the Note and the Deed of Trust, Assignor may retain the excess.

B. Default and Remedies

B.1. If a default exists in payment of the Note or performance of any obligation in the Deed of Trust or this assignment and the default continues after any required notice of the default and the time allowed to cure, Assignee may—

a. exercise Assignee’s rights with respect to rent under the Texas Property Code as then in effect;

b. increase or reduce rent or change the terms of any lease, if permitted;

c. enter into new leases in the name of Assignor or otherwise on terms that Assignee chooses; and

d. sue for the collection of unpaid rent, to cancel any lease in default, and for possession of any portion of the Property covered by a lease in default.

B.2. Assignee will apply all rent collected under this assignment as required by the Texas Property Code as then in effect.

B.3. Assignee may elect not to collect rent under this assignment, but that election will not prejudice Assignee’s right to collect rent subsequently. Assignee will never be liable for failure to collect rent but will be accountable for rent received before foreclosure of the Deed of Trust.

B.4. By exercising rights and remedies under this assignment, Assignee does not waive the right to enforce the Note or the Deed of Trust.
C. General Provisions

C.1. Assignee’s collection of rent from the Property does not relieve Assignor of any obligations in the Note and the Deed of Trust.

C.2. Neither acceptance of this assignment nor any other act of Assignee under this assignment will be construed as a waiver of the priority of the Deed of Trust lien as to any lease or contract.

C.3. This assignment binds, benefits, and may be enforced by the successors in interest of the parties.

C.4. This assignment terminates on release of the Deed of Trust. At Assignor’s expense, Assignee will sign a release of this assignment in recordable form.

C.5. Assignee does not have or assume any obligations as lessor to any occupant of the Property.

C.6. Assignee may exercise Assignee’s rights and remedies in this assignment without taking possession of the Property.

C.7. When the context requires, singular nouns and pronouns include the plural.

[Name of assignor]

Include acknowledgment.
Consent Resolutions

Corporation, Written Consent of Sole Director

Clause 10-6-1

[Name of corporation]

Written Consent of Sole Director

The undersigned, being the sole member of the board of directors of [name of company], a Texas corporation (the “Company”), acting pursuant to the provisions of [section 6.201 of the Texas Business Organizations Code], adopts by consent the following resolutions: [insert resolution recitals (see clauses 10-6-5 and 10-6-6)].

__________________________________________________________________________________________________________________________ ...
__________________________________________________________________________________________________________________________

[Name of sole director]
Date:

Corporation, Unanimous Written Consent

Clause 10-6-2

[Name of corporation]

Unanimous Written Consent of Board of Directors

The undersigned, being all the members of the board of directors of [name of company], a Texas corporation (the “Company”), acting pursuant to the provisions of [section 6.201 of the Texas Business Organizations Code], adopt by consent the following resolutions: [insert resolution recitals (see clauses 10-6-5 and 10-6-6)].
Consent Resolutions

Clause 10-6-3

[Name of limited liability company]

Written Consent of the [Sole Member/Manager]

The undersigned, being the [sole member/manager] of [name of company], a Texas limited liability company (the “Company”), acting pursuant to the provisions of [article 2.23(B)(1) of the Texas Limited Liability Company Act, Tex. Rev. Civ. Stat. Ann. art. 1528n/section 6.201 of the Texas Business Organizations Code], adopts by consent the following resolutions: [insert resolution recitals (see clauses 10-6-5 and 10-6-6)].

[Name of [sole member/manager]]
Date:

Clause 10-6-4

[Name of limited liability company]

Unanimous Written Consent of [Members/Managers]

The undersigned, being all the [members/managers of the board of managers] of [name of company], a Texas limited liability company (the “Company”), acting pursuant to the provisions of [article 2.23(B)(1) of the Texas Business Organizations Code], adopts by consent the following resolutions: [insert resolution recitals (see clauses 10-6-5 and 10-6-6)].

[Name of [members/managers]]
Date:
Limited Liability Company Act, Tex. Rev. Civ. Stat. Ann. art. 1528n/section 6.201 of the Texas Business Organizations Code], adopt by consent the following resolutions: [insert resolution recitals (see clauses 10-6-5 and 10-6-6)].

[Name of [member/manager]]
Date:

Repeat for each member or manager.

Borrowing Resolution Recitals

Clause 10-6-5

[The Company is the general partner of [name], a [Texas/[state]] limited partnership (“Borrower”). RESOLVED, that [the Company/Borrower] is authorized to borrow the amount of $[amount] from [name of lender] (“Lender”) to [purchase certain land and improvements located in [county] County, Texas, (the “Property”)/[state other purpose of use of loan proceeds]] and to enter into a promissory note (the “Note”) in the principal amount of $[amount], payable to the order of Lender.

RESOLVED FURTHER, that to secure the payment of the Note, [the Company/Borrower] is authorized to enter into a deed of trust (the “Deed of Trust”) covering the Property and any necessary modifications, extensions, increases, and renewals of the Deed of Trust.

RESOLVED FURTHER, that [the Company/Borrower] is authorized to enter into any assignments, pledges, mortgages, deeds of trust, security agreements, and other documents and instruments concerning the Property, or any real or personal property, or any interest therein, owned by [the Company/
Borrower] that may be necessary or appropriate, or required by Lender, to evidence and secure the payment of the Note.

RESOLVED FURTHER, that [the Company/Borrower] is authorized to contract for the issuance by Lender of letters of credit, to discount with Lender notes, acceptances, and evidences of indebtedness payable to or due [the Company/Borrower], to endorse the same and execute any contracts and instruments for repayment thereof to Lender as Lender may require, to enter into foreign exchange transactions with or through Lender, and to enter into interest-rate hedging transactions with Lender in connection with the Note.

RESOLVED FURTHER, that [name of individual] (the “Authorized Representative”) is authorized to execute and deliver, on behalf of and in the name of [the Company/Borrower], the Note, the Deed of Trust, and any other agreements, documents, or instruments, and to take or cause to be taken any action necessary or appropriate in connection with the Note and the Deed of Trust or to accomplish the purposes of these resolutions, in the form and with the provisions the Authorized Representative may deem proper.

RESOLVED FURTHER, that the president or any vice president of [the Company/Borrower] is authorized to execute and deliver, on behalf of and in the name of [the Company/Borrower], the Note, the Deed of Trust, and any other agreements, documents, or instruments, and to take or cause to be taken any action necessary or appropriate in connection with the Note and the Deed
of Trust or to accomplish the purposes of these resolutions, in the form and with the provisions that the officers may deem proper.

RESOLVED FURTHER, that [the Company/Borrower] confirms and ratifies all actions previously taken by any officer or other representative of [the Company/Borrower] with respect to the loan evidenced by the Note and all documents executed in connection with the loan.

*Corporate Guaranty Resolution Recitals*

*Clause 10-6-6*

[Name of lender] (“Lender”) has agreed to make a loan in the amount of $[amount] to [name of borrower] (“Borrower”) to be evidenced by a note, in the original principal amount of $[amount], payable to the order of Lender (the “Note”), which is secured by a deed of trust (the “Deed of Trust”) covering the property described in the Deed of Trust.

As a condition to making the loan, Lender has requested that the Company guarantee [a portion of] the indebtedness evidenced by the Note and the obligations of Borrower under the Deed of Trust and any other document executed by Borrower evidencing or securing the Note (the “Guaranteed Obligations”).

RESOLVED, that the Company reasonably may be expected to benefit, either directly or indirectly, from guaranteeing the Guaranteed Obligations.

RESOLVED FURTHER, that the Company is authorized to enter into a guaranty (the “Guaranty”) guaranteeing the Guaranteed Obligations.
RESOLVED FURTHER, that [name of individual] (the “Authorized Representative”) is authorized to execute and deliver, on behalf of and in the name of the Company, the Guaranty and any other agreements, documents, or instruments, and to take or cause to be taken any action necessary or appropriate in connection with the Guaranty or to accomplish the purposes of these resolutions, in the form and with the provisions the Authorized Representative may deem proper.

Or

RESOLVED FURTHER, that the president or any vice president of the Company is authorized to execute and deliver, on behalf of and in the name of the Company, the Guaranty and any other agreements, documents, or instruments, and to take or cause to be taken any action necessary or appropriate in connection with the Guaranty or to accomplish the purposes of these resolutions, in the form and with the provisions that the officers may deem proper.

Continue with the following.

RESOLVED FURTHER, that the Company confirms and ratifies all actions previously taken by any officer or other representative of the Company on behalf of the Company with respect to the Guaranty and all documents executed in connection with the Guaranty.
Collection and Payment Agreement

Basic Information

Date:

Borrower:

Borrower’s Mailing Address:

Lender:

Lender’s Mailing Address:

Collection Agent:

Collection Agent’s Mailing Address:

Prior Note

Date:

Original principal amount:

Maker:

Payee:

Holder:

Holder’s mailing address:

Maturity date:
[Terms:]

Secured by deed of trust

Date:

Recorded in:

Wraparound Note

Date:

Original principal amount:

Maker: Borrower

Payee: Lender

Maturity date:

[Terms:]

Secured by Wraparound Deed of Trust

Date:

Recorded in:

Property (including any improvements):

Particulars of the Agreement

Day of month by which Borrower’s deposit must be made:

Date of first deposit:
Amount of deposit for escrow account under Wraparound Note:

Monthly principal and interest due on Wraparound Note:

Collection Agent’s fee:

Monthly principal and interest due on Prior Note:

Amount of deposit for escrow account under Prior Note:

**Clauses and Covenants**

Lender has sold the Property to Borrower, and as partial consideration Borrower has executed and delivered to Lender the Wraparound Note, a copy of which is attached to this agreement. Lender is required to make payments to Holder of the Prior Note, a copy of which is attached to this agreement, according to its terms. Borrower, Lender, and Collection Agent enter into this agreement to facilitate payment of both notes.

A. **Borrower’s Duties**

   A.1. Borrower will deposit in Lender’s account with Collection Agent on or before each monthly due date an amount equal to the required monthly installment of principal and interest due under the Wraparound Note plus any required monthly payment to the tax and insurance escrow account.

   A.2. Borrower will promptly submit to Collection Agent and Lender copies of bills for ad valorem taxes on the Property and for insurance policy premiums on the Property if Borrower receives such bills.

   A.3. Borrower will pay Collection Agent one-half of the annual fee for its services as specified below. Borrower also agrees to reimburse Collection Agent for any extraordinary expenses incurred as a result of Borrower’s delinquency or default in making deposits.
B. **Lender’s Duties**

   **B.1.** Before the time specified for Borrower to make the first deposit, Lender will open a special account with Collection Agent and will notify Borrower of any information relevant to making deposits to the account.

   **B.2.** Lender will pay Collection Agent one-half of the annual fee for its services as specified below.

   **B.3.** Lender will notify Borrower and Collection Agent of any adjustment in the amount of the monthly escrow account payment that may become necessary.

C. **Collection Agent’s Duties**

   **C.1.** Within [number] business days after each of Borrower’s monthly deposits to Lender’s special account, Collection Agent will pay on behalf of Lender the required payments due on the Prior Note.

   **C.2.** After paying all amounts then due under the Prior Note, Collection Agent will pay or credit the remaining balance to Lender each month.

   **C.3.** Collection Agent will promptly forward to Lender and Borrower copies of its documents transmitting all payments.

   **C.4.** Unless specified otherwise in this agreement, on termination of this agreement Collection Agent will pay any amounts in Lender’s special account to Lender.

D. **General Provisions**

   **D.1.** No interest will be paid on funds in Lender’s account.

   **D.2.** This agreement will terminate on the occurrence of any of the following events or conditions:
a. The full and final payment of either the Wraparound Note or the Prior Note.

b. Written notice from Lender and Borrower to Collection Agent. Collection Agent will then transfer all amounts in Lender’s account to any successor Collection Agent and be released from further liability. If Lender and Borrower fail to appoint a successor collection agent within thirty days, Collection Agent is unconditionally authorized to deposit the balance of the account with a court of proper jurisdiction.

c. Acceleration of maturity of the Wraparound Note by Lender. In this event, Lender may terminate this agreement by giving notice to Collection Agent and Borrower.

d. Collection Agent’s resignation. Collection Agent may resign by giving Borrower and Lender written notice at least thirty days before the effective date of the resignation. On such resignation, the balance of the account will be transferred according to written instructions from Borrower and Lender. If Collection Agent does not receive written instructions within thirty days after mailing the notice, Collection Agent is unconditionally authorized to deposit the balance of the account with a court of proper jurisdiction.

D.3. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.
D.4. Collection Agent may rely on any document that it reasonably believes to be authentic in making any delivery of money under this agreement. Collection Agent is not liable for harm resulting from any of its acts or omissions unless the acts or omissions constitute willful misconduct or gross negligence. Borrower and Lender agree that Collection Agent’s liabilities and obligations are strictly limited to those enumerated in this agreement. Borrower and Lender also indemnify Collection Agent against all liability, loss, and expense that Collection Agent may incur in exercising any authority granted to it by this agreement.

D.5. This agreement binds, benefits, and may be enforced by the successors in interest of the parties.

D.6. When the context requires, singular nouns and pronouns include the plural.

[Name of borrower]

[Name of lender]

[Name of collection agent]
Form 10-8

Designation of Homestead and Affidavit of Nonhomestead

Date:

Affiant:

Affiant’s Homestead Property:

For a rural homestead, indicate the number of acres designated, not to exceed 200 acres if the homestead of a family or 100 acres if the homestead of a single adult. If there is more than one survey, include the number of acres in each. For an urban homestead, indicate the number of acres designated, not to exceed 10 acres.

Current Record Title Holder of Affiant’s Homestead Property:

Affiant’s Nonhomestead Property:

[Lender:]

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. My full legal name is [full legal name of affiant], and I am over the age of eighteen years.

2. I currently reside at [current residence address].

3. I do not now intend or ever intend to reside on, use in any manner, or claim Affiant’s Nonhomestead Property as a business or residence homestead.

4. I disclaim all homestead right, interest, and exemption in Affiant’s Nonhomestead Property.
5. I now own and reside on, use, claim, and designate Affiant’s Homestead Property as my only legal homestead, exempt from forced sale under the constitution and laws of Texas.

6. This affidavit and this designation are made to [induce Lender to make a loan secured by a deed of trust on Affiant’s Nonhomestead Property/\[state other purpose of affidavit]].

__________________________________________

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _________________ by [name of affiant].

____________________________

Notary Public, State of Texas
Date:

Affiant:

Affiant’s Homestead Property (“Property”):

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. My full legal name is [full legal name of affiant], and I am over the age of eighteen years.

2. I currently reside at [current residence address].

3. I acknowledge that I am buying the Property and will use and claim the Property as my homestead.

4. I acknowledge that I am obtaining a loan (“Loan”) from Lender for a part of the purchase price of the Property.

Lender:

Lender’s Address:

Current Record Title Holder of Affiant’s Homestead Property:
5. I confirm that Lender has informed me that, as a condition of obtaining the Loan from Lender, I must occupy the Property as my primary residence after the closing so that the Property will constitute my homestead.

6. I also confirm that Lender has informed me that my failure to occupy the Property as my primary residence will impair Lender’s security for the Loan and that Lender would not have made the Loan but for my representation and stated intention that the Property will be used as my homestead and residence.

7. I further confirm that I have been informed that, if I cease to occupy the Property as my residence, Lender may accelerate all amounts then due and owing to Lender with respect to the Loan and exercise all rights granted to Lender in the instruments evidencing and securing the Loan.

8. I understand that, if Lender accelerates the Loan in such circumstances, the entire loan balance will be immediately due and payable, and if I fail to pay the amounts due, Lender may institute collection proceedings against me, including, without limitation, nonjudicial foreclosure sale in accordance with the terms and conditions of the deed of trust encumbering the Property that I have executed to secure payment of the Loan.

__________________________________________________________

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on ________________ by [name of affiant].

__________________________________________________________

Notary Public, State of Texas
Form 10-10

Lender’s Estoppel Certificate

Basic Information

Date:

Borrower:

Borrower’s Mailing Address:

Prior Lender:

Prior Lender’s Mailing Address:

Prior Lender’s Note: Note dated [date], in the original principal amount of $[amount], executed by Borrower and payable to Prior Lender.

Prior Lender’s Deed of Trust: [include recording information]

Subordinate Lender:

Subordinate Lender’s Mailing Address:

Subordinate Lender’s Loan:

Property:

Clauses and Covenants

Borrower has requested Subordinate Lender to make a loan to be secured by the Property, and Subordinate Lender has agreed that the liens securing the note evidencing Subordinate Lender’s Loan will be subordinate to the liens securing Prior Lender’s Note. As a
condition to making Subordinate Lender’s Loan, however, Subordinate Lender requires Prior Lender to verify the following information concerning Prior Lender’s Note. Prior Lender understands that Subordinate Lender will rely on this information in connection with the closing of Subordinate Lender’s Loan.

1. Prior Lender certifies to Subordinate Lender the following:
   
a. True copies of Prior Lender’s Note and Prior Lender’s Deed of Trust are attached as Exhibits [exhibit numbers/letters].

b. Prior Lender’s Note and Prior Lender’s Deed of Trust have not been renewed, extended, modified, or amended [include if applicable: ], except as evidenced by the documents attached as Exhibits [exhibit numbers/letters].

c. Prior Lender is the present owner and holder of Prior Lender’s Note.

d. The unpaid principal balance of Prior Lender’s Note as of Date is $[amount].

e. The amount of accrued unpaid interest on Prior Lender’s Note as of Date is $[amount].

f. All amounts required to be paid as of Date under the terms of Prior Lender’s Note and Prior Lender’s Deed of Trust and any other loan documents have been paid in full.

g. No default exists under the terms of Prior Lender’s Note or Prior Lender’s Deed of Trust or any other loan documents.

h. The amount of $[amount] is held in escrow by Prior Lender for the payment of taxes and other amounts required to be escrowed under the terms of Prior Lender’s Note and Prior Lender’s Deed of Trust.
Lender’s Estoppel Certificate

2. Prior Lender agrees that Prior Lender’s Deed of Trust will not secure any indebtedness other than the indebtedness evidenced by Prior Lender’s Note, and Prior Lender waives the provisions of any future advance or dragnet clause that would cause Prior Lender’s Deed of Trust to secure other indebtedness of Borrower.

3. Prior Lender agrees that Subordinate Lender’s Loan will not cause Prior Lender’s Note to be in default, and Prior Lender waives the provisions of any due-on-sale clause or due-on-encumbrance clause that would make Subordinate Lender’s Loan a default under Prior Lender’s Note or Prior Lender’s Deed of Trust.

4. Prior Lender agrees to give Subordinate Lender written notice of default not less than [number] days before any acceleration of the unpaid balance of Prior Lender’s Note. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

5. Prior Lender agrees to accept payments on Prior Lender’s Note from Subordinate Lender with the understanding that Subordinate Lender in no way obligates itself to make any payments.

6. If Prior Lender transfers Prior Lender’s Note to any other party, Prior Lender agrees to notify the transferee of the terms of this estoppel certificate and obtain the transferee’s consent to its terms and conditions.

__________________________________________________________________________________________________________________________

[Name of prior lender]
Form 10-11

Lienholder’s Subordination to Oil, Gas, and Mineral Lease

Basic Information

Date:

Lienholder:

Deed of Trust

Date:

Grantor:

Beneficiary:

Property:

Recording information:

Lease

Date:

Lessor:

Lessee:

Recording information:
Clauses and Covenants

The property described in the Lease includes [all/part] of the Property encumbered by the Deed of Trust. For value received, Lienholder, owner of the Deed of Trust lien, subordinates the lien to the Lease and ratifies the Lease.

If the Deed of Trust lien is foreclosed, the sale of the Property will not affect the Lease if the Lease is maintained according to its terms.

[Name of lienholder]

Include acknowledgment.
Form 10-12

Notice from Lender’s Attorney to Borrower

Basic Information

Date:

Borrower:

Lender:

Loan: Loan evidenced by a note dated [date] in the original principal amount of $[amount], executed by Borrower, payable to Lender, and secured by a deed of trust on the property described therein.

Attorney:

Disclosure of Relationship

This notice discloses the relationship between Attorney, Borrower, and Lender.

1. Lender has engaged Attorney to prepare the note, deed of trust, and other documents relating to the Loan.

2. Attorney has not researched or examined title to the property and makes no representation or warranty about the condition of title, access to the property, or any other matter that might be revealed by an examination of a survey, title commitment, or the property itself. In preparing the documents, Attorney has relied on information provided by other parties, including the title company. If Borrower is purchasing the property, Borrower is cautioned to assure itself that the deed to Borrower conveys what Borrower has contracted to purchase and otherwise conforms with the earnest money contract.
3. Attorney represents only Lender and no other party involved in this transaction, although Attorney’s legal fees may be paid by Borrower.

4. Attorney’s legal fees are based on a per document or per transaction charge rather than an hourly fee. The legal fees are intended to provide fair compensation for time and labor involved in information gathering, document preparation, processing, and review. No charge has been made for preparation of Truth in Lending disclosures or for any disclosures required by the Real Estate Settlement and Procedures Act, if Attorney has prepared any of those documents.

5. Borrower has the right to be represented by its own attorney and to have its attorney review the Loan documents (including the deed, if there is one) and closing documents and be present at the closing of the Loan.

6. If any documents to be used are prepared by someone other than Attorney, Lender reserves the right to have Attorney review and approve those documents to ensure they properly protect Lender’s interests.

   By signing below, Borrower indicates that it has been notified of and understands its right to independent legal counsel and that Attorney represents only the interests of Lender and not those of Borrower or any other party.

   [Name of borrower]

NOTE TO TITLE COMPANY OR CLOSER: Please return the executed original of this notice to [name and address].
Form 10-13

Subordination of Lien

Basic Information

Date:

Subordinating Party:

Subordinated Lien

Date:

Grantor:

Beneficiary:

Note Secured by Subordinated Lien: Note dated [date], in the original principal amount of $[amount].

Recording information:

Superior Lien

Date:

Borrower:

Lender:

Note Secured by Superior Lien: Note dated [date], in the original principal amount of $[amount].

Recording information:
Property:

Terms of Subordination

Subordinating Party is the owner and holder of the Subordinated Lien, which is a lien against the Property.

For value received, Subordinating Party subordinates the Subordinated Lien against the Property to the Superior Lien and agrees that the Subordinated Lien will remain subordinate to the Superior Lien regardless of the frequency or manner of renewal, extension, change, or alteration of the Superior Lien or the Note Secured by Superior Lien.

When the context requires, singular nouns and pronouns include the plural.

[Name of subordinating party]

Include acknowledgment.
Notice of Final Agreement

Date:

Borrower:

Lender:

To: Borrower and all other debtors and obligors with respect to the Loan identified below.

1. THE WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES.

THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

2. As used in this notice:

“Obligor” means any entity or individual who (a) is obligated to pay the Loan or (b) otherwise is or becomes obligated to pay the Loan (for example, as cosigner or guarantor) or (c) has pledged any property as security for the Loan.

“Loan” means the loan by Lender that is to be evidenced by the note dated [date] executed by Borrower, payable to the order of Lender, in the original principal amount of $[amount] as modified and extended by Borrower.

“Written Loan Agreement” means one or more promises, notes, agreements, undertakings, security agreements, deeds of trust, or other documents, or commitments, or any combination of actions or documents relating to the Loan.
3. Each Borrower and Obligor who signs below acknowledges, represents, and warrants to Lender that Lender has given and each respective Borrower and Obligor has received a copy of this notice on or before the execution of any Loan Agreement.

____________________________
[Name of lender]

____________________________
[Name of borrower]

____________________________
[Name of obligor]
Guaranty

Basic Information

Date:

Guarantor:

Guarantor’s Mailing Address:

Borrower:

Borrower’s Mailing Address:

Lender:

Lender’s Mailing Address:

Guaranteed Indebtedness: The debt evidenced by the note dated [date], in the original principal amount of $[amount], executed by Borrower and payable to the order of Lender, the obligations under the deed of trust executed in connection with the note and any other document executed by Borrower evidencing or securing the note (collectively, the “Loan Documents”), plus all interest, penalties, expenses, attorney’s fees, and other collection costs as provided in the Loan Documents.

Clauses and Covenants

1. Guarantor agrees to pay, when due or declared due, the Guaranteed Indebtedness to Lender at Lender’s Mailing Address.
2. Guarantor waives (a) diligence in preserving liability of any person on the Guaranteed Indebtedness and in collecting or bringing suit to collect the Guaranteed Indebtedness; (b) all rights of Guarantor under chapter 43 of the Texas Civil Practice and Remedies Code, section 17.001 of the Texas Civil Practice and Remedies Code, [and] rule 31 of the Texas Rules of Civil Procedure [include if applicable: , and sections 51.003, 51.004, and 51.005 of the Texas Property Code]; (c) protest; (d) notice of extensions, increases, renewals, or rearrangements of the Guaranteed Indebtedness; and (e) notice of acceptance of this guaranty, of creation of the Guaranteed Indebtedness, of failure to pay the Guaranteed Indebtedness as it matures, of any other default, of adverse change in Borrower’s financial condition, of release or substitution of collateral, of intent to accelerate, of acceleration, and of subordination of Lender’s rights in any collateral, and every other notice of every kind. Guarantor’s obligations under this guaranty will not be altered nor will Lender be liable to Guarantor because of any action or inaction of Lender in regard to a matter waived or of which notice is waived by Guarantor in the preceding sentence.

3. Guarantor agrees to pay reasonable attorney’s fees and other collection costs if an attorney is retained to enforce this guaranty for collection.

4. This guaranty is an absolute, irrevocable, unconditional, and continuing guaranty of payment and performance and not of collection.

5. Lender need not resort to Borrower or any other person or proceed against collateral before pursuing its rights against Guarantor or any other guarantor. Lender’s action or inaction with respect to any right of Lender under the law or any agreement will not alter the obligation of Guarantor hereunder. Lender may pursue any remedy against Borrower or any collateral or under any other guaranty without altering the obligations of Guarantor hereunder and without liability to Guarantor, even though Lender’s pursuit of such remedy may result in Guarantor’s loss of rights of subrogation or to proceed against others for reimbursement of contribution or any other right.
6. Guarantor will remain liable for the Guaranteed Indebtedness even though the Guaranteed Indebtedness may be unenforceable against or uncollectible from Borrower or any other person because of incapacity, lack of power or authority, discharge, or any other reason.

7. Guarantor consents and acknowledges that Guarantor’s obligations will not be released by (a) the renewal, extension, or modification of the Guaranteed Indebtedness or any of the Loan Documents; (b) the insolvency, bankruptcy, liquidation, or dissolution of Borrower or any other obligor; (c) the failure of Lender to properly obtain, perfect, or preserve any security interest or lien in any collateral for the Guaranteed Indebtedness; (d) the release, substitution, or addition of any collateral for the Guaranteed Indebtedness; or (e) the failure of Lender to exercise diligence, commercial reasonableness, or reasonable care in the preservation, enforcement, or sale of any of the collateral.

8. Lender need not notify Guarantor that Lender has sued Borrower, but if Lender gives written notice to Guarantor that it has sued Borrower, Guarantor will be bound by any judgment or decree, to the extent permitted by law.

9. Lender may sue any guarantor without impairing Lender’s rights against any other guarantor, with or without making Borrower a party. Lender may settle with Borrower or any other guarantor for such amounts as it may elect or may release Borrower or any guarantor or any collateral securing the Guaranteed Indebtedness without impairing Lender’s right to collect the Guaranteed Indebtedness from Guarantor.

10. This guaranty binds Guarantor and Guarantor’s heirs, successors, and assigns, and it benefits and may be enforced by Lender and Lender’s successors in interest. When the context requires, singular nouns and pronouns include the plural. This guaranty will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. The provisions of this guaranty are severable. If a court of competent jurisdiction finds that
any provision of this guaranty is unenforceable, then the remaining provisions will remain in effect without the unenforceable parts.

11. Final Agreement: This written agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

[Name of guarantor]
Form 10-16

This disclosure, set forth in Tex. Fin. Code § 343.104, must be made by hand delivery or mail not later than the third business day after the date the lender receives a home loan application. Tex. Fin. Code § 343.001 defines “home loan” for purposes of the required disclosure.

Insurance Notice to Applicant

You may elect to purchase credit life, disability, or involuntary unemployment insurance in conjunction with this mortgage loan. If you elect to purchase this insurance coverage, you may pay for it either on a monthly premium basis or with a single premium payment at the time the lender closes this loan. If you choose the single premium payment, the cost of the premium will be financed at the interest rate provided for in the mortgage loan.

This insurance is NOT required as a condition of closing the mortgage loan and will be included with the loan only at your request.

You have the right to cancel this credit insurance once purchased. If you cancel it within 30 days of the date of your loan, you will receive either a full refund or a credit against your loan account. If you cancel this insurance at any other time, you will receive either a refund or credit against your loan account of any unearned premium. YOU MUST CANCEL WITHIN 30 DAYS OF THE DATE OF THE LOAN TO RECEIVE A FULL REFUND OR CREDIT.

To assist you in making an informed choice, the following estimates of premiums are being provided along with an example of the cost of financing. The examples assume that the term of the insurance product is [number] years and that the interest rate is [percent] percent (a rate that has recently been available for the type of loan you are seeking). PLEASE NOTE THAT THE ACTUAL LOAN TERMS YOU QUALIFY FOR MAY VARY FROM THIS EXAMPLE. “Total amount paid” is the amount that would be paid if you financed only the total insurance pre-
mium for a [number] year period and is equal to the amount you would have paid if you made all scheduled payments. This is NOT the total of payments on your loan.

CREDIT LIFE INSURANCE: Estimated premium of $[amount]

DISABILITY INSURANCE: Estimated premium of $[amount]

INVOLUNTARY UNEMPLOYMENT INSURANCE: Estimated premium of $[amount]

TOTAL INSURANCE PREMIUMS: $[amount]

TOTAL AMOUNT PAID: $[amount]

The undersigned acknowledge[s] receipt of the foregoing notice on [date].

Include the following language if an acknowledgment of receipt is desired.

Continue with the following.

[Name of applicant]
Date:

Include additional signature lines for each applicant.
Form 10-17

Loan Agreement

Borrower’s Required Insurance Coverages

Basic Information

Date:

Borrower:

Mailing address:

Phone:

E-mail:

Type of entity:

State of organization:

Federal tax identification number:

Lender:

Mailing address:

Phone:

E-mail:

Loan officer:

Guarantor:
Mailing address:

Phone:

E-mail:

Title Company:

Mailing address:

Phone:

E-mail:

Note

Date:

Original Principal Amount:

Maturity date:

Loan Commitment Fee:

Use of Loan Proceeds:

Collateral

Real Property:

Prior liens: [include recording information]

Personal property:

Prior security interests: [include recording information]
Loan Documents

Loan agreement/note: [list other loan documents, i.e., deed of trust, security agreement, guaranty, etc.]

Financial Covenants:

Additional Loan Requirements:

The Loan

Subject to the terms and conditions of this agreement, Lender will lend Borrower the Original Principal Amount as represented by the Note (the “Loan”), and Borrower agrees to pay the Note.

Clauses and Covenants

A. Conditions Precedent to Loan

The obligation of Lender to make the Loan is conditioned on—

A.1. the execution and delivery of the Loan Documents;

A.2. the accuracy, in all material respects, of all representations and warranties in the Loan Documents;

A.3. no default existing under the Loan Documents;

A.4. payment of the Loan Commitment Fee and all expenses incurred by Lender in connection with the Loan Documents; and

A.5. Lender’s receipt, in a form acceptable to Lender, of—
a. opinion of Borrower’s counsel as to Borrower’s authority to execute and deliver the Loan Documents; the enforceability of the Loan Documents; the nonusurious nature of the Loan [include if applicable: ; and the validity of Borrower’s organization];

b. certification from Borrower’s authorized representative for any Borrower that is an entity attaching (i) a copy of Borrower’s organizational documents, (ii) the approval of Borrower’s governing authority for the execution and delivery of the Loan Documents, and (iii) specimen signatures from all Borrower representatives authorized to execute the Loan Documents;

c. certification from governmental authorities for any Borrower that is an entity confirming Borrower’s existence [include if applicable: and Borrower’s account status with the Texas comptroller of public accounts];

d. appraisal of the Real Property;

e. survey plat of the Real Property;

f. environmental assessment of the Real Property;

g. commitment for issuance of a loan policy of title insurance in the Original Principal Amount insuring the validity of Lender’s lien on the Real Property and confirming that no liens exist on the Real Property other than those liens permitted by the Loan Documents;

h. financing statement reports on the Personal Property issued by all applicable filing officers confirming no financing statements are filed on the Personal Property other than those financing statements permitted by the Loan Documents;
i. financial statement on Borrower [include if applicable: and financial statement on Guarantor]; and

j. proof of insurance required by the Loan Documents
together with all other documents, instruments, and certificates reasonably requested by Lender.

B. Borrower’s Representations

To induce Lender to enter into this agreement and to make the Loan, Borrower represents to Lender that—

B.1. Borrower—

a. has the power and authority needed to execute and deliver the Loan Documents and to perform Borrower’s obligations under the Loan Documents; and

b. possesses all permits, registrations, approvals, consents, licenses, trademarks, trademark rights, trade names, trade name rights, and copyrights needed to conduct Borrower’s business[./ and;]

c. [include if applicable: was validly formed and exists under the laws of the State of Organization[./ and;]]

d. [include if applicable: is in good standing under the laws of the State of Organization and all other jurisdictions where the nature of Borrower’s business makes qualification necessary[./ and;]]
e. [include if applicable: is qualified to do business under the laws of the State of Organization and all other jurisdictions where the nature of Borrower’s business makes qualification necessary.]

B.2. the execution, delivery, and performance of the Loan Documents executed by Borrower have been duly authorized and do not and will not (a) contravene or violate any legal requirement; (b) result in the breach of, or constitute a default under, any instrument to which Borrower is a party or by which any of Borrower’s property may be bound or affected; or (c) result in a requirement to create any lien on any of Borrower’s property other than liens granted to Lender on the Collateral;

B.3. the Loan Documents are legal, valid, and binding obligations of the parties executing the documents;

B.4. Borrower has good and indefeasible title to the Real Property and has good title to the Personal Property, free and clear of all liens except (a) as disclosed in the Loan Documents; (b) liens for ad valorem taxes, general and special assessments, and other governmental charges not yet due or payable; and (c) liens granted to Lender;

B.5. Borrower’s financial statements delivered to Lender fairly present the financial condition and the results of Borrower’s operations as of the dates and for the periods indicated, and no material adverse change has occurred in the assets, liabilities, financial condition, or business of Borrower since the dates of the financial statements;

B.6. Borrower has no knowledge of any litigation or administrative claim, action, or proceeding, pending or threatened, against Borrower or directly involving the Collateral before or by any governmental authority that, if adversely determined, could have a material adverse effect on Borrower;
B.7. there is no outstanding adverse judgment, writ, order, injunction, award, or decree affecting Borrower or the Collateral;

B.8. Borrower is not in default under any agreement to which Borrower is bound or to which any of the collateral is subject that could have a material adverse effect on Borrower or the Collateral;

B.9. all information and documentation supplied to Lender and all statements made to Lender by or on behalf of Borrower are correct and complete in all material respects as of the date made;

B.10. Borrower has no knowledge of the Real Property’s being used for the production, release, or disposal of hazardous wastes or materials;

B.11. the Real Property is taxed and billed separately from any other property for ad valorem tax purposes;

B.12. no part of the Real Property is located within a flood zone;

B.13. Borrower’s financial records have been prepared and maintained in accordance with good accounting practices consistently applied and reflect all moneys due or to become due from or to Borrower; and

B.14. Borrower has filed all required tax returns and paid all taxes shown thereon to be due, except those for which extensions have been obtained and those that are being contested in good faith and for which appropriate reserves have been established and disclosed in writing to Lender.

C. **Affirmative Covenants**

Borrower will—
C.1. apply all proceeds from the sale, collection, or other disposition of the Collateral to amounts owing on the Note unless the Loan Documents authorize an alternate use of the proceeds;

C.2. comply with the Additional Loan Requirements;

C.3. comply with the Financial Covenants;

C.4. operate Borrower’s business in accordance with all applicable legal requirements;

C.5. keep at Borrower’s address, or such other place as Lender may approve, accounts and records reflecting the operation of Borrower’s business and copies of all written contracts, leases, and other instruments that affect the Collateral;

C.6. prepare Borrower’s financial records in compliance with good accounting practices consistently applied;

C.7. permit Lender to examine and make copies of Borrower’s books, records, contracts, leases, and other instruments at any reasonable time;

C.8. deliver to Lender, at Lender’s request from time to time, Borrower’s tax returns and [audited/reviewed/compiled/internally prepared] financial statements of Borrower prepared in accordance with good accounting practices consistently applied, in detail reasonably satisfactory to Lender and certified to be true and correct by [include if applicable: the chief financial officer of] Borrower [include if applicable: and accompanied by an opinion of an independent certified public accountant];

C.9. deliver to Lender, at Lender’s request from time to time, tax returns of Guarantor, and [audited/reviewed/compiled/internally prepared] financial statements of Guarantor
prepared in accordance with good accounting practices consistently applied, in detail reasonably satisfactory to Lender and certified to be true and correct by [include if applicable: the chief financial officer of] Guarantor [include if applicable: and accompanied by an opinion of an independent certified public accountant];

C.10. execute, acknowledge as required, and deliver to Lender, at Lender’s request from time to time, at Borrower’s expense, any document needed by Lender to (a) correct any defect, error, omission, or ambiguity in the Loan Documents; (b) comply with Borrower’s obligations under the Loan Documents; (c) make subject to and perfect the liens and security interests of the Loan Documents any property intended to be covered thereby; and (d) protect, perfect, or preserve the liens and the security interests of the Loan Documents against third persons or make any recordings, file any notices, or obtain any consents requested by Lender in connection therewith;

C.11. notify Lender promptly (a) on acquiring knowledge of the occurrence of any event of default under the Loan Documents; (b) if any of Borrower’s property is surrendered in satisfaction of a debt or obligation [include if applicable: or on acquiring knowledge that any of Guarantor’s property was surrendered in satisfaction of a debt or obligation]; and (c) of any litigation, arbitration, mediation, or proceedings before any governmental agency that could have a material adverse effect on Borrower or the Collateral [include if applicable: or on acquiring knowledge of any litigation, arbitration, mediation, or proceedings before any governmental agency that could have a material adverse effect on Guarantor];

C.12. pay promptly on demand all expenses in connection with (a) the negotiation, preparation, execution, filing, recording, rerecording, modification, and supplementation of the Loan Documents; (b) the collection of the Note; (c) the protection of the Collateral; (d) the
collection, enforcement, sale, or other disposition of the Collateral; and (e) the performance by Lender of any of Borrower’s obligations under the Loan Documents;

C.13. use the Note proceeds for the purposes permitted in this agreement[.] and]

C.14. do all things necessary to preserve Borrower’s existence, qualifications, rights, and franchises in all jurisdictions where Borrower does business.

D. Negative Covenants

Borrower will not—

D.1. use or allow the use of the Collateral in any manner that (a) constitutes a public or private nuisance; (b) makes void, voidable, or cancelable, or increases the premium of, any insurance required by the Loan Documents; or (c) lessens the value of the Collateral, other than as a result of ordinary wear and tear from the Collateral’s intended use;

D.2. purchase, acquire, or lease any property from, or sell, transfer, or lease any property to, any equity owner, manager, director, officer, agent, or employee of Borrower, or any person or entity controlled by, controlling, or under common control with Borrower, except on terms then customarily available between unrelated parties in substantially similar transactions;

D.3. lend money to, or guarantee the payment or performance of any liability or obligation of, any person, except short-term loans to Borrower’s employees that, in the aggregate, do not exceed $[amount];

D.4. materially change the nature of Borrower’s business or enter into any business that is substantially different from Borrower’s existing business;
D.5. incur any indebtedness other than the Note, except short-term indebtedness to trade creditors incurred in the ordinary course of Borrower’s business that, in the aggregate, does not exceed $\text{amount} $;

D.6. create or permit any mortgage, security interest, or lien on any Collateral other than mortgages, security interests, or liens existing at the date of this agreement and disclosed to Lender or created pursuant to the Loan Documents;

D.7. purchase or redeem any of Borrower’s ownership interests, declare or pay any dividends, or make any distribution to the holders of any of Borrower’s ownership interests (to the extent Borrower is an entity);

D.8. sell, transfer, convey, or lease any Collateral except for sales in the ordinary course of business and on the conditions provided in the Loan Documents; [or]

D.9. acquire all or substantially all of the assets or ownership interests of any third party[;/ or]

D.10. liquidate or dissolve, or become a party to any merger or consolidation.

E. Default and Remedies

E.1. A default exists if—

a. Borrower fails to timely pay the Note;

b. a party fails to perform any obligation or covenant in any of the Loan Documents;

c. any representation made by a party in any of the Loan Documents is false in any material respect when made;
d. a receiver is appointed for any party executing any of the Loan Documents, or for any of the Collateral;

e. any Collateral is assigned for the benefit of creditors;

f. a bankruptcy or insolvency proceeding is commenced by a party executing any of the Loan Documents;

g. a bankruptcy or insolvency proceeding is commenced against a party executing any of the Loan Documents, and the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered;

h. any of the following parties is terminated, begins to wind up its affairs, is authorized by its governing body or persons to terminate or wind up its affairs, or any event occurs or condition exists that permits the termination or winding up of the affairs of any of the following parties: Borrower, a partnership of which Borrower is a general partner, or any other obligated party executing any of the Loan Documents; or

i. any Collateral is impaired by uninsured loss, theft, damage, or destruction, or by levy and execution, or by issuance of an official writ or order of seizure, unless it is promptly replaced with collateral of like kind and quality or restored to its former condition.

E.2. If a default exists, Lender may—

a. declare the unpaid principal balance, earned interest, and any other amounts owed on the Note immediately due; and
b. exercise against Borrower, the Collateral, and any other party executing the Loan Documents any rights and remedies available to Lender under the Loan Documents.

E.3. Notwithstanding any other provision in the Loan Documents, in the event of a default, before exercising any of Lender’s remedies under the Loan Documents, Lender will first give Borrower notice of default and Borrower will have ten days after delivery of notice in which to cure the default. If the default is not cured within ten days after notice is delivered, Borrower and each surety, endorser, and guarantor waive all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

F. General Provisions

F.1. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address provided in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by notice given as provided herein.

F.2. The Loan Documents, including any of their exhibits and attachments, constitute the entire agreement of the parties. There are no representations, agreements, or promises by Lender pertaining to the Loan that are not in those documents.
F.3. This agreement may be amended only by an instrument in writing signed by the parties.

F.4. Borrower may not assign this agreement or any of Borrower’s rights under it without Lender’s prior written consent, and any attempted assignment is void. This agreement binds, benefits, and may be enforced by the parties and their successors in interest.

F.5. Borrower authorizes Lender to charge any amount due Lender under the Loan Documents against any of Borrower’s deposit accounts with Lender.

F.6. Except as otherwise provided in the Loan Documents, Borrower waives all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

F.7. No remedy, right, or power conferred on Lender in this agreement is intended to be exclusive of any other remedy, right, or power now or hereafter existing at law, in equity, or otherwise, and all remedies, rights, and powers are cumulative.

F.8. This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. This agreement is to be performed where the Note is payable.

F.9. Interest on the Note will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Note or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Note or, if the principal of the Note has been paid, refunded. This provision overrides any conflicting provisions in this and all other Loan Documents.
F.10. It is not a waiver of default if the nondefaulting party fails to declare immediately a default or delays taking any action. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in the other Loan Documents or provided by law.

F.11. There are no third-party beneficiaries of this agreement.

F.12. If any provision of this agreement is determined to be invalid or unenforceable, the validity or enforceability of any other provision will not be affected.

F.13. The rule of construction that ambiguities in a document will be construed against the party who drafted it will not be applied in interpreting this agreement.

F.14. The parties’ relationship is an ordinary commercial relationship, and the parties do not intend to create the relationship of principal and agent, partnership, joint venture, or any other special relationship. Lender in exercising Lender’s rights and performing Lender’s obligations under the Loan Documents owes no fiduciary duty to Borrower.

F.15. If this agreement is executed in multiple counterparts, all counterparts taken together will constitute this agreement.

F.16. If Lender agrees to waive or defer any of the requirements of this agreement as a condition precedent to the advance of the proceeds of the Note, Borrower will provide any deferred information or documentation within thirty days after the advance.

F.17. In the event of any conflict among the provisions of this Loan Agreement and any of the Loan Documents, the more restrictive provision will control.

F.18. When the context requires, singular nouns and pronouns include the plural.

F.19. The term Note includes all extensions and renewals of the Note.
THE WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES.

THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

Signed on [date].

[Name of borrower]

[Name of lender]

Attach insurance rider if applicable.
Insurance Rider to Loan Agreement

Texas law prohibits additional insured coverage in a construction contract, or in an agreement collateral to or affecting a construction contract, except that pertaining to a single family house, townhouse, duplex, or directly related land development, or to a public works project of a municipality. **Tex. Ins. Code ch. 151.** See section 17.2:4 in this manual.

Loan Agreement

Date:

Borrower:

Lender:

This insurance rider is part of the Loan Agreement.

**Borrower’s Required Insurance Coverages**

**Type of Insurance or Endorsement**

<table>
<thead>
<tr>
<th>Minimum Policy or Endorsement Limit</th>
</tr>
</thead>
</table>

**General Liability Insurance Policy Required of Borrower:**

- [ ] Commercial general liability (occurrence basis)
  - Per occurrence: $__________
  - General aggregate: $__________
  - Products-completed operations aggregate: $__________
  - Personal and advertising injury: $__________
  - Damage to premises rented to you: $__________
  - Medical expense: $__________

**Required Endorsements to Borrower’s General Liability Policy:**

- [ ] Designated location(s) general aggregate limit: $__________
- [ ] Liquor liability: $__________
Commercial Property Insurance Policies Required of Borrower If No Construction Is Contemplated or, If Construction Is Contemplated, for the Period After Construction Is Completed:

☐ Causes of loss—special form 100 percent of replacement cost of the Property on an agreed-value basis

Required Endorsements to Borrower’s Commercial Property Policy:

☐ Business income and additional expense Sufficient limits to address reasonably anticipated business interruption losses for a period of ____ months

☐ Boiler and machinery $___________

☐ Flood (if Property is located within a 100-year floodplain (FEMA Flood Zone “A” or any subdesignation of Zone “A”)) $___________

☐ Earth movement $___________

☐ Ordinance or law coverage $___________

☐ Workers’ compensation $500,000

☐ Employer’s liability $___________

☐ Business automobile liability $___________

☐ Garage $___________

☐ Crime (or fidelity) $___________

☐ Innkeepers $___________

☐ Excess liability $___________

☐ Umbrella liability (occurrence basis) $___________

Include any other desired endorsements. See chapter 17.
General Insurance Requirements

a. The commercial general liability must be endorsed to name Lender as an “additional insured” and must not be endorsed to exclude the partial, contributory, or comparative negligence of Lender from the definition of “insured contract.”

b. Additional insured endorsements must not exclude coverage for the sole or contributory ordinary negligence of Lender.

c. Property insurance policies must contain waivers of subrogation of claims against Lender.

d. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements with respect to Borrower’s insurance must be delivered by Borrower to Lender on the date of this agreement and at least [number] days before the expiration of the current policies.

e. Borrower may carry a business owner’s insurance policy, commercial package insurance policy, or other package insurance policy rather than separate commercial property and general liability insurance policies described above, provided that such package policy contains the minimum insurance coverages, endorsements, and limits set forth in this agreement.

Include any other desired endorsements. See chapter 17.
f. If Borrower will employ a third-party manager for the Real Property, Borrower will require that the third-party manager carry the property and liability insurance policies described in Exhibit [exhibit number/letter] to this agreement.

And/Or

g. If all or a portion of the Property is to be constructed during the construction period, Borrower will maintain, in lieu of the commercial property insurance described above, the builder’s risk insurance described in Exhibit [exhibit number/letter] and require that the general contractor and architect carry the liability insurance policies described in Exhibit [exhibit number/letter].

And/Or

h. Certificates of insurance and copies of any additional insured endorsements with respect to a third-party manager’s, contractor’s, subcontractor’s, or architect’s insurance must be delivered by Borrower to Lender before such party enters the Property and thereafter at least [number] days before the expiration of the policies.
Mark applicable boxes.

Additional Insurance Policies Required during Construction Period

FROM GENERAL CONTRACTOR

<table>
<thead>
<tr>
<th>Type of Insurance or Endorsement</th>
<th>Minimum Policy or Endorsement Limit</th>
</tr>
</thead>
</table>

General Liability Insurance Policy Required of General Contractor:

- Commercial general liability (occurrence basis)
  - Per occurrence: $_______
  - General aggregate: $_______
  - Products-completed operations aggregate: $_______
  - Personal and advertising injury: $_______
  - Damage to premises rented to you: $_______
  - Medical expense: $_______

Required Endorsements to General Contractor’s General Liability Policy:

- Designated construction project(s) general aggregate limit: $_______
- ________________________________________________________________________ $_______

Include any other desired endorsements. See chapter 17 in this manual.

Additional Liability Insurance Policies Required of General Contractor:

- Workers’ compensation: $500,000
- Employer’s liability: $_______
- Business automobile liability: $_______
Required Endorsements to Borrower’s or General Contractor’s Builder’s Risk Insurance Policy:

- Professional liability $__________
- Excess liability $__________

Or

- Umbrella liability (occurrence basis) $__________

Commercial Property Insurance Policies Required of General Contractor for General Contractor’s Personal Property and Equipment:

- Causes of loss—special form 100 percent of replacement cost of the general contractor’s personal property and equipment

FROM ARCHITECT

Type of Insurance or Endorsement                     Minimum Policy or Endorsement Limit

Professional Liability Insurance Policy Required of Architect:

- Professional liability $__________

FROM BORROWER OR GENERAL CONTRACTOR

Type of Insurance or Endorsement                     Minimum Policy or Endorsement Limit

Builder’s Risk Insurance Policy Required of Borrower or General Contractor:

- Builder’s risk on a “completed value” basis 100 percent of replacement cost of the improvements to be constructed on the Property

Required Endorsements to Borrower’s or General Contractor’s Builder’s Risk Insurance Policy:

- Contract penalties $__________
- Collapse $__________
- Debris removal additional limit $__________
☐ Earthquake $____________
☐ Expediting expenses $____________
☐ Ordinance or law $____________
☐ Pollutant cleanup and removal $____________
☐ Preservation of property $____________
☐ Testing $____________
☐ Flood (if Property is located within a 100-year floodplain (FEMA Flood Zone “A” or any subdesignation of Zone “A”)) $____________
☐ Occupancy of up to ____% of covered property to be permitted $____________
Form 10-18

Additional Clauses for Loan Agreements

Capital Expenditures

Clause 10-18-1

Borrower will not make any expenditures for fixed assets in excess of [amount] dollars ($[amount]) in any [fiscal/calendar] year. “Fixed assets” means tangible property that has a useful life in excess of [number] years.

Working Capital

Clause 10-18-2

Borrower will maintain at all times an excess of current assets over current liabilities of not less than [amount] dollars ($[amount]). “Current assets” means the sum of Borrower’s cash, marketable securities, and other similar assets that are reasonably expected to be converted into cash or applied within twelve months of the date of determination. “Current liabilities” means the sum of all money owed by Borrower that is payable on demand or within twelve months of the date of determination.

Liquidity Ratio

Clause 10-18-3

Borrower will at all times maintain a ratio of the sum of cash and marketable securities to current liabilities of not less than [number] to 1. “Current liabilities” means the sum of all money owed by Borrower that is payable on demand or within twelve months of the date of determination.
Current Ratio

Clause 10-18-4

Borrower will maintain at all times a ratio of current assets to current liabilities of not less than \([\text{number}]\) to 1. “Current assets” means the sum of Borrower’s cash, marketable securities, and other assets that are reasonably expected to be converted into cash or applied within twelve months of the date of determination. “Current liabilities” means the sum of all money owed by Borrower that is payable on demand or within twelve months of the date of determination.

Debt Service Coverage

Clause 10-18-5

Borrower will maintain a ratio of net operating income to debt service for the [calendar/fiscal] year of not less than \([\text{number}]\) to 1. “Net operating income” means gross income less operating expenses. “Debt service” means principal and interest payments on all debts with a maturity in excess of one year.

Loan-to-Value Ratio

Clause 10-18-6

Borrower will maintain a loan-to-value ratio on the [Collateral/Real Property/Personal Property] of \([\text{ratio}]\) or less. The value of the [Collateral/Real Property/Personal Property] shall be the fair market value of the [Collateral/Real Property/Personal Property] as determined by [Lender/an appraisal acceptable to Lender]. “Loan” means the principal of any indebtedness secured
by a [lien/security interest] on the [Collateral/Real Property/Personal Property].
Notice of Penalties for Making False or Misleading Written Statement (Pursuant to Section 343.105, Texas Finance Code)

Warning: Intentionally or knowingly making a materially false or misleading written statement to obtain property or credit, including a mortgage loan, is a violation of Section 32.32, Texas Penal Code, and, depending on the amount of the loan or value of the property, is punishable by imprisonment for life or any term of 2 years to 99 years and a fine not to exceed $10,000.

[I/We], the undersigned home loan applicant(s), represent that [I/we] have received, read, and understand this notice of penalties for making a materially false or misleading written statement to obtain a home loan.

[I/We] represent that all statements and representations contained in [my/our] written home loan application, including statements or representations regarding [my/our] identity, employment, annual income, and intent to occupy the residential real property secured by the home loan, are true and correct as of the date of loan closing.

[Name of borrower/loan applicant]

Repeat signature lines as necessary.
Certification of Trust

Basic Information

Date:

Trust:

Trustee:

Trustee’s Mailing Address:

| Repeat as necessary. |

Settlor:

| Repeat as necessary. |

Include the following terms as applicable.

Note

Date:

Original principal amount:

Borrower:

Lender:

Deed of Trust

Date:

Grantor:
Beneficiary:

Recording information:

Property:

Buyer:

Terms of Certification

1. Trustee is a currently acting trustee of the Trust under an instrument executed on [date], and the Trust exists.

2. The Trust powers include at least all those trust powers granted a trustee by subchapter A, chapter 113, of the Texas Property Code.

2. The Trust powers include the power to, and the Trustee is authorized to

   borrow money in the amount of $[amount] from Lender to [purchase the Property/[state other purpose or use of loan proceeds]] and to enter into the Note, payable to the order of Lender [/].

    grant security interests in or liens on all or certain assets of the Trust, including entering into the Deed of Trust covering the Property and any necessary modifications, extensions, increases, and renewals of the Deed of Trust [/].

And/Or
And/Or

enter into any assignments, pledges, mortgages, deeds of trust, security agreements, and other documents and instruments concerning the Property, or any real or personal property, or any interest therein, owned by the Trust that may be necessary or appropriate or required by Lender to evidence and secure the payment of the Note [;/.]

And/Or

contract for the issuance by Lender of letters of credit, to discount with Lender notes, acceptances, and evidences of indebtedness payable to or due the Trust, to endorse the same and execute any contracts and instruments for repayment thereof to Lender as Lender may require, to enter into foreign exchange transactions with or through Lender, and to enter into interest-rate hedging transactions with Lender in connection with the Note [;/.]

And/Or

execute deeds or other instruments of conveyance [;/.]

And/Or

enter into a guaranty guaranteeing [a portion of] the obligations of Borrower to Lender [;/.]

And/Or

[state other purpose of certification].

Select one of the following.

3. The Trust is irrevocable.
3. The Trust is revocable, and the power to revoke the Trust is held by [name].

4. Under the terms of the Trust, [all/[number]] of the currently acting trustees are required to sign documents in order to exercise the powers of the trustees.

5. Title to the Trust assets should be taken in the following manner: [describe].

6. The Trust has not been revoked or modified or amended in any manner that would cause the representations contained in this Certification to be incorrect.

Trustee:

______________________________
 [Name of trustee]

Repeat signature lines as necessary.
Form 10-21

Release of Collateral Transfer of Note and Lien

Basic Information

Date:

Secured Party:

Secured Party’s Mailing Address:

Debtor:

Debtor’s Mailing Address:

Collateral Note: $[amount] Note executed by [maker] and payable to the order of [payee] dated [date].

Collateral Note Security: Deed of Trust dated [date], recorded in [recording data].

Collateral Transfer of Note and Lien

Date:

Recorded: [recording data]

Purpose of Collateral Transfer of Note and Lien

In the Collateral Transfer of Note and Lien, Debtor granted to Secured Party a security interest in the Collateral Note and the Collateral Note Security, each as described in the Collateral Transfer of Note and Lien.
Release

Secured Party releases Secured Party’s security interest in the Collateral Note and Collateral Note Security.

No Release of Underlying Collateral Note Debt and Collateral Note Security

Secured Party’s release of its security interest in the Collateral Note and the Collateral Note Security does not affect or release (1) the indebtedness owing to Debtor on the Collateral Note and (2) the liens held by Debtor under the Collateral Note Security documents on the property described in those documents.

When the context requires, singular nouns and pronouns include the plural.

[Name of secured party]

Include acknowledgment.
Form 10-22

Assumption Agreement

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Basic Information

Date:

Transferor:

Transferor’s Original Mailing Address:

Assuming Party:

Assuming Party’s Mailing Address:

Holder of Note and Lien (“Holder”):

Holder’s Mailing Address:

Note

Date:

Original Principal Amount:

Borrower:

Lender:

Unpaid Principal Amount:
Accrued but Unpaid Interest:

Maturity Date:

[Extended Maturity Date of Note:]

Property (including any improvements):

Note and Lien(s) Are Described in the Following Documents (“Lien Documents”): [include recording information]

Modified Terms:

Agreement of the Parties

For good and valuable consideration, Transferor, Assuming Party, and Holder are entering into this agreement.

1. Assuming Party and Transferor warrant to Holder that the Note and the Lien Documents, as modified by this agreement, are valid and enforceable, and represent to Holder that the Note and Lien Documents are not subject to rights of offset, rescission, or other claims.

2. Assuming Party—

   a. promises to perform all of Borrower’s obligations under the Note and promises to pay to the order of Holder (i) the Unpaid Principal Amount, (ii) the Accrued but Unpaid Interest, and (iii) all other amounts now or hereafter due and owing on the Note; and

   b. agrees to perform all obligations of grantor [include if applicable: and debtor/obligor] under the Lien Documents.

Select one of the following.
2. Assuming Party and Transferor—

   a. promise to perform all of Borrower’s obligations under the Note and promise to pay to the order of Holder (i) the Unpaid Principal Amount, (ii) the Accrued but Unpaid Interest, and (iii) all other amounts now or hereafter due and owing on the Note; and

   b. agree to perform all obligations of grantor [include if applicable: and debtor/obligor] under the Lien Documents.

3. Holder consents to Transferor’s conveyance of the Property to Assuming Party and Assuming Party’s assumption of Transferor’s obligations under the Note and the Lien Documents, and Holder releases Transferor from Transferor’s obligations to Holder under the Note and the Lien Documents.

   [Include if applicable: All unpaid amounts owing on the Note are due by the Extended Maturity Date of Note. Assuming Party also extends the liens described in the Lien Documents.]

   Or

3. Holder consents to Transferor’s conveyance of the Property to Assuming Party and Assuming Party’s assumption of Transferor’s obligations under the Note and the Lien Documents, but Holder’s consent does not release Transferor from Transferor’s obligations to Holder under the Note and the Lien Documents.
[Include if applicable: All unpaid amounts owing on the Note are due by the Extended Maturity Date of Note. Transferor and Assuming Party also extend the liens described in the Lien Documents.]

4. The Note and the Lien Documents continue as written, except as provided in this agreement.

5. When the context requires, singular nouns and pronouns include the plural.

[Name of transferor]

[Name of assuming party]

[Name of holder]

Include acknowledgments.
Lender’s Rescission and Waiver of Acceleration of Note

Date:

Note

Date:

Original Principal Amount:

Borrower:

Lender:

Original Stated Maturity Date:

Accelerated Maturity Date:

Rescission Date:

Deed of Trust

Date:

Grantor:

Lender:

Recording information:

Property:

[Guarantor:]
Lender, as of the Accelerated Maturity Date, accelerated the maturity of the Note.

Lender hereby rescinds and waives, as of the Rescission Date, its acceleration of the maturity of the Note. Lender hereby reinstates the payment terms of the Note, and the obligation evidenced by the Note will be governed by Texas Civil Practice and Remedies Code section 16.035 as if no acceleration had occurred.

A copy of this rescission and waiver, in accordance with Texas Civil Practice and Remedies Code section 16.038 has been served on each debtor who, according to Lender’s records, is obligated to pay the Note.

[Name of lender]
Form 10-24

Affidavit of Mailing of Lender’s Rescission and Waiver of Acceleration of Note

Date:

Affiant:

Note

Date:

Original principal amount:

Borrower:

Mortgagee:

Original stated maturity date:

Accelerated maturity date:

Rescission Date:

Deed of Trust

Date:

Grantor:

Mortgagee:

[Servicer: [include name of servicer if servicer is not mortgagee]]

Recording information:
Property: [Insert property description and include the following if applicable: including all personal property secured by the security agreement included in the Deed of Trust.]

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to Mortgagee’s rescission and waiver, as of the Rescission Date, of Mortgagee’s prior acceleration of the maturity of the Note.

2. Attached to this affidavit is a copy of the letter and accompanying Lender’s Rescission and Waiver of Acceleration of Note (collectively, the “Written Notice”) served by [first-class mail/certified mail] on each debtor obligated to pay the Note, in compliance with Texas Civil Practice and Remedies Code section 16.038, by [Mortgagee/Servicer/an attorney representing Mortgagee], either personally or by an agent, depositing a copy of the Written Notice in the United States mail, postage prepaid, addressed to each debtor obligated to pay the Note at each debtor’s last known address.

__________________________________________________________________________________________________________________________ ...

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on ________________ by [name of affiant].

__________________________________________________________________________________________________________________________ ...

Notary Public, State of Texas

After recording return to:

[name and address]

Include attachments.
Chapter 11
Home Equity Loan Documents

I. Home Equity Loans Generally

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Chapter 11

Home Equity Loan Documents

I. Home Equity Loans Generally

§ 11.1 General Considerations

Article XVI, section 50, of the Texas Constitution allows a lien on homestead property to secure a home equity loan. In a departure from prior Texas practice, the validity of such a lien is generally not dependent on the use to which the loan proceeds are applied. Constitutional provisions authorizing home equity lending continue, however, to reflect a strong public policy solicitous of the homestead as the last shield against destitution. Home equity loans are authorized only on satisfaction of a number of significant constitutional safeguards and restrictions aimed at protecting homestead owners.

These restrictions are nonseverable and nonwaivable. Each must be satisfied to create a valid lien. Strict compliance with the requirements of the Texas Constitution is required. See Toler v. Fertitta, 67 S.W.2d 229, 230 (Tex. Comm’n App. 1934, holding approved).

Regulatory Commentary: Regulations and official commentary pertaining to home equity lending are available from the following different sources.


Special Note on 7 Tex. Admin. Code Ch. 153: On November 7, 2017, Texas voters approved SJR 60, which proposed several amendments to article XVI, section 50 of the Texas Constitution relating to home equity loans. In order to implement the adopted constitutional provisions, the Finance Commission and Credit Union Commission proposed the following changes to title 7, chapter 153 of the Texas Administrative Code: amending sections 153.1, 153.5, 153.14, 153.17, 153.84, and 153.86; adding new section 153.45; and repealing section 153.87 (“Proposed Rule”). These proposed changes are expected to be effective in 2018 after the revision of this manual is published. Practitioners are advised to refer to the Texas Secretary of State’s website for the most current version of the home equity lending interpretations.

1. Lenders authorized by the constitution to make home equity extensions of credit are afforded substantial protections when relying on these interpretations. No act or omission is deemed to violate a home equity constitutional provision if the act or omission conforms to an interpretation of the provision that is in effect at the time of the act or omission and made by a state agency to which the power of interpretation is delegated or by an appellate court of this state or the United States. Tex. Const. art. XVI, § 50(u). However, the validity of certain of the interpretations
has been successfully attacked in *Texas Bankers Ass’n v. Ass’n of Community Organizations for Reform Now (ACORN)*, 303 S.W.3d 404 (Tex. App.—Austin 2010, pet. granted). As a result, 7 Tex. Admin. Code §§ 153.1(11), 153.5(3) (defining interest) and § 153.5(4), (6), (8), (9), (12) (incorporating that definition) have been held constitutionally invalid, and 7 Tex. Admin. Code §§ 153.13, 153.18, 153.20, 153.22, 153.84 have been revised by the commissions to rectify invalid provisions found by the lower court. The Supreme Court of Texas granted a petition for review of the decision to determine (1) whether deference to agency interpretations should be the standard for appellate review when state agencies, in this case the Finance Commission of Texas and the Credit Union Commission, have been delegated the authority to interpret constitutional home equity provisions by the constitution and statutes of this state; (2) whether the Finance Code’s definition of “interest” was properly applied in agency interpretations for purposes of determining the constitutional 3 percent fee cap; and (3) whether agency interpretations should be upheld that allow the signing of an equity loan by power of attorney instead of a required signing by homeowners at locations specified by the constitution. On unopposed motion, the court also ordered ACORN dismissed as a party because of its intervening dissolution and ordered the style of the cause corrected to read *Finance Commission of Texas et al. v. Valerie Norwood et al.*, No. 10-0121, 54 Tex. Sup. Ct. J 1077 (Tex. Feb. 25, 2011). In an opinion issued on June 21, 2013, the Texas Supreme Court decided (1) that agency interpretations are subject to the same standard of review as courts of appeals, which are reviewed, as a matter of law, *de novo*; (2) that the agency interpretation of the 3 percent fee cap, tying it to the meaning of the Finance Code definition of “interest,” was invalid (“interest” as used in that provision means the amount determined by multiplying the loan principal by the interest rate); and (3) that execution of a power of attorney used in an equity loan transaction must occur only at the office of a lender, an attorney at law, or a title company. *Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013). On January 24, 2014, on a motion for rehearing filed by the Texas Bankers Association, a supplemental opinion was issued to clarify that per diem interest and discount points were not subject to the 3 percent fee cap and to reaffirm the court’s decision relating to the execution of a power of attorney used in an equity loan transaction. *Finance Commission of Texas*, 418 S.W.3d at 595–97.

2. **1998 OCCC Commentary:** On October 7, 1998, the Office of the Consumer Credit Commissioner (OCCC), the Texas Department of Banking, the Savings and Loan Department, and the Credit Union Department issued their joint Regulatory Commentary on Equity Lending Procedures to provide initial guidance to lenders and consumers concerning the regulatory views of the participating agencies. This regulatory commentary is referred to in this chapter as the “1998 OCCC Commentary.” Though the 1998 OCCC Commentary has been supplanted by title 7, chapter 153, of the Texas Administrative Code (Home Equity Lending) (see 29 Tex. Reg. 84 (2004)), it retains vitality by helping practitioners understand home equity lending restrictions. The 1998 OCCC Commentary is accessible on the OCCC website at [http://occc.texas.gov](http://occc.texas.gov).

3. **Department of Insurance Procedural Rules:** The Texas Department of Insurance adopted title insurance coverages specifically for home equity loans along with accompanying procedural rules: (1) Equity Loan Mortgage Endorsement (T-42) and accompanying Procedural Rule P-44 and (2) Supplemental Coverage Equity Loan Mortgage Endorsement (T-42.1) and accompanying Procedural Rule P-47. These endorsements and procedural rules provide underwriting guidelines that interpret the constitutional requirements for a home equity lien.

**Limitation of Chapter:** The commentary and forms in this chapter are applicable to a first-lien home equity loan. Texas Finance Code chapter 342 imposes additional duties, prohibitions, and disclosure requirements in connection with secondary mortgage loans. Attorneys are cautioned that some forms in this chapter may require modification for use with a secondary mortgage loan transaction.
Model Forms and Regulations: Home equity loans regulated by the OCCC must be written in plain language designed to be easily understood by the average consumer and must be printed in an easily readable font and type size. Tex. Fin. Code § 341.502(a). The Finance Commission has adopted rules governing loan contracts subject to Texas Finance Code section 341.502, including model loan contracts that in certain cases may be required for use. See 7 Tex. Admin. Code ch. 90. Home equity loans that are regulated by the OCCC and therefore subject to these plain language and model form requirements include only loans that (1) provide for an interest rate exceeding 10 percent a year, (2) are extended primarily for personal, family, or household use, (3) are a secondary mortgage loan, and (4) are made by a person engaged in the business of making such loans licensed by the OCCC (other than a bank, savings and loan, or credit union). Tex. Fin. Code §§ 341.101, 341.102–.103, 342.005; Tex. Att’y Gen. Op. No. JC-0513 (2002). These requirements do not apply to first-lien home equity loans or home equity loans made by traditional lenders.

Changes Effective January 1, 2018: There are significant changes for home equity loans closed on or after January 1, 2018. These changes are summarized below:

1. The 3 percent cap on fees is lowered to 2 percent.
2. Survey, appraisal and title premium/title search fees are excluded from the 2 percent fee cap calculation.
3. The prohibition against home equity loans on property with an agricultural use tax exemption is eliminated.
4. A home equity loan may now be refinanced into a conventional loan if (a) at least one year has elapsed since the home equity loan was closed; (b) there is no advance of new money (except closing costs); (c) the new principal loan balance does not exceed 80 percent of the property’s fair market value on the day of refinance; and (d) the owner is provided with a new disclosure twelve days prior to closing, advising owner of the risks of refinancing into a non–home equity loan.
5. For a home equity line of credit (HELOC), the provision that prohibits additional advances after the initial advance if the loan balance exceeds 50 percent of the fair market value of the property at closing is eliminated.

Where applicable, this chapter will identify provisions affected by the changes. These changes only apply to home equity loans closed on or after January 1, 2018. A home equity loan closed before January 1, 2018, should be analyzed under the old rules.

§ 11.2 Property with an Agricultural Use Tax Exemption

Before January 1, 2018, a lender could not make a home equity loan secured by property with an agricultural use tax exemption (except for property used primarily for dairy production). The January 1, 2018, constitutional amendments eliminate this prohibition and now permit home equity loans on homestead property that has an agricultural use tax exemption. There is, however, an apparent conflict with the language of Tex. Tax Code § 23.42(a–1), which provides that “an individual is not entitled to have land designated for agricultural use if the land secures a home equity loan described by Section 50(a)(6), Article XVI, Texas Constitution.” This conflict between the Texas Constitution and the Texas Tax Code will need to be resolved.

§ 11.3 Authorized Lenders

The seven categories of lenders that may make home equity loans are—
1. a bank, savings and loan association, savings bank, or credit union doing business under Texas or federal law, including a subsidiary of a bank, savings and loan association, savings bank, or credit union;

2. a federally chartered lending instrumentality;

3. a person approved as a mortgagee by the United States government to make federally insured loans;

4. a person licensed to make regulated loans under Texas law;

5. a seller financing all or part of the homestead purchase;

6. a person related to the borrower within the second degree of affinity or consanguinity; or

7. a person regulated under Texas law as a mortgage banker or mortgage company.

Tex. Const. art. XVI, § 50(a)(6)(P). To qualify as a mortgage company under category 7 above, a lender must obtain a license under Texas Finance Code chapter 156, the Residential Mortgage Loan Company Licensing and Registration Act. To qualify as a mortgage banker under category 7 above, a lender must obtain a license under Texas Finance Code chapter 157, the Mortgage Banker Registration and Residential Mortgage Loan Originator License Act. 7 Tex. Admin. Code § 153.17(3).

§ 11.3:1 Financial Institutions

Some questions remain regarding the eligibility of a financial institution chartered in a foreign state to make a home equity loan. Such institutions are generally considered to be exempt from Texas usury law under 12 U.S.C. § 1831d. Such institutions may make loans to Texas residents under the usury laws of their home states. The 1998 OCCC Commentary recognizes that a financial institution chartered and doing business in a foreign state is not subject to licensure as a Texas-regulated lender but offers no direct opinion on whether such an institution would be recognized under the Texas Constitution as an authorized home equity lender. 1998 OCCC Commentary, at 9.

§ 11.3:2 HUD-Approved Mortgagees

A person approved by the United States government as a mortgagee to make federally insured loans is an authorized home equity lender. The Department of Housing and Urban Development (HUD) approves lenders to make federally insured loans. Federal Housing Administration (FHA) and HUD direct endorsement or nonsupervised mortgagees are eligible to make home equity loans. Correspondents to a HUD-approved mortgagee are not authorized to make home equity loans unless they qualify under another category of authorized lender. 7 Tex. Admin. Code § 153.17(2). Unless a HUD-approved mortgagee is also a bank, savings and loan association, or credit union, the mortgagee must obtain a license from the Office of Consumer Credit Commissioner to make junior-lien home equity loans. Tex. Fin. Code §§ 124.005, 339.005, 341.103–.104, 342.051.

§ 11.3:3 VA-Guaranteed Loans

VA-guaranteed loans are backed by a partial guaranty by the Department of Veterans Affairs (VA). See 38 U.S.C. § 3703. Though guaranteed, these loans are not technically “federally insured.” The eligibility of VA lenders to make home equity loans remains unclear.
§ 11.3:4  State-Regulated Lenders

A lender authorized under Texas Finance Code chapter 341 must still meet both constitutional and statutory qualifications to make a home equity loan. Generally, a nondepository lender that makes, negotiates, arranges, or transacts a secondary mortgage loan governed by Finance Code chapter 342 must comply with the licensing provisions of that chapter. See 7 Tex. Admin. Code § 153.17(1), (3). Residential mortgage loan originators licensed under chapter 156 of the Finance Code, federal and state banks, savings banks, and savings and loan associations are expressly exempt from the licensing requirements of chapter 342. See Tex. Fin. Code § 342.051(c)(1), (f). Exempt lenders are nevertheless thought to be subject to the substantive provisions of that chapter applicable to secondary mortgage loans. However, chapter 342 and other chapters of subtitle B, title 4, of the Finance Code do not apply to a credit union’s extension of credit unless the agreement that evidences the transaction specifically provides otherwise. See Tex. Fin. Code § 124.005.

§ 11.3:5  Mortgage Banker or Mortgage Company

A person regulated by the state of Texas as a mortgage banker or mortgage company is authorized by the constitution to make a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(P)(vi).

§ 11.3:6  Loans by Relatives

A person related to the borrower within the second degree of affinity or consanguinity may make a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(P)(v). The Texas Government Code gives instructions for computing degrees of affinity and consanguinity. See Tex. Gov’t Code §§ 573.021—.025. Individuals also are exempt under licensing and registration requirements of Texas Finance Code chapter 180 when offering or negotiating a residential mortgage loan with, or on behalf of, an immediate family member of the individual. See Tex. Fin. Code § 180.003(2). An “immediate family member” for this purpose means the spouse, child, sibling, parent, grandparent, or grandchild of an individual. The term also includes a stepparent, stepchild, and step-sibling and a relationship established by adoption. See Tex. Fin. Code § 180.002(8).

§ 11.3:7  Redlining Restrictions

A lender otherwise authorized to make a home equity loan is ineligible to make such a loan if found by a federal regulatory agency to have engaged in the practice of refusing to make loans because the debtor resides or the property is located in a certain area. Tex. Const. art. XVI, § 50(a)(6)(P). No provision is made in the constitution to rehabilitate or requalify lenders who were once found to have done this.

§ 11.4  Restriction on Loan-to-Value Ratio

The principal amount of a home equity loan when added to the aggregate total of all other indebtedness secured by a lien against the homestead may not exceed 80 percent of the fair market value of the homestead on the date that the extension of credit is made. Tex. Const. art. XVI, § 50(a)(6)(B). For the purpose of this calculation, the principal amount of a home equity loan is the sum of cash advances and charges made at the inception of the loan to the extent that the charges are financed in the principal amount of the note. 7 Tex. Admin. Code § 153.3(1). The 80 percent limit applies to the principal balance of all outstanding debt secured by the homestead on the date that the extension of credit is made. 7 Tex. Admin. Code § 153.3(2). The principal amount of a home equity loan does not include interest accrued after the date that the extension of credit is made (other than any interest capitalized and added to the principal balance on the date that the extension of credit is made) or
amounts advanced by the lender after closing as the result of default, including, for example, ad valorem taxes, hazard insurance premiums, and authorized collection costs, including attorney’s fees. 7 Tex. Admin. Code § 153.3(3). With a closed-end multiple advance loan, the principal balance includes contractually obligated future advances not yet disbursed. 7 Tex. Admin. Code § 153.3(4).

**Valuation:** To establish the fair market value of the homestead, the lender and owner must sign a written acknowledgment establishing its value on the date that the loan is made. Tex. Const. art. XVI, § 50(a)(6)(Q)(ix). A lender or assignee for value may conclusively rely on the fair market value established by this written acknowledgment if that value is established by appraisal or evaluation prepared in accordance with any applicable state or federal requirement and the lender or assignee has no actual knowledge at the time that the loan is made that the fair market value established by the written acknowledgment is incorrect. Tex. Const. art. XVI, § 50(h). The appraisal or evaluation should be attached to the written acknowledgement of value executed by the borrower at closing. See Procedural Rule P-47, Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

Federal banking regulators have issued regulations establishing the minimum criteria for valuations of real estate. An “appraisal” by a state certified or licensed appraiser is generally required for transactions valued at more than $250,000. An “evaluation” is required for transactions of $250,000 and less. See 12 C.F.R. §§ 34.43(a), (b), 225.63(a), (b), 323.3(a), (b), 564.3(a), (b).

Federal Financial Institutions Examination Council Interagency Appraisal Evaluation Guidelines issued by federal banking regulators provide further specifications for an evaluation. The evaluation must (1) be written; (2) include the preparer’s name, address, signature, and date of the evaluation; (3) describe the collateral, its condition, and its current and projected use; (4) describe the source of information used in the analysis; (5) describe the analysis and supporting information; and (6) provide an estimate of the real estate’s market value, with any limiting conditions. Interagency Appraisal and Evaluation Guidelines in Commercial Real Estate and Construction Lending, Comptroller’s Handbook, Appendix E (Comptroller of the Currency, November 1995), available at https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/index-comptrollers-handbook.html. Qualifying evaluations and appraisals may be performed by lender employees or agents as long as the appraiser or evaluator is independent from the loan decision. Home equity loans made by FDIC-insured institutions must be supported by an appraisal or evaluation complying with these federal requirements.

In some cases, constitutional restrictions against additional collateral for home equity loans may require the partition, subdivision, and replatting of a tract into separate homestead and nonhomestead parcels. The proper apportioning of value between the homestead tract and the nonhomestead tract is essential to compliance with loan-to-value limits. This apportionment of value should take into account that the partitioned unsecured tract may have critical value to the homestead because it provides access to a public street or, conversely, it may have no value save in conjunction with the disposition of the entire property. See In re Tinsley, 217 B.R. 188 (Bankr. N.D. Tex. 1997).

§ 11.5 Restrictions on Open-End Credit

A home equity loan must be for a definite original principal amount. The credit may not be in the form of an open-end account that may be debited from time to time or from which credit may be extended from time to time unless the open-end account qualifies as a home equity line of credit. Tex. Const. art. XVI, § 50(a)(6)(F).
The 1998 OCCC Commentary provides that open-end credit is defined by Tex. Rev. Civ. Stat. art. 5069–1B.002(14) (since codified as Tex. Fin. Code § 301.002(a)(14)) as an account under a written contract between a creditor and an obligor in connection with which—

1. the creditor reasonably contemplates repeated transactions and the obligor is authorized to make purchases or borrow money;

2. interest may be charged from time to time on an outstanding unpaid balance; and

3. the amount of the credit that may be extended during the term of the account is generally made available to the extent that any outstanding balance is repaid.

1998 OCCC Commentary, at 5.

The 1998 OCCC Commentary provides that amounts advanced by the lender after closing as a result of default for ad valorem taxes, hazard insurance premiums, and authorized collection costs, including reasonable attorney’s fees, are not contemplated repeated transactions that render the loan an open-end account. 1998 OCCC Commentary, at 5.

**Home Equity Line of Credit (HELOC):** A home equity loan may be of the open-end account type if it qualifies as a home equity line of credit or HELOC. Tex. Const. art. XVI, § 50(a)(6)(F). A HELOC is a form of open-end account that may be debited from time to time, under which credit may be extended from time to time, and under which the borrower requests advances, repays money, and reborrows money. 7 Tex. Admin. Code § 153.82. To qualify as a HELOC, a home equity loan must meet eight additional constitutional requirements:

1. **Borrower-Requested Advances.** With a HELOC, credit may be extended to the borrower from time to time. However, any advances must be borrower-requested. Tex. Const. art. XVI, § 50(t)(1). Only a borrower named in the HELOC may request an advance. An owner may request an advance only if also named as a borrower. A HELOC may contain provisions that restrict which borrowers may request an advance or may require that all borrowers consent to the advance. 7 Tex. Admin. Code § 153.82.

2. **Minimum Advances.** No single debit or advance on a HELOC may be for less than $4,000. Tex. Const. art. XVI, § 50(t)(2).

3. **Restriction against Credit/Debit Cards or Preprinted Checks Not Solicited by Borrower.** Advances on a HELOC may not be made by credit card, debit card, or similar device or by preprinted check unsolicited by a borrower. Tex. Const. art. XVI, § 50(t)(3). A borrower may from time to time specifically request preprinted checks for use in obtaining a HELOC advance but may not request the lender to periodically send preprinted checks to the borrower. A borrower may use a check reorder form, which may be included with preprinted checks, as a means of requesting a specific number of preprinted checks. 7 Tex. Admin. Code § 153.84(2).

A lender may offer one or more nonprohibited devices or methods for a borrower to request a HELOC loan advance. 7 Tex. Admin. Code § 153.84(1). The request may be made in person, but this is not required. 7 Tex. Admin. Code § 153.84(3). Permissible advance requests may be made by contacting the lender directly, by telephonic fund transfers, and by electronic fund transfers. Examples of devices to obtain a HELOC advance that are not “prohibited similar devices” to those specifically prohibited by the constitution include prearranged drafts, preprinted checks requested by the borrower, or written transfer instructions. 7 Tex. Admin. Code § 153.84(1).

4. **Restriction on Fees.** The restriction on closing expenses generally applicable to home equity loans is equally applicable to HELOCs. All such fees must be charged or collected only at the time of the initial extension of credit. No
fee may be charged or collected in connection with any subsequent debit or advance. Tex. Const. art. XVI, § 50(t)(4). For the purpose of this restriction, the date of the initial extension of credit is the closing date of the HELOC. 7 Tex. Admin. Code § 153.85(b).

5. Restriction on Loan-to-Value Ratio. The 80 percent restriction on loan-to-value generally applicable to home equity loans also applies to HELOCs. The maximum principal amount that may be extended under the line of credit, when added to the aggregate total of the outstanding principal balances of all indebtedness secured by the homestead on the date of the extension of credit, may not exceed the 80 percent loan-to-value limit. Tex. Const. art. XVI, § 50(t)(5). The maximum principal amount that may be outstanding on a HELOC at any time is determined as of the date of loan closing and does not change during the term of the HELOC. 7 Tex. Admin. Code § 153.86(3). The following amounts, when added together, must be equal to or less than 80 percent of the fair market value of the property: (1) the amount of the advance; (2) the principal amount of the HELOC at the time of the advance; and (3) the principal balance outstanding on all other debts secured by the homestead calculated as of the date of closing of the HELOC. 7 Tex. Admin. Code § 153.86(1), (4).

6. Loan-to-Value Limit on Additional Advances. For HELOCs closed before January 1, 2018, no additional advances may be made if the total principal amount outstanding exceeds an amount equal to 50 percent of the fair market value of the homestead as determined on the date of the original extension of credit. Tex. Const. art. XVI, § 50(t)(6); 7 Tex. Admin. Code § 153.87. To calculate the total principal amount outstanding for the purposes of determining the 50 percent threshold, the following amounts are added: (1) the principal amount of the HELOC at the time of the proposed advance and (2) the principal balance outstanding on all other debts secured by the homestead calculated as of the date of closing of the HELOC. 7 Tex. Admin. Code § 153.86(1), (4). If the total principal amount of the HELOC exceeds the 50 percent limitation but then is paid down to an amount equal to or less than 50 percent of the fair market value, subsequent advances are permitted subject to all other HELOC restrictions (for example, minimum advance limit and loan-to-value limit). For HELOCs closed on or after January 1, 2018, this 50 percent loan-to-value restriction on additional advances is not applicable.

7. Restriction against Unilateral Lender Amendments. A lender or holder of a HELOC may not unilaterally amend the extension of credit. Tex. Const. art. XVI, § 50(t)(7).

8. Restriction on Amortization. A HELOC must be repayable in regular periodic installments. The installments must be repayable not more often than every fourteen days and not less often than monthly. The installments must commence not later than two months from the date of the extension of credit. During the period in the loan term during which the borrower may request advances, the amount of each installment must be at least equal to the accrued interest on the loan. During the period in the loan term after which the borrower may not request additional advances, the amount of the installments must be substantially equal and sufficient to retire the indebtedness over the remaining term of the loan. Tex. Const. art. XVI, § 50(t)(8).

While installments on a HELOC are required to begin not later than two months from the date of the extension of credit, this does not apply when no advance is made at the time of closing. If no advance is made at closing, the repayment period is not required to begin until after the first advance. 7 Tex. Admin. Code § 153.88(b). While HELOC borrowers cannot be required to make loan installments more frequently than every fourteen days, this does not prohibit a borrower from voluntarily making payments on a schedule that is more frequent than that required by the lender. 7 Tex. Admin. Code § 153.88(c).
§ 11.6 Restriction on Fees

For home equity loans closed on or after January 1, 2018, closing expenses, other than interest or bona fide discount points used to buy down the interest rate, may not exceed 2 percent of the original principal amount of the loan. Loan closing expenses subject to this restriction include any fees paid to anyone to originate, evaluate, maintain, record, insure, or service the extension of credit, excluding fees for:

(i) an appraisal performed by a third party appraiser;

(ii) a property survey performed by a state registered or licensed surveyor;

(iii) a state base premium for a mortgagee policy of title insurance with endorsements established in accordance with state law; or

(iv) a title examination report if its cost is less than the state base premium for a mortgagee policy of title insurance without endorsements established in accordance with state law.


For home equity loans closed before January 1, 2018, closing expenses, other than interest, may not exceed 3 percent of the original principal amount of the loan. Appraisal fees, survey fees, title insurance premiums, and title search fees are included in the 3 percent loan fee calculation.

The 2 percent (3 percent for pre-2018 loans) fee limit applies only to charges, other than interest, that are required by the lender to be paid by the borrower or the borrower’s spouse at the inception of the loan. Charges after loan closing for such matters as contractually permitted force-placed insurance premiums, returned check fees, late fees, and debt collection and foreclosure costs are subsequent events that are not subject to the 2 percent (3 percent for pre-2018 loans) fee limitation. See 7 Tex. Admin. Code § 153.5(15).

§ 11.6:1 Interest

Interest is specifically excluded from the 2 percent (3 percent for pre-2018 loans) fee limitation. Tex. Const. art. XVI, § 50(a)(6)(E). “Interest” had been interpreted by the Texas Finance Commission and Credit Union Commission in 2004 for purposes of the 2 percent (3 percent for pre-2018 loans) fee limitation to mean interest as defined by Tex. Fin. Code § 301.002(a)(4) and as interpreted by Texas courts. See 7 Tex. Admin. Code §§ 153.1(11), 153.5(3). Finance Code section 301.002, which is located in the subtitle of the Code governing usury, defines interest in pertinent part as “compensation for the use, forbearance, or detention of money.” See Tex. Fin. Code § 301.002(a)(4). However, the supreme court invalidated this broad interpretation of interest as contrary to the intent and meaning of the constitution in Finance Commission of Texas v. Norwood, 418 S.W.3d 566 (Tex. 2013). The case reached the supreme court on petition for review of Texas Bankers Ass’n v. Ass’n of Community Organizations for Reform Now (ACORN), 303 S.W.3d 404 (Tex. App.—Austin 2010, pet. granted), which was so styled and popularly referred to as the “ACORN” case before the supreme court ordered ACORN to be dismissed as a party because of its intervening dissolution and the style of the cause corrected to read Finance Commission of Texas et al. v. Valerie Norwood et al., No. 10-0121, 54 Tex. Sup. Ct. J. 1077 (Tex. Feb. 25, 2011).

By adopting a definition of interest that is tied to a statute that can be amended by the legislature from time to time, the supreme court found that the commission’s interpretation “utterly defeats the clear purpose of constitutionalizing it, which was to place the [fee] limitation beyond the Legislature’s power to change without ratification by the voters.” Finance Commission of Texas, 418 S.W.3d at 587. Moreover, the supreme court found implausible that the legislature intended that the
same definition of interest that applies to and strengthens the consumer protections of usury would be applied to determining
the constitutional fee limitation, which it weakens, although both are intended as consumer protections. Instead, the court
adopted what it characterized as a narrower and “well-understood meaning of ‘interest’: the amount equal to the loan principal
multiplied by the interest rate.” *Finance Commission of Texas*, 418 S.W.3d at 587. The court concluded that “consistent with
the [legislative] history, purpose, and text of Section 50(a)(6)(E), ‘interest’ as used in that provision means the amount deter-
mimed by multiplying the loan principal by the interest rate.” *Finance Commission of Texas*, 418 S.W.3d at 588. The court
noted, however, that “this narrower definition of interest does not limit the amount a lender can charge for a loan, but instead
limits only what part of the total charge can be paid in front-end fees rather than interest paid over time.” *Finance Commission
of Texas*, 418 S.W.3d at 588 n.104.

Per diem interest and discount points are considered “interest” and not subject to the constitutional 2 percent (3 percent for
to be excluded from the 2 percent (3 percent for pre-2018 loans) fee cap, must truly correspond to a reduced interest rate. Tex.
Const. art. XVI, § 50(a)(6)(E).

§ 11.6:2 Voluntary Optional Fees

Optional charges not required by the lender but paid at the sole discretion of the borrower are not fees subject to the 2 percent
(3 percent for pre-2018 loans) limit. 7 Tex. Admin. Code § 153.5(1). If the borrower chooses to pay premiums for certain
insurance coverage (for example, credit life, credit accident, or health insurance coverage), the premiums are not included
within the 2 percent (3 percent for pre-2018 loans) limit. If the lender required these same coverages, the premiums would be
fees subject to the 2 percent (3 percent for pre-2018 loans) limit.

§ 11.6:3 Fees to Originate

Fees to originate a home equity loan are subject to the 2 percent (3 percent for pre-2018 loans) limit. 7 Tex. Admin. Code
§ 153.5(6). Fees required to be paid by the borrower to third parties for separate and additional consideration for activities
relating to originating the loan are fees subject to the 2 percent (3 percent for pre-2018 loans) limit. Attorney’s fees for docu-
ment preparation and broker’s fees are considered fees to originate a loan. However, charges for loan origination that third
parties absorb and do not require the borrower or borrower’s spouse to pay are not fees subject to the 2 percent (3 percent for

§ 11.6:4 Fees Absorbed by Lender

Charges that the lender absorbs that might otherwise be paid by the borrower or borrower’s spouse are not fees subject to the
2 percent (3 percent for pre-2018 loans) limit. 7 Tex. Admin. Code § 153.5(5).

§ 11.6:5 Fees to Evaluate

Fees to evaluate the credit decision for a home equity loan are subject to the 2 percent (3 percent for pre-2018 loans) limit.
This includes fees collected to cover the expenses of a credit report, flood zone determination, tax certificate, or inspection.
For home equity loans closed on or after January 1, 2018, appraisal fees, survey fees, and title report fees are excluded from the 2 percent fee limit. Tex. Const. art. XVI, § 50(a)(6)(E)(i)–(iv). For home equity loans closed prior to January 1, 2018, appraisal fees, survey fees, and title report fees are included in the 3 percent fee limit.

§ 11.6:6 Fees to Maintain

Fees to maintain a home equity loan are subject to the 2 percent (3 percent for pre-2018 loans) limit. Fees paid at the inception of the loan as compensation for performing a service for the life of the loan (for example, flood zone determination fee or tax service fee) are subject to the 2 percent (3 percent for pre-2018 loans) limit. Also included in the 2 percent (3 percent for pre-2018 loans) limit are fees to maintain the loan customarily paid at the inception of the home equity loan but deferred for later payment. 7 Tex. Admin. Code § 153.5(9).

§ 11.6:7 Fees to Record

Fees paid to public officials and others for the purposes of recording public documents evidencing the lien are fees subject to the 2 percent (3 percent for pre-2018 loans) limit. 7 Tex. Admin. Code § 153.5(10).

§ 11.6:8 Fees to Insure

For home equity loans closed on or after January 1, 2018, a mortgagee’s title insurance premium with endorsements is excluded from the 2 percent fee limit. Tex. Const. art. XVI, § 50(a)(6)(E)(iii).

For home equity loans closed prior to January 1, 2018, premiums to insure a home equity loan (for example, title insurance) are fees subject to the 3 percent limit.

Premiums that the borrower or borrower’s spouse are required to pay to purchase homeowner’s insurance are not fees subject to the 2 percent (3 percent for pre-2018 loans) limit. This includes fire and extended coverage insurance and flood insurance. Though the failure to maintain insurance is generally an event of default on the home equity loan, it is not a condition to the extension of the credit. A lender may collect and escrow premiums for this insurance and include the premium in the periodic payment amount or principal amount. If the lender sells insurance to the borrower, the lender must also comply with all applicable law concerning the sale of insurance in connection with a mortgage loan. 7 Tex. Admin. Code § 153.5(16).

§ 11.6:9 Fees to Service

Any fee charged to or paid by an owner at the inception of the loan transaction to service a home equity loan is a fee subject to the 2 percent (3 percent for pre-2018 loans) limit. Also, subject to the 2 percent (3 percent for pre-2018 loans) limit are fees to service a loan customarily paid at the inception of the home equity loan but deferred for later payment. 7 Tex. Admin. Code § 153.5(12).

§ 11.6:10 Escrow Funds

A lender may provide escrow services in a home equity loan transaction. Funds deposited by the borrower into the escrow account for the payment of taxes, insurance premiums, maintenance or homeowner’s association assessments, or similar purposes remain the property of the borrower and are not considered fees subject to the 2 percent (3 percent for pre-2018 loans)
limit. However, a lender must not contract for a right of offset against escrow funds. This would result in a violation of prohibitions against additional collateral. 7 Tex. Admin. Code § 153.5(14).

§ 11.6:11 Fees to Subdivide or Replat

In some situations constitutional restrictions against additional collateral for a home equity loan may require the subdivision or replatting of a tract into separate homestead and nonhomestead parcels. Fannie Mae policy for the purchase of home equity loans suggests that all lender-required costs incurred by the borrower to resurvey, subdivide, or replat the property are fees subject to the 2 percent (3 percent for pre-2018 loans) limit. Fannie Mae Lender Letter LL02-98 (May 28, 1998).

§ 11.6:12 Subsequent Events

The 2 percent (3 percent for pre-2018 loans) fee limit applies only to fees contracted for or paid by an owner or owner’s spouse at the inception of the loan. If the owner fails to perform covenants in the credit documents resulting in the lender’s later assessment of costs to the owner, such postclosing costs are not subject to the 3 percent limit. Examples of these costs include lender-acquired homeowner’s insurance, late charges, returned check fees, collection costs, and foreclosure costs. 7 Tex. Admin. Code § 153.5(15). However, if the loan is subsequently modified, the original loan and its subsequent modification are regarded as a single transaction for purposes of calculating the 2 percent (3 percent for pre-2018 loans) fee limitation (that is, any fees paid in connection with the loan modification when added to fees charged at loan closing cannot exceed the 2 percent (3 percent for pre-2018 loans) limitation). A modification for this purpose occurs when one or more terms of the loan are amended by written agreement between the lender and owner in which the original promissory note is not satisfied and replaced with a new debt instrument. See 7 Tex. Admin. Code § 153.14(2)(D).

§ 11.6:13 Secondary Mortgage Loans

A secondary mortgage loan as defined by Tex. Fin. Code § 342.001(4) is subject to certain statutory fee limitations. See Tex. Fin. Code §§ 342.307, 342.308, 342.502. A home equity loan also constituting a secondary mortgage loan must comply with both the constitutional and statutory fee limitations. 7 Tex. Admin. Code § 153.5(13).

§ 11.7 Restriction against Recourse Debt

A home equity loan must be a nonrecourse loan with no personal liability against the owner or the owner’s spouse. Tex. Const. art. XVI, § 50(a)(6)(C). The lender may look to recover only against the homestead property and not pursue a deficiency judgment against any owner or any owner’s spouse. 7 Tex. Admin. Code § 153.4(2). If the owner or the spouse of the owner cosigns the home equity loan or consents to the home equity lien, the loan must not give the lender personal recourse against either the owner or the spouse. 7 Tex. Admin. Code § 153.4(1).

Fraud: The lender may have recourse against the owner or owner’s spouse if the owner or spouse obtains the extension of credit by actual fraud. Tex. Const. art. XVI, § 50(a)(6)(C). Actual fraud requires a showing of dishonesty of purpose or intentional breach of duty that is designed to injure another or to gain an undue or unconscientious advantage. 7 Tex. Admin. Code § 153.4(3).
§ 11.8 Restriction against Prepayment Penalties

Home equity loans must be capable of being paid in advance without penalty or other charge. Tex. Const. art. XVI, § 50(a)(6)(G). A lockout provision in a loan contract prohibiting a buyer from paying early is considered a prepayment penalty. 7 Tex. Admin. Code § 153.7(2).

There is no express constitutional prohibition against note provisions applying principal prepayment to the last of the principal payments becoming due or providing that any partial prepayment would not alter the amount or timing of scheduled monthly payments. 1998 OCCC Commentary, at 5.

§ 11.9 Restriction against Additional Collateral

The homestead is the only collateral that may secure a home equity loan. The constitution expressly prohibits the credit from being secured by any other real or personal property. See Tex. Const. art. XVI, § 50(a)(6)(H).

§ 11.9:1 Incidental Collateral

A lender and an owner may enter into an agreement whereby a lender may acquire a security interest in items “incidental” to the homestead collateral. Items not considered additional real or personal property collateral are—

1. escrow funds for the payment of taxes and insurances;
2. an undivided interest in a condominium unit, a planned unit development, or the right to use and enjoy certain property owned by an association;
3. insurance proceeds related to the homestead;
4. condemnation proceeds;
5. fixtures; or
6. easements necessary or beneficial to the use of the homestead including access easements for ingress and egress.

7 Tex. Admin. Code § 153.8(1).

§ 11.9:2 Guaranty

A guaranty or obligation of a cosigner or surety is considered additional collateral not permissible in connection with a home equity loan. A guaranty of a home equity loan is also deemed inconsistent with Tex. Const. art. XVI, § 50(a)(6)(C) (prohibition against personal recourse). 7 Tex. Admin. Code § 153.8(2).

§ 11.9:3 Cross-Collateral Provisions

If the borrower has other loans with the home equity lender secured by nonhomestead property (for example, a loan to purchase a car or boat), the security documents on these other loans may sometimes provide that this other collateral secures all debt of the borrower with that lender. Such a cross-collateral provision violates the constitutional prohibition against other collateral for a home equity loan. 7 Tex. Admin. Code § 153.8(4).
§ 11.9:4    Right of Offset

A contractual right of offset is prohibited additional collateral to a home equity loan. 7 Tex. Admin. Code § 153.8(3).

§ 11.9:5    Undivided Interest in Tenancy in Common

A debtor’s undivided interest in a tenancy in common will sustain a homestead claim. See Laster v. First Huntsville Properties Co., 826 S.W.2d 125, 131 (Tex. 1991).

§ 11.9:6    Homestead Exceeding Maximum

An urban homestead consists of not more than ten contiguous acres of land located in a city, town, or village, together with improvements thereon. Rural homesteads may be up to one hundred acres for single adults and two hundred acres for a family. Tex. Const. art. XVI, §§ 50, 51; Tex. Prop. Code § 41.002. For a homestead established on a tract that exceeds the maximum allowable land area, the excess is considered additional real property, which may not secure a home equity loan. 7 Tex. Admin. Code § 153.8(5).

The inclusion of nonhomestead acreage may invalidate a home equity lien. Tex. Const. art. XVI, § 50(a)(6)(H). Procedural Rule P-47 requires as a condition to insuring a home equity lien against invalidity for inclusion of additional collateral that each owner execute an affidavit stating that (1) all the property is the homestead of the owner and owner’s spouse; (2) no portion of the property is nonhomestead; and (3) the owner and spouse claim no other property as homestead except as described in the affidavit. Procedural Rule P-47, Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

There is no provision in Tex. Const. art. XVI, § 50, upholding the validity of a home equity lien if the collateral includes only de minimus acreage in excess of the maximum acreage. Procedural Rule P-47 requires, as a condition to insuring against invalidity for inclusion of excess acreage, that the insured obtain a surveyor’s certificate or letter stating the exact acreage or square footage of the collateral or that a computation of the acreage be made by a software program designed to compute acreage and generate drawings of land from the entry of boundary description calls.

§ 11.9:7    Options to Purchase

If the home equity lien extends to the maximum permitted acreage, lenders may risk invalidating the lien by taking an option to purchase an adjacent property deemed necessary to realize full value for the collateral. Fannie Mae policy for the purchase of home equity loans prohibits the lender taking such an option on adjacent acreage under circumstances in which such an interest could be construed as additional collateral. Fannie Mae Lender Letter LL02-98 (May 28, 1998).

§ 11.9:8    Distinguishing Rural and Urban Homestead

A home equity loan secured by property exceeding ten acres must be secured by a rural homestead. The proper classification of the homestead as rural or urban in certain cases is critical to the validity of the home equity lien.

Whether a homestead is urban or rural is a question of fact. The Texas legislature in 1999 enacted a detailed test for classifying homesteads as urban or rural. Tex. Prop. Code § 41.002(c). If a homestead does not meet the statutory definition of urban, it is
classified as rural. The statute is the exclusive vehicle for distinguishing between rural and urban homesteads. *In re Bouchie*, 324 F.3d 780 (5th Cir. 2003).

A homestead is considered to be urban if, at the time the designation is made, the property is—

1. located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and
2. served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality:
   - electric;
   - natural gas;
   - sewer;
   - storm sewer; and
   - water.


§ 11.9:9 Distinguishing Family and Single Adult Homestead

A rural single adult homestead is limited to one hundred acres. A rural family homestead may include up to two hundred acres. Tex. Const. art. XVI, §§ 50, 51; Tex. Prop. Code § 41.002. Thus, a home equity loan secured by property exceeding one hundred acres may be secured by a family rural homestead only. The proper classification of the property in such cases as a family or single adult homestead is critical to the validity of the home equity lien.

No definition of the word *family* is supplied by the constitution. Case authorities provide that a family consists of (1) a group of people having the social status of a family living subject to one domestic government; (2) with the head of the family legally or morally obligated to support at least one other family member; and (3) a corresponding dependence by the other family members for this support. *NCNB Texas National Bank v. Carpenter*, 849 S.W.2d 875, 879–80 (Tex. App.—Fort Worth 1993, no writ).

A married person with a living spouse can have only a family homestead interest. The spouses in a marriage together enjoy the benefits of the family homestead exemption. The constitution gives each spouse a separate and undivided possessory interest in the homestead, which may be lost only by death or abandonment and may not be compromised by either his heirs or the other spouse. Abandonment by one spouse of his homestead interest does not affect the character of the property as family homestead or the protection of the family homestead from judgment creditors as long as the other spouse occupies the property as a home. *Salomon v. Lesay*, 369 S.W.3d 540 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

§ 11.10 Restriction on Number of Home Equity Loans

There may be only one home equity loan or reverse mortgage on the owner’s homestead at any given time regardless of the aggregate total outstanding debt against the homestead. There is no corresponding restriction on the number of purchase-money, improvement, tax, or owelty liens on the same homestead. Tex. Const. art. XVI, § 50(a)(6)(K); 7 Tex. Admin. Code § 153.10(1). If the property ceases to be the homestead of the owner, the lender may treat a previous home equity lien as a nonhomestead lien for the purposes of this restriction. 7 Tex. Admin. Code § 153.10(2).
§ 11.11 Restriction on Frequency of Home Equity Loans

Home equity loans cannot be closed more frequently than one year after the closing date of the last such loan made on the same property. Tex. Const. art. XVI, § 50(a)(6)(M)(iii). A home equity loan cannot be refinanced until the expiration of one year after its original closing date. 7 Tex. Admin. Code § 153.14(1)(A). A new home equity loan cannot be made before the expiration of one year even if the previous home equity loan has been paid in full. 7 Tex. Admin. Code § 153.14(1)(B).

Effect of State of Emergency: A home equity loan may be closed before the first anniversary date of a prior home equity loan on the same property if the owner on oath requests an earlier closing due to a state of emergency that (1) has been declared by the President of the United States or governor as provided by law and (2) applies to the area where the homestead is located. Tex. Const. art. XVI, § 50(a)(6)(M)(iii).

Modification of Home Equity Loans: A home equity loan may be modified before the expiration of one year from the date of the original closing. A modification is a transaction in which one or more terms of the home equity loan are modified but the note is not satisfied and replaced. 7 Tex. Admin. Code § 153.14(2). Any modification of a home equity loan must be agreed to in writing by both the borrower and lender unless the law otherwise requires. An example of a modification that is not required to be in writing is the modification required under the Servicemembers Civil Relief Act. 7 Tex. Admin. Code § 153.14(2)(A). Any modification of a home equity loan may not include the advance of additional funds nor include new terms that would not have been permitted by applicable law on the date of the original loan closing. 7 Tex. Admin. Code § 153.14(2)(B), (C). Any fees paid by the borrower for the modification are fees subject to the 2 percent (3 percent for pre-2018 loans) limit. 7 Tex. Admin. Code § 153.14(2)(D).

§ 11.12 Restriction on Amortization of Home Equity Loans

No balloon payments are allowed with closed-end home equity loans. The loan must be scheduled to be repaid in substantially equal periodic installments. The installments must be payable not more often than every fourteen days or any less often than monthly. The installments must begin no later than two months from closing. Each installment payment must equal or exceed the amount of accrued interest on the note as of the date of that installment and contribute to the repayment of some amount of principal. A home equity loan may not contain a “negative amortization” feature, in which scheduled payments in the early years of the loan are in an amount less than the accruing interest and the resulting interest deficits are capitalized into the loan principal. Tex. Const. art. XVI, § 50(a)(6)(L); 7 Tex. Admin. Code §§ 153.11, 153.16(2).

There are special amortization rules for home equity loans qualifying as a home equity line of credit. See Tex. Const. art. XVI, § 50(a)(6)(L)(ii). See section 11.5 above.

§ 11.12:1 Subsequent Events

The constitutional restriction on amortization does not preclude a lender’s recovery of amounts made necessary by the borrower’s failure to perform loan covenants such as taxes, adverse liens, insurance premiums, collections costs, and similar items. 7 Tex. Admin. Code § 153.11(4).
§ 11.12:2 Prepaid Interest

Scheduled periodic payments must begin no later than two months from the date that the extension of credit is made. This effectively limits prepaid interest to a maximum of one period’s interest (first scheduled periodic payment would include interest in arrears for the preceding period). Tex. Const. art. XVI, § 50(a)(6)(L). Nothing in this provision limits or otherwise affects a lender’s ability to charge or collect mortgage discount points with a corresponding interest rate reduction.

§ 11.13 Restriction on Interest

Interest on a home equity loan may be for any fixed or variable rate authorized by statute. Tex. Const. art. XVI, § 50(a)(6)(O).

§ 11.13:1 Variable Rate Notes

A home equity loan may be made on a variable interest rate tied to an external index. 7 Tex. Admin. Code § 153.16(3). If a variable interest rate is used, payment adjustments must be regularly made in amounts sufficient to fully amortize the outstanding loan balance in substantially equal successive payments between interest rate adjustments. 7 Tex. Admin. Code § 153.16(4)(A). The scheduled payment amount between each payment change date should be substantially equal and the amount of the payment should equal or exceed the amount of interest scheduled to accrue between each payment date and retire a portion of the principal. 7 Tex. Admin. Code § 153.16(4)(B). A home equity loan may contain an adjustable rate of interest that provides a maximum fixed interest rate pursuant to a schedule of stepped or tiered rates or provides a lower initial interest rate through the use of a discounted rate at the beginning of the loan. 7 Tex. Admin. Code § 153.16(5).

§ 11.13:2 Interest Rate

Interest rates on home equity loans must comply with all applicable constitutional and statutory provisions. 7 Tex. Admin. Code § 153.16(1). Tex. Const. art. XVI, § 11, permits interest rates of 10 percent or less on credit transactions unless alternative interest rates are specified by the legislature by statute. Interest rates of first-lien mortgages are nominally controlled by Tex. Fin. Code tit. 4, subtit. A. However, Congress by the enactment of the Depository Institutions Deregulation and Monetary Control Act of 1980 (12 U.S.C. § 1735f–7a) and the Alternative Mortgage Transaction Parity Act (12 U.S.C. §§ 3801–3806) preempted state interest rate limitations on first-lien residential mortgage loans. Secondary mortgage loans that exceed the constitutional rate of 10 percent are controlled by Texas Finance Code chapter 342, subchapter G. Chapter 124 of the Code and federal law provide for maximum rates on certain loans by credit unions. See 7 Tex. Admin. Code § 153.16(1).

§ 11.14 Restriction on Basis for Acceleration

The maturity of a home equity loan may not be accelerated because of a decrease in the market value of the homestead or the owner’s default under some other indebtedness not secured by a prior valid encumbrance against the homestead. Tex. Const. art. XVI, § 50(a)(6)(J).

§ 11.14:1 Decrease in Value

The constitution does not prohibit the acceleration of a home equity loan because of a default by the owner of covenants contained in the loan, including covenants not to commit waste or remove property that indirectly bears on the market value of the homestead. 7 Tex. Admin. Code § 153.9(1).
§ 11.14:2  Cross-Default

A home equity loan can contain a cross-default provision only if the lien associated with the home equity loan is subordinate to the lien that is referenced by the cross-default clause. 7 Tex. Admin. Code § 153.9(2).

§ 11.15  Restriction against Confession of Judgment or Waiver of Citation

A home equity borrower may not be required to sign any confession of judgment or power of attorney allowing a confession of judgment or appearance for the debtor by a third party in a judicial proceeding.Tex. Const. art. XVI, § 50(a)(6)(Q)(iv); Tex. Civ. Prac. & Rem. Code § 30.001.

§ 11.16  Restriction against Assignment of Wages

A borrower may not be required to make an assignment of wages as security for a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(Q)(ii).

§ 11.17  Restriction against Same Creditor Payoffs

A lender may not require a borrower to apply the loan proceeds of a home equity loan to pay off any other extension of credit by that same lender except one already validly secured by the homestead. Tex. Const. art. XVI, § 50(a)(6)(Q)(i). This provision precludes a creditor from demanding a security interest in the debtor’s homestead as a condition for granting a forbearance, rearrangement, or recasting of an indebtedness not already secured by the homestead.

§ 11.17:1  Required Payment of Debt Secured by Homestead

A lender may require a debt secured by the homestead to be paid by the proceeds of a home equity loan. 7 Tex. Admin. Code § 153.18(2).

§ 11.17:2  Payoffs of Other Creditors

An owner is generally entitled to use the loan proceeds of a home equity loan for any lawful purpose at the owner’s discretion. The lender may require that the loan proceeds be used to pay off, prepay, or reduce existing debt to another lender (for example, if underwriting guidelines based on earnings require that the debtor’s monthly obligations be reduced to qualify for a loan). See 7 Tex. Admin. Code § 153.18(2).

§ 11.17:3  Other Restrictions Prohibited

Other than requiring loan proceeds to be paid on debt secured by the homestead or requiring payment of debt to another lender, the home equity lender may not otherwise specify or restrict the use of the loan proceeds. 7 Tex. Admin. Code § 153.18(1).
§ 11.17:4 Voluntary Payoffs to Same Creditor

The constitution prohibits the home equity lender only from requiring the debtor to pay off existing nonhomestead debt to that same lender. An owner is not precluded from voluntarily paying off existing nonhomestead debt to the home equity lender. 7 Tex. Admin. Code § 153.18.

§ 11.18 Required Preloan Disclosures

§ 11.18:1 Twelve-Day Disclosure for Home Equity Loans

The Texas Constitution requires a preloan disclosure specifying certain restrictions on home equity lending. Tex. Const. art. XVI, § 50(g). The required disclosure is reproduced as form 11-1 in this chapter. The text of the preloan disclosure is intended as a summary of the borrower’s rights under the constitution. In case of any conflict between the substantive provisions of Tex. Const. art. XVI, § 50, and the text of the preloan disclosure, the substantive provisions are controlling. A lender may supplement the consumer disclosure to clarify any discrepancies or inconsistencies. Tex. Const. art. XVI, § 50(g); 7 Tex. Admin. Code § 153.51(2).

A home equity loan may not be closed before the twelfth calendar day after the later of the date that the borrower submits a loan application to the lender or the date that the lender provides the borrower with a preloan disclosure in a separate instrument. Tex. Const. art. XVI, § 50(g). 7 Tex. Admin. Code §§ 153.12, 153.51.

If the discussions with the borrower are conducted primarily in a language other than English, the lender must provide the borrower with an additional copy of the notice, before the loan closing, that is translated in the written language in which the discussions were conducted. Tex. Const. art. XVI, § 50(g). The Office of the Consumer Credit Commissioner has provided a Spanish language translation of the notice on its website at http://occc.texas.gov.

If the owner has executed a power of attorney in the manner described by title 7, section 153.15(2), of the Texas Administrative Code, then the lender may provide the consumer disclosure to the attorney-in-fact instead of providing it to the owner. 7 Tex. Admin. Code § 153.51(5).

Computation of Time: In computing the expiration of the twelve-day cooling-off period, the date that the disclosure is made is not counted. The twelve-day cooling-off period commences on the day after the lender provides the required preloan disclosure. The loan may be closed at any time on the twelfth day of the notice period. 7 Tex. Admin. Code § 153.12. The lender may establish verifiable procedures to ensure that the owner receives the required notice within the required time frame. 7 Tex. Admin. Code § 153.51(3).

The constitution does not prohibit the required notice being delivered by mail. Government regulations adopted a “mailbox rule.” If a lender mails the notice to the borrower, a reasonable period of time should be allowed for delivery. A three-calendar-day period not including Sundays and federal legal public holidays constitutes a rebuttable presumption for sufficient mailing and delivery. 7 Tex. Admin. Code § 153.51(1).

The required notice should be delivered to each owner and each owner’s spouse. If delivery is on different dates, the twelve-day cooling-off period should be calculated from the last delivered notice.
§ 11.18:2  One-Day Disclosure

A home equity loan must not be closed until one business day after the owner of the homestead receives a copy of the final loan application, if not previously provided, and a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing. Tex. Const. art. XVI, § 50(a)(6)(M)(ii). The home equity loan may be closed at any time during normal business hours on the next business day following the calendar day on which the borrower receives the one-day preloan disclosure or any date thereafter. 7 Tex. Admin. Code § 153.13(6). A lender may satisfy this disclosure requirement by delivery to the borrower of a properly completed closing disclosure for a closed-end home equity loan. 7 Tex. Admin. Code § 153.13(3)(A). For an HELOC, a lender may satisfy this disclosure requirement by delivery to the borrower of a properly completed account-opening disclosure under Regulation Z. 12 C.F.R. § 1026.6(a).

§ 11.18:3  Bona Fide Emergency

If a bona fide emergency or other good cause exists and the lender obtains the written consent of the owner, the lender may provide the documentation to the owner or the lender may modify previously provided documentation on the day of closing. Tex. Const. art. XVI, § 50(a)(6)(M)(ii). The bona fide emergency must occur before the closing date. A home equity loan secured by a homestead in an area designated by the Federal Emergency Management Agency (FEMA) as a disaster area is an example of a bona fide emergency if the homestead is damaged during FEMA’s declared incident period. 7 Tex. Admin. Code § 153.13(4).

§ 11.18:4  Other Good Cause

A condition that would cause the owner “financial impact or an adverse consequence” is an example of other good cause that would allow the required one-day preloan disclosure to be given or modified on the day of closing. 7 Tex. Admin. Code § 153.13(5)(A)(i). Another example of good cause occurs when the modified disclosure contains only a de minimus variance from the prior disclosure. To qualify as a de minimus variance, one or more of the actual disclosed fees, costs, points, and charges must be less than the initial preloan disclosure or, if greater than the amounts given in the initial preloan disclosure, not vary by the greater of $100 or 0.125 percent of the principal amount of the home equity loan at closing. 7 Tex. Admin. Code § 153.13(5)(B)(i).

§ 11.19  Borrower’s Right of Rescission

The homestead owner or the owner’s spouse may rescind a home equity loan transaction without penalty or charge within three days after the date that the extension of credit is made. Tex. Const. art. XVI, § 50(a)(6)(Q)(viii). The borrower’s spouse has this right of rescission even if the spouse has no record title to or community property interest in the homestead. 7 Tex. Admin. Code § 153.25(1). Funding of a home equity loan should be delayed until after the expiration of the rescission period.
§ 11.19:1 Calculation of Rescission Period

The rescission period begins at closing (the signing of the loan documents) and continues for three calendar days. If the third calendar day falls on a Sunday or federal legal public holiday, the right of rescission is extended to the next calendar day that is not a Sunday or a federal legal public holiday. 7 Tex. Admin. Code § 153.25(2). Loan proceeds may be disbursed on the day following the expiration of the rescission period.

§ 11.19:2 Truth in Lending Act

A home equity loan transaction may be subject to the provisions of the Truth in Lending Act and Regulation Z, which permit the borrower three business days to rescind a mortgage loan in applicable transactions. For a complete discussion of right of rescission procedures under the Truth in Lending Act and Regulation Z, see chapter 12 in this manual. A lender’s compliance with the right of rescission procedures of the Truth in Lending Act and Regulation Z will satisfy the requirements of the constitution for a home equity loan if the notices are given to all owners of the homestead and to each spouse of an owner. 7 Tex. Admin. Code § 153.25(3).

§ 11.20 Requirements for Loan Documents

§ 11.20:1 Written Contract Required

A home equity lien must be a voluntary lien created under a written agreement. Tex. Const. art. XVI, § 50(a)(6)(A).

Plain Language and Font Requirements: A home equity loan contract for a home equity loan regulated by the Office of the Consumer Credit Commissioner (OCCC) must be written in plain language designed to be easily understood by the average consumer and must be printed in an easily readable font and type size. See the discussion in section 11.1 above.

Model Forms: In addition to requiring plain-language contracts, the Finance Code empowers the Finance Commission to adopt rules governing loan contracts subject to that section and to adopt model loan contracts. Tex. Fin. Code § 341.502(b). A lender may use either a model contract or its own nonstandard contract if the nonstandard contract has been submitted to, but not disapproved by, the OCCC. See the discussion in section 11.1 above.

§ 11.20:2 Required Loan Conditions

The constitution states that a home equity loan is an extension of credit made on specified conditions. Some of the conditions are self-actuating. See Tex. Const. art. XVI, § 50(a)(6)(Q). Tex. Const. art. XVI, § 50(a)(6)(Q)(vi), requires that “the security instruments securing the extension of credit contain a disclosure that the extension of credit is the type of credit defined by Section 50(a)(6), Article XVI, Texas Constitution.” Practitioners differ as to whether the remaining conditions listed at Tex. Const. art. XVI, § 50(a)(6)(Q), must be included in the home equity loan documents. The home equity extension of credit, form 11-2 in this chapter, includes the conditions. In the absence of definitive authority on this question, the attorney is cautioned to exercise professional judgment regarding the inclusion of these conditions. If the conditions are included in the home equity extension of credit, the conditions may affect the negotiability of the instrument under chapter 3 of the Texas Business and Commerce Code. However, there is some dated authority that a nonrecourse note is by its very nature nonnegotiable. Hinckley v. Eggers, 587 S.W.2d 448, 450 (Tex. Civ. App.—Dallas 1979, writ ref’d n.r.e.).
§ 11.20:3  **Required Disclosure**

The security documents for a home equity loan must disclose that the credit is an equity loan subject to Tex. Const. art. XVI, § 50(a)(6). This disclosure should appear in the mortgage instrument bold-faced, capitalized, underlined, or otherwise conspicuously set out from the surrounding material. 1998 OCCC Commentary, at 10.

§ 11.20:4  **Restriction against Blanks Left in Instruments**

The borrower in a home equity loan transaction may not sign any instrument in which blanks for substantive terms of agreement are left to be filled in. Tex. Const. art. XVI, § 50(a)(6)(Q)(iii). The prohibited blanks refer to loan contract terms and not signature blocks that must be signed to execute the document. 7 Tex. Admin. Code § 153.20. No guidance is provided regarding blanks for recording information unknown at the time of closing.

The constitution does not specify the instruments to which this restriction applies. Procedural Rule P-47 requires, as a condition to insuring a home equity lien against invalidity for impermissible blanks, that no such blanks appear in (1) the written acknowledgement of the fair market value, (2) the insured mortgage, (3) the promissory note, or (4) any affidavits of compliance with Tex. Const. art. XVI, § 50(a)(6). See Procedural Rule P-47, Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

§ 11.20:5  **Required Copies**

The borrower at closing must receive a copy of the final loan application and all executed documents signed by the borrower at closing and related to the extension of credit. Tex. Const. art. XVI, § 50(a)(6)(Q)(v). It is not required that signed copies be provided as long as the copies accurately reflect the documents that the borrower actually signed at closing. Pelt v. U.S. Trust N.A., 359 F.3d 764, 768 (5th Cir. 2004).

Except for the requirement that the borrower receive a copy of the final loan application, the constitution does not require the lender to provide copies of documents signed by the borrower before closing but related to the extension of credit. See 7 Tex. Admin. Code § 153.22.

§ 11.20:6  **Required Signatories**

A written instrument creating a home equity lien must be signed by each owner and each owner’s spouse (regardless of whether the spouse claims ownership or other interest in the property or is liable on the debt). Tex. Const. art. XVI, § 50(a)(6)(A). A spouse or owner who is not a maker of the note may consent to the lien by signing a written consent to the mortgage instrument. The consent may be included in the mortgage instrument or a separate document. 7 Tex. Admin. Code § 153.2(2).

A lender, at the lender’s option, may require each owner and each owner’s spouse to consent to the home equity loan. This is in addition to the consent required for the lien. 7 Tex. Admin. Code § 153.2(3).

A trustee may sell or encumber a homestead property for which the trustee holds title in a “qualifying trust” without the joinder of either spouse with a beneficial interest in the trust unless expressly prohibited by the instrument or court order creating the trust. A married person who transfers homestead property to the trustee of a qualifying trust, however, must comply with
the requirements relating to the joinder of the person’s spouse as provided by chapter 5 of the Texas Family Code. **Tex. Prop. Code § 41.0021.**

**§ 11.20:7  Junior-Lien Requirements**

If a home equity loan is subordinate to another lien on the property, the loan may also be governed by Texas Finance Code chapter 342 unless the interest rate is 10 percent per year or less. **See Tex. Fin. Code §§ 342.001(4), 342.005.** The loan documents must comply with the requirements applicable to secondary mortgage loans. 1998 OCCC Commentary, at 4–5. If the mortgagee has a license from the Office of Consumer Credit Commissioner, both the home equity extension of credit (promissory note) (form 11-2 in this chapter) and deed of trust (home equity loan) (form 11-3) must contain the name, mailing address, and telephone number of the OCCC. **Tex. Fin. Code § 14.104.** See clause 8-9-24 in this manual for an example of such a disclosure. Additionally, the printed language in the home equity extension of credit and the deed of trust must be modified slightly. In the deed of trust, in paragraph B.4., the phrase “in a form acceptable to Lender” must be struck so that the obligation reads “maintain an insurance policy that . . . .” This change is necessary because Finance Code sections 342.404, 342.405, and 342.413 prohibit a lender from approving the selection of insurance. **See Tex. Fin. Code §§ 342.404, 342.405, 342.413.** Also, Finance Code section 342.404 provides that if insurance is required in connection with a loan made under that chapter, the lender must furnish the borrower a statement like clause 11-4-8, which may be added to the home equity deed of trust as a numbered paragraph under “General Provisions.” **See Tex. Fin. Code § 342.404.**

The same chapter imposes other requirements if the mortgagee sells or procures insurance related to the loan at a rate not fixed or approved by the State Board of Insurance. **See Tex. Fin. Code § 342.405.**

Finance Code section 342.307 limits the enforcement fees that may be included in secondary mortgage loan documents. To comply with this section for a home equity loan that is also a secondary mortgage loan, in the home equity extension of credit (promissory note) (form 11-2), the alternative indicated attorney’s fee provision should be used. In the deed of trust (form 11-3), in paragraph E.10., after the words “the hands of an attorney” add “who is not an employee of Lender.”

If the prior lien instrument contains a due-on-sale clause, the home equity deed of trust may violate the due-on-sale clause.

**§ 11.20:8  Home Loans**

A home equity loan may also be subject to the requirements of Texas Finance Code chapter 343, regulating certain types of “home loans.” **See section 10.14 in this manual.**

**§ 11.21  Restriction on Place of Closing**

A home equity loan may be closed only at the offices of the lender, an attorney at law, or a title company. **Tex. Const. art. XVI, § 50(a)(6)(N).** The place of closing must be the permanent physical address of the office or branch office of the lender, attorney, or title company so that the closing occurs in an authorized physical location other than the homestead. **7 Tex. Admin. Code § 153.15(1).** This provision is intended to protect homeowners from coercive conduct in an equity loan closing conducted at the “kitchen table” of one’s home.

“Closing” as construed by the Texas Supreme Court in **Finance Commission of Texas v. Norwood, 418 S.W.3d 566** (Tex. 2013), is a process that includes not just the final action of executing documents and funding the loan but also the initial action
of obtaining required consents. Accordingly, the supreme court concluded that a homeowner’s executing a required consent or a power of attorney is part of the closing process and also must occur only at one of the locations authorized by Tex. Const. art. XVI, § 50(a)(6)(N). Finance Commission of Texas, 418 S.W.3d at 588; see also 7 Tex. Admin. Code § 153.15(3). The court further concluded that the commission’s interpretations of section 50(a)(6)(N) (which in part authorized a lender to accept a properly executed power of attorney allowing the attorney-in-fact to execute loan documents on behalf of the homeowner or to receive consents of the homeowner required under section 50(a)(6)(A) by mail or other delivery of the homeowner’s signature) contradict the intent and purpose of the text of the provision and are therefore invalid. Finance Commission of Texas, 418 S.W.3d at 588–89. Although Fannie Mae generally allows a duly appointed attorney-in-fact to sign the security instrument or note on the borrower’s behalf when certain conditions are met, its Selling Guide has been updated with respect to loans purchased on or after February 1, 2014, to prohibit the use of a power of attorney in cash-out refinance transactions and other transactions in connection with Texas section 50(a)(6) mortgage loans. See Fannie Mae, Selling Guide Announcement SEL-2013-08 (Oct. 22, 2013).

§ 11.21:1 Offices of Lender

A home equity loan may not be closed in the offices of a mere loan broker. To qualify as a lender, the party must advance funds directly to the borrower or be identified as the payee of the note. 7 Tex. Admin. Code § 153.15.

§ 11.21:2 Offices of Title Company

The offices of a title company include the leased or owned Texas office location of a title insurance company or (1) a direct operation, (2) a title insurance agent, or (3) an attorney conducting the attorney’s business in the name of the title insurance company, direct operation, or title insurance agent (if the attorney or the attorney’s bona fide employees are escrow officers under Tex. Ins. Code § 2501.003(4)). Procedural Rule P-44, Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas. The phrase title company refers to an agent of a title insurance company. A company merely performing title abstractions is not within the definition of a title company. Rooms With A View, Inc. v. Private National Mortgage Ass’n, Inc., 7 S.W.3d 840, 846–47 (Tex. App.—Austin 1999, pet. denied).

§ 11.22 Restriction on Release or Transfer of Note

Within a reasonable time after repayment of a home equity loan, the lender must cancel and return the promissory note to the borrower and deliver in a recordable form a release of lien. If the loan is being refinanced, a lender may deliver an endorsement and assignment of the lien. Tex. Const. art. XVI, § 50(a)(6)(Q)(vii). The lender is required to provide these copies without charge. 7 Tex. Admin. Code § 153.24(1). The lender is not required, however, to record or pay for the recording of the release of lien. 7 Tex. Admin. Code § 153.24(2). Thirty days is a reasonable time for the lender to perform the duties required by this section. 7 Tex. Admin. Code § 153.24(3). An affidavit of lost note or imaged note, or equivalent, may be returned to the owner in lieu of the original note if the original note has been lost or imaged. 7 Tex. Admin. Code § 153.24(4).

§ 11.23 Restriction on Refinancing

The refinancing of a debt, any portion of which is secured by a home equity lien, may be made only by an extension of credit meeting all of the constitutional requirements of a home equity loan or reverse mortgage, unless the refinancing meets all of the following conditions of Tex. Const. art. XVI, § 50(f)(2):
1. One-Year Prohibition. The refinance is not closed before the first anniversary of the date the extension of credit was closed. Tex. Const. art. XVI, § 50(f)(2)(A).

2. Prohibition on Additional Funds. The refinanced extension of credit does not include the advance of any additional funds other than (a) funds advanced to refinance a debt described by Tex. Const. art. XVI, § 50(a)(1)–(7); or (b) actual costs and reserves required by the lender to refinance the debt.

3. Eighty Percent Loan-to-Value Limitation. The refinance is of a principal amount that, when added to the aggregate total of all indebtedness secured by the homestead, does not exceed 80 percent of the fair market value of the homestead on the date of the refinance.

4. Twelve-Day Notice. The lender provides the owner the notice contained in form 11-8 of this chapter within three business days of loan application and at least twelve days before the refinance is closed. Tex. Const. art. XVI, § 50(f)(2)(D).

5. Affidavit of Compliance. An affidavit executed by the owner or the owner’s spouse acknowledging that the requirements of Tex. Const. art. XVI, § 50(f)(2) have been met conclusively establishes that the requirements of Tex. Const. art. XVI, § 50(a)(4) have been met. See form 11-9 for a sample affidavit.

Additionally, any refinance of a debt against homestead to secure a debt for purchase money, taxes, owelty of partition, federal tax lien, or improvements that includes the advance of additional funds may not be secured by a valid lien against the homestead unless (1) the additional funds advanced are to pay taxes, an owelty of partition, or improvements, (2) the new loan is made as a home equity loan or reverse mortgage, or (3) the additional funds are for reasonable costs necessary to refinance such debt. Tex. Const. art. XVI, § 50(a); see 7 Tex. Admin. Code § 153.41.

§ 11.24 Forfeiture Provision

Constitutional provisions for home equity lending contain a forfeiture provision for loans failing to meet constitutional requirements. If a lender or holder fails to comply with the lender’s or holder’s constitutionally mandated obligations within sixty days after notice of the violation by the borrower, the lender or holder forfeits all principal and interest on the note. Tex. Const. art. XVI, § 50(a)(6)(Q)(x). Only a violation of a constitutionally mandated provision in the extension of credit will trigger a forfeiture. Vincent v. Bank of America, 109 S.W.3d 856 (Tex. App.—Dallas 2003, no pet.) (citing an earlier version of Tex. Const. art. XVI, § 50(a)(6)(Q)(x)).

§ 11.25 Cure Provisions

If a lender fails to comply with constitutional restrictions on home equity lending, the lender may avoid a forfeiture of all principal and interest and enforce an otherwise invalid lien by timely curing the failure in the manner specified by the Texas Constitution. Constitutional curative measures are equally available to cure lender noncompliance in an original home equity loan or in the refinance of a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(Q)(x); 7 Tex. Admin. Code § 153.95(a); In re Adams, 307 B.R. 549, 553–54 (Bankr. N.D. Tex. 2004). Cure procedures are specific to certain identified home equity lending violations:

§ 11.25:1 Violation of Restriction on Fees, Restriction on Prepayment Penalties, or Restriction on Interest

In the event of a violation of the constitutional restrictions found at Tex. Const. art. XVI, § 50(a)(6)(E) (restriction on fees), Tex. Const. art. XVI, § 50(a)(6)(G) (restriction on prepayment penalties), or Tex. Const. art. XVI, § 50(a)(6)(O) (restriction on
interest), the lender may cure the violation by refunding the borrower the amount of any overcharge. See Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(a). The cure is effective when the lender credits the borrower’s account with a refund, places the refund in the mail or other delivery carrier, or delivers the refund in person. A cure may also be made using any other delivery method agreed to by the borrower in writing after the lender receives notice of the lender’s failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:2 Violation of Restriction on Loan-to-Value Ratio

In the event of a violation of the constitutional restriction found at Tex. Const. art. XVI, § 50(a)(6)(B) (restriction on loan-to-value ratio), the lender may cure the violation by sending the borrower written acknowledgment that the lien is valid only to the extent that the loan amount does not exceed the loan-to-value restriction. See Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(b). The cure is effective when the lender places the acknowledgment in the mail or other delivery carrier or delivers the acknowledgment in person. A cure may also be made using any other delivery method that the borrower agrees to in writing after the lender receives notice of the lender’s failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:3 Violation of Restriction against Additional Collateral or Restriction on Qualifying Agricultural Homestead (for Pre-2018 Loans)

In the event of a violation of the constitutional restrictions found at Tex. Const. art. XVI, § 50(a)(6)(H) (restriction against additional collateral), or Tex. Const. art. XVI, § 50(a)(6)(I) (restriction on qualifying agricultural homestead), the lender may cure the violation by sending the borrower an acknowledgment that the home equity loan is not secured by the prohibited additional collateral or nonqualifying agricultural property (for pre-2018 loans). See Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(b). The cure is effective when the lender places the acknowledgment in the mail or other delivery carrier or delivers the acknowledgment in person. A cure may also be made using any other delivery method that the borrower agrees to in writing after the lender receives notice of the lender’s failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:4 Violation of Restriction against Prohibited Amount, Percentage, Term, or Other Provision

In the event of a violation involving some other prohibited amount, percentage, term, or other provision, the lender may cure the violation by sending written notice to the borrower amending the prohibited provision and adjusting the account of the borrower to ensure that the borrower is not required to pay more than an amount permitted by the constitution or that the borrower is not subject to any other term or provision prohibited by the constitution. See Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(c). The cure is effective when the lender makes the necessary adjustment to the borrower’s account and places the required notice in the mail or other delivery carrier or personally delivers the notice to the borrower. A cure may also be made using any other delivery method agreed to by the borrower in writing after the lender receives notice of the lender’s failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:5 Violation of Requirement for Delivery of Documents

In the event of a violation of the constitutional restriction found at Tex. Const. art. XVI, § 50(a)(6)(Q)(v) (requirement for delivery to the borrower of copies of all documents signed by the borrower), the lender may cure the violation by delivering the required documents to the borrower. See Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(d). The cure is effective when the lender delivers the required documents by placing them in the mail or other delivery carrier or by personally delivering the docu-
ments to the borrower. A cure may also be made using any other delivery method agreed to by the borrower in writing after
the lender receives notice of the lender’s failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:6 Violation of Requirement for Acknowledgment of Fair Market Value of Homestead

In the event of a violation of the constitutional restriction found at Tex. Const. art. XVI, § 50(a)(6)(Q)(ix) (requirement that
lender and borrower sign a written acknowledgment of the fair market value of the homestead), the lender may cure the viola-
tion by obtaining the appropriate signatures on the required acknowledgment of fair market value. See Tex. Const. art. XVI,

§ 11.25:7 Violation of Restriction on Number of Home Equity Loans

In the event of a violation of the restriction found at Tex. Const. art. XVI, § 50(a)(6)(K) (antistacking provision allowing only
one home equity loan on a homestead at a time), the lender may cure the violation by sending the borrower a written acknowl-
edgment that the accrual of interest and all of the borrower’s obligations under the extension of credit are abated while any
prior lien remains secured by the homestead. See Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(e). The cure is effective when the
lender places the acknowledgment in the mail or other delivery carrier or personally delivers the acknowledgment to the
debtor. A cure may also be made using any other delivery method agreed to by the borrower in writing after the lender
receives notice of the lender’s failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:8 “Catch-All” Cure Provision

In the event of a violation of constitutional restrictions on home equity lending that cannot be cured by any of the above cure
provisions, the lender may cure the violation by refunding or crediting the borrower $1,000 and offering to refinance the
extension of credit for the borrower for the remaining term at no cost to the borrower, on the same terms, including interest, as
the original extension of credit together with any modifications necessary to comply with the constitution. See Tex. Const. art.
XVI, § 50(a)(6)(Q)(x)(f). The lender must make a $1,000 refund or give a $1,000 credit. 7 Tex. Admin. Code § 153.96(b)(1).
Additionally, the lender must either modify or refinance. If modification is elected, the modification may be made without
completing the requirements of a refinance. If a refinance is elected, the refinance must meet all constitutional requirements
for a home equity loan. 7 Tex. Admin. Code § 153.96(b).

The catch-all cure provision presupposes the debtor’s compliance and cooperation with the lender’s attempted cure. The
debtor may not block the lender’s cure by the debtor’s refusal to cooperate. The cure protection afforded the lender is com-
plete on the refund or credit of the $1,000 and the timely delivery of an offer to modify or refinance. 7 Tex. Admin. Code
§ 153.96; In re Adams, 307 B.R. 549, 560 (Bankr. N.D. Tex. 2004). The offer to modify or refinance is delivered by placing
the offer in the mail or with other delivery carriers or by personal delivery to the borrower. 7 Tex. Admin. Code
§ 153.96(a)(2). After the borrower accepts an offer to modify or refinance, the lender or holder must complete, or make a
good-faith effort to complete, the modification or refinance with a reasonable time not to exceed ninety days. 7 Tex. Admin.
Code § 153.96(d).

§ 11.25:9 Noncurable Violations

Any violation of Tex. Const. art. XVI, § 50(a)(6)(P) (prohibition against home equity loans made by an unauthorized lender),
or Tex. Const. art. XVI, § 50(a)(6)(A) (requirement that home equity liens be created by written agreement with the consent of
each owner and each owner’s spouse), are noncurable and result in the forfeiture of all principal and interest on the home equity loan. An exception to this rule applies in the case in which one spouse fails to consent by signature to the home equity loan but subsequently does consent. See Tex. Const. art. XVI, § 50(a)(6)(Q)(xi).

§ 11.25:10 Burden of Proof to Show Cure

The lender bears the burden of showing the lender’s compliance with any cure provision relied on by the lender to cure a violation. 7 Tex. Admin. Code §§ 153.94(b), 153.96(c).

§ 11.25:11 Timeliness of Cure

To timely cure a violation of a home equity lending restriction, the lender must comply with the cure provisions within sixty days after the lender is notified of the violation by the borrower. Tex. Const. art. XVI, § 50(a)(6)(Q)(x). The sixty-day cure period begins the day after the lender or holder receives the borrower’s notification to the lender or holder. If the borrower mails the notification to the lender or holder, a rebuttable presumption arises that the delivery date is the date indicated on the certified mail receipt or other carrier-delivery receipt signed by the lender or holder. This does not preclude other methods of delivering the notification. However, with other methods of delivery, the borrower has the burden of proving delivery. See 7 Tex. Admin. Code §§ 153.92, 153.93. After the commencement of the sixty-day cure period, all calendar days are counted up to day sixty. If day sixty falls on a Sunday or a federal legal public holiday, the cure period is extended to include the next day that is not a Sunday or a federal legal public holiday. 7 Tex. Admin. Code § 153.92(a). If a borrower provides inadequate notice of the alleged violation, the sixty-day cure period does not begin to run. 7 Tex. Admin. Code § 153.92(b).

If a lender or holder appropriately cures the violation before receiving notice of the violation from the borrower, the cure is as effective as if the lender or holder had timely cured the violation after receiving notice from the borrower. 7 Tex. Admin. Code § 153.95(b).

§ 11.25:12 Requirements for Borrower’s Notification of Lender’s Failure to Comply

The borrower notifies the lender or holder of an alleged failure to comply with an obligation by taking reasonable steps to give notice of the failure. The notification must include an identification of the borrower, an identification of the loan, and a description of the alleged failure to comply. The notice need not cite the section of the constitution allegedly violated. 7 Tex. Admin. Code § 153.91.

To designate a point of contact for receipt of notice of failure to comply, the lender or holder may make at closing a reasonably conspicuous designation in writing of a location where the borrower may deliver written or oral notice of violation of home equity restrictions. The designation may include a mailing address, a physical address, telephone number, e-mail, or other point of contact. The lender or holder may change this point of contact by conspicuous written notice to the borrower. The change is effective when sent by the lender or holder. 7 Tex. Admin. Code § 153.93.

The four-year residual limitations period of Tex. Civ. Prac. & Rem. Code § 16.051 applies to constitutional infirmities under section 50(a)(6). See Priester v. JP Morgan Chase Bank, 708 F.3d 667 (5th Cir. 2013). Because cure provisions exist in the Texas Constitution, the court concluded that homestead liens that are constitutionally defective are voidable rather than void ab initio. To the extent that a claim under the Texas Constitution renders a defective homestead lien voidable, rather than void, once the limitations period has passed the lien is no longer voidable and is then valid.
§ 11.25:13  Statute of Limitations

The Texas Supreme Court ruled in 2016 that the four-year residual limitations period of Tex. Civ. Prac. & Rem. Code § 16.051 does not apply to constitutional infirmities under Tex. Const. art. XVI, § 50(a)(6). *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542 (Tex. 2016). Consequently, a borrower may bring an action against his home equity lender for constitutional violations at any time during the life of the loan if the lender fails to correct the alleged defects after notification of the defect. This Texas Supreme Court decision reversed the precedent set in *Priester v. JP Morgan Chase Bank*, 708 F.3d 667 (5th Cir. 2013), which applied the four-year residual limitations period to home equity loan violations.

§ 11.26  Nonseverability Provision

Home equity lending is authorized only on condition that none of the constitutional restrictions ever be preempted by federal law. To this end, Tex. Const. art. XVI, § 50(j), contains a “poison pill” provision that all home equity provisions are nonseverable and that none would have been enacted without the other. If any home equity provision is held to be preempted by federal law, all home equity lending provisions are rendered invalid. In such a case, a savings provision upholds the validity of home equity loans made before the decision holding any aspect of home equity lending preempted by federal law. Tex. Const. art. XVI, § 50(j).

§ 11.27  Truth in Lending

A home equity loan may be subject to the Truth in Lending Act and its accompanying Regulation Z. See the discussion of this subject in section 11.19:2 above and chapter 12 in this manual.

[Sections 11.28 through 11.30 are reserved for expansion.]

I. Reverse Mortgage Loans

§ 11.31  Overview

Reverse mortgage loans secured on Texas homestead properties were first authorized by constitutional amendment effective January 1, 1998. Tex. Const. art. XVI, § 50(a)(7), authorizes reverse mortgages, and Tex. Const. art. XVI, § 50(k)–(r), (v), defines and governs them. There are currently no enabling statutes that implement these constitutional provisions or interpretive rule making, although the power to interpret constitutional reverse mortgage provisions has been expressly delegated to the Texas Finance Commission and the Texas Credit Union Commission. See Tex. Fin. Code §§ 11.308, 15.413.

Reverse mortgages are a type of home equity loan for which only senior homeowners, age sixty-two or older, are eligible. Tex. Const. art. XVI, § 50(k)(2). The loans are meant to provide senior homeowners the resources needed to remain in their homes for their remaining lives, if they so desire, by converting their home equity into annuity-like periodic payments, or advances, to the homeowners for life (referred to as a “tenure” option) or, if preferred, a term of years (referred to as a “term” option) that may be used to pay for housing costs, medical care, and other costs of living. A homeowner under a reverse mortgage may also elect to receive a single advance at loan settlement (referred to as a “lump sum” option) or multiple unscheduled advances under a line of credit. Tex. Const. art. XVI, § 50(p).
A reverse mortgage is a nonrecourse obligation generally based on an owner’s equity in the owner’s homestead property, and the owner is not required to demonstrate general creditworthiness or a source of income or other assets with which to repay the loan. Any Texas resident age sixty-two or older who owns and occupies as a principal dwelling a single-family home, a qualified condominium unit or townhouse, or a permanently attached and qualified manufactured home in which there is sufficient appraised home equity should qualify for a reverse mortgage. See Tex. Const. art. XVI, § 50(k)(2), (4). Home equity means the appraised market value of the homestead property minus the outstanding balance of all mortgages and liens secured on the homestead property. See Tex. Const. art. XVI, § 50(a)(6)(B).

An owner generally is not obligated to make any repayments of principal or interest during the term of a reverse mortgage as long as the owner continues to occupy the home as a principal residence and keeps property tax and insurance payments current. Tex. Const. art. XVI, § 50(k)(6). Advances made to a homestead owner under a reverse mortgage accrue interest, including interest on interest, until the occurrence of a maturity event, when the full loan balance of principal and interest is repaid to the lender in one final lump-sum payment, typically from sales proceeds when the homestead property is sold by the owner or by the owner’s estate after the owner dies. Maturity events are strictly limited by the constitution. A reverse mortgage generally cannot be called due and payable until (1) the homeowner sells or transfers the homestead property; (2) the homeowner permanently abandons the property for twelve consecutive months without obtaining the lender’s prior approval or, if the loan is used for the purchase of a homestead property, the borrower fails to timely occupy the homestead property as the borrower’s principal residence within a specified period after loan closing stipulated in the written loan agreement; or (3) the homeowner (or, if married, the last of the homeowners) dies. Tex. Const. art. XVI, § 50(k)(6)(A)–(C). The lender in some cases may, however, call the loan due if discovering the owner has committed actual fraud in obtaining the loan; has defaulted on contractual obligations in the deed of trust to repair and maintain, pay taxes and assessments on, or insure the homestead property; or has failed to maintain the lender’s first-lien priority on the homestead property. Tex. Const. art. XVI, § 50(k)(6)(D).

Texas procedural rules provide the authority for title insurance companies to insure the validity of reverse mortgage liens and for lenders to foreclose reverse mortgage liens under conditions permitted by the Texas Constitution. Specifically, the Texas Commissioner of Insurance has adopted a reverse mortgage endorsement (T-43) to the standard mortgagee’s form of title insurance policy in Procedural Rule P-45, and the Supreme Court of Texas has adopted revisions to rules 735 and 736 of the Texas Rules of Civil Procedure to provide for an expedited procedure for foreclosing reverse mortgage loans requiring a court order as a condition to foreclosure. See Tex. R. Civ. P. 735–736; Procedural Rule P-45, Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

Although the Texas reverse mortgage is a particular type of home equity loan, it is important to note that the numerous conditions imposed on home equity loans under section 50(a)(6) described in part I. of this chapter are inapplicable to reverse mortgages authorized by section 50(a)(7). The limitations under section 50(a)(6), for example, restricting the permitted loan-to-value ratio (80 percent) and fees and charges (3 percent) and imposing cooling off and rescission rights and numerous other conditions, are not carried over to the reverse mortgage provisions. Reverse mortgages nevertheless have their own subset of consumer protections spelled out in subsections 50(k)–(p) and 50(v), all of which must be strictly observed to create a valid and enforceable lien on a homestead property.

§ 11.32 Consensual Homestead Lien by Senior Homeowner and Spouse

A reverse mortgage loan may be made only to, and only with the consent of, a person who is, or whose spouse is, sixty-two years of age or older. It may be secured by only a voluntary lien on the owner’s homestead property created by a written agree-
ment between the lender, each owner of the homestead property, and the spouse of each owner. Each owner’s spouse must consent to the lien securing a reverse mortgage regardless of whether the spouse claims an ownership interest in the property or is an applicant for, or obligor on, the debt. Any homestead property, urban or rural, is eligible as security for a reverse mortgage (with no disqualifying exception for homestead property designated for agricultural use for property tax purposes, unlike Tex. Const. art. XVI, § 50(a)(6), home equity loans). Tex. Const. art. XVI, § 50(k)(1), (2).

§ 11.33 Nonrecourse Debt

A reverse mortgage must be made without recourse for personal liability against any owner or the spouse of any owner. Tex. Const. art. XVI, § 50(k)(3). A reverse mortgage is typically repaid from sales proceeds on the sale of the homestead property by the borrower or the sale by the borrower’s estate after the borrower, or the last of the borrowers, dies. If a reverse mortgage is not paid when due, the lender or note holder must look to recovery against the homestead property under its security interest as its exclusive remedy. The homeowner, therefore, will never owe more than the loan balance or the value of the homestead property, whichever is less, and no assets other than the homestead property may be used to repay the debt. Neither the borrower’s estate nor the heirs of the estate have any liability for any deficiency that may result from the sale of the homestead property. Tex. Const. art. XVI, § 50(k)(3).

§ 11.34 Advances Based on Equity in Homestead

Advances under a reverse mortgage must be based on the equity in the owner’s homestead property or the equity the owner will invest when purchasing a homestead property that the borrower will occupy as a principal residence. Tex. Const. art. XVI, § 50(k), was amended effective January 1, 2014, to authorize a reverse mortgage to be used to finance the purchase of a Texas homestead, and thereby to qualify Texas homeowners for the first time to participate in the Federal Housing Administration’s “HECM for Purchase” loan program. See Tex. S.J. Res. 18, 83d Leg., R.S., 2013 Tex. Gen. Laws Pamph. 3, at A-7. Owners are not disqualified for a reverse mortgage because they lack income or other assets for repaying the loan. Tex. Const. art. XVI, § 50(k)(4). For purposes of determining eligibility under any state statute relating to payments, allowances, benefits, or services on a “means-tested” basis (including expressly supplemental security income, low-income energy assistance, property tax relief, medical assistance, and general assistance), reverse mortgage advances made to the borrower are considered loan proceeds and not income, and undisbursed funds under a reverse mortgage loan are considered equity in the home and not loan proceeds. Tex. Const. art. XVI, § 50(o).

§ 11.35 No Repayment until Maturity Event Occurs; Grounds for Foreclosure

The borrower must have no legal obligation to repay a reverse mortgage, or any portion of its principal or interest, until the loan balance is due on the occurrence of one of the following maturity events: (1) the last surviving borrower dies, (2) the homestead property is sold or transferred, or (3) all borrowers cease occupying the homestead property as their principal residence for twelve consecutive months (without the lender’s prior written approval) or, if the loan is used for the purchase of a homestead property, the borrower fails to timely occupy the homestead property as the borrower’s principal residence within a specified period after loan closing stipulated in the written agreement creating the lien on the property. The lender may also require payment of all principal and interest if the borrower commits actual fraud in connection with the loan; defaults on an obligation provided for in the loan documents to repair and maintain, pay taxes and assessments on, or insure the homestead property; or fails to maintain the priority of the lender’s lien on the homestead property. Tex. Const. art. XVI, § 50(k)(6)(A)–(D).
A reverse mortgage debt may be accelerated and declared due and payable only after the occurrence of one of the foregoing constitutional grounds for foreclosure, notice by the lender to the borrower of a claimed ground for foreclosure, and an opportunity for the borrower to remedy the claimed ground for foreclosure in the manner and within a period stipulated by the Texas Constitution. The lender must first give written notice to the borrower that one of these grounds for foreclosure exists and give the borrower an opportunity to cure the ground for foreclosure. Notice must be given in the same manner provided for a notice by mail related to the foreclosure of liens for home equity loans under section 50(a)(6). The owner must be given at least thirty days to either (1) remedy the condition creating the ground for foreclosure, (2) pay the reverse mortgage debt secured by the homestead property from proceeds of the sale of the homestead property or from any other sources, or (3) convey the homestead property to the lender by deed in lieu of foreclosure. A cure period of only twenty days must be given the owner if the claimed ground for foreclosure is a failure of the borrower to maintain the priority of the reverse mortgage lien under section 50(k)(6)(D)(iii). Tex. Const. art. XVI, § 50(k)(10).

§ 11.36 Permitted Uses of Loan Funds

Proceeds from a reverse mortgage may be used by senior homeowners for any purpose, although most often loan proceeds are regarded as a supplement to Social Security benefits and pension payments and used by homeowners to maintain their homes in a good state of repair, pay property taxes and insurance when due, and defray medical and other ordinary costs of living. Significantly, advances under a reverse mortgage are not taxable as income and generally do not affect senior homeowners’ eligibility for Social Security or Medicare benefits. See Tex. Const. art. XVI, § 50(o). (However, senior homeowners electing a lump-sum advance of proceeds should seek counseling regarding their continued eligibility for Medicaid benefits if retaining the advance as a liquid asset.)

§ 11.37 Foreclosure under Power of Sale and by Court Order

Foreclosure based on either of the grounds set out in Tex. Const. art. XVI, § 50(k)(6)(A), (B), that all borrowers have died or that the homestead property securing the loan has been sold or otherwise transferred, may be carried out under the power of sale contained in the deed of trust securing the loan and the requirements of section 51.002 of the Texas Property Code, pertaining to contractual liens. Tex. Const. art. XVI, § 50(k)(11).

If the foreclosure is for any other ground, however, a reverse mortgage lien may be foreclosed on only by court order pursuant to rules 735 and 736 of the Texas Rules of Civil Procedure. Tex. Const. art. XVI, § 50(k)(11). Rule 735 provides several judicial foreclosure options for a lender foreclosing a reverse mortgage on grounds other than under section 50(k)(6)(A) or (B). Under rule 735, the lender may file (1) a suit seeking judicial foreclosure, (2) a suit or counterclaim seeking a final judgment that includes an order allowing foreclosure under the security instrument, or (3) an application for an order allowing foreclosure under rule 736 pertaining to expedited foreclosure proceedings. Tex. R. Civ. P. 735. Under the expedited procedures of rule 736, a lender may file a verified application in the district court of the county in which the homestead property is located seeking a court order allowing a foreclosure in accordance with the power of sale under the security instrument and section 51.002 of the Property Code. Under the rule, if no response is timely made, the court must grant the application without further notice or hearing if the application complies in form and content with the requirements of the rule and a copy of the notice and certificate of service has then been on file with the clerk of the court for at least ten days. If a response is made, however, a hearing on the application must be set promptly after reasonable notice to the parties and, in any case, not later than ten business days after a request for hearing by either party. The rule calls for a streamlined hearing in which no discovery is allowed and the court’s action in granting or denying the order may not be appealed. On hearing, if the court determines that the appli-
cant has proved that a valid debt exists that is secured by a valid lien on the homestead property created under Texas Constitu-
tion, article XVI, section 50(a)(7), the court must grant the application and issue an order to proceed with foreclosure pursuant
to the power of sale. Tex. R. Civ. P. 736.

A four-year limitations period applies to actions to foreclose a reverse mortgage lien on a homestead property once a ground
for foreclosure has occurred. On the expiration of the four-year limitations period, the real property lien and a power of sale to
enforce it become void. See Tex. Civ. Prac. & Rem. Code § 16.035(a), (d). Practitioners are cautioned that the accrual date for
such an action is not the date that the reverse mortgage debt is accelerated and declared due and payable, but instead the
lender’s cause of action to enforce a reverse mortgage lien accrues when one or more of the constitutional conditions to fore-
closure has occurred. If the ground for foreclosure is the death of the last surviving borrower, the cause of action accrues on
the date of that death—a fact that could be undiscovered by the lender for some extended period of time. See Financial Free-
dom Senior Funding Corp. v. Horrocks, 294 S.W.3d 749 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

§ 11.38 No Closing until Delivery of Twelve-Day Consumer Notice and Certification of Required
Counseling

A reverse mortgage may not be closed before the twelfth calendar day after the date the lender provides to the prospective bor-
rower a statutory notice on a separate instrument, which the lender or originator and the borrower must sign for the notice to
take effect. See form 11-7 in this chapter for the text of the notice.

Furthermore, a reverse mortgage may not be closed until the prospective borrower and the spouse of the prospective borrower
attest in writing that the prospective borrower and the spouse of the prospective borrower received counseling regarding the
advisability and availability of reverse mortgages and other financial alternatives that was completed not earlier than the 180th
day nor later than the fifth day before the date the extension of credit is closed. See Tex. Const. art. XVI, § 50(k)(8), (9).

§ 11.39 Advances According to Authorized Payment Plan (Including Line-of-Credit Method)

The proceeds of a reverse mortgage must be disbursed to the borrower in one or more payments of principal, generally
referred to as advances, according to an agreed payment plan. The total loan obligation, generally referred to as the balance, is
the sum of all advances due at loan maturity (including any amounts advanced to cover closing and other costs) plus accrued
interest, including interest on interest, and other finance charges, such as mortgage insurance premiums and servicing fees.
Line-of-credit advances under a Texas reverse mortgage were first authorized effective November 8, 2005. Tex. S.J. Res. 7,
79th Leg., R.S., 2005 Tex. Gen. Laws Pamph. 1, at A-1. As amended, Tex. Const. art. XVI, § 50(p), expressly permits a line-
of-credit method of advances in which an initial advance may be made at any time and future advances may be made at times
and in amounts requested by the borrower until the credit limit established by the loan documents is reached (and, thereafter,
subsequent advances may be made at times and in amounts requested by the borrower to the extent that the outstanding bal-

In addition, if the borrower fails to timely pay any of the following for which the borrower is obligated under the loan docu-
ments, the lender may at any time, to the extent necessary to protect the lender’s interest in or the value of the homestead prop-
erty, advance amounts on behalf of the borrower to pay (1) property taxes, (2) assessments, (3) insurance, (4) costs of repairs
and maintenance (when performed by persons who are not employed by or affiliated with the lender), or (5) any lien that has
or may obtain priority over the reverse mortgage lien. Tex. Const. art. XVI, § 50(p)(6).
§ 11.40 Prohibitions against Use of Credit Cards and Similar Devices, Transaction Fees, and Unilateral Amendments of Terms

A reverse mortgage must provide that (1) an owner may not use a credit card, debit card, preprinted solicitation check, or similar device to obtain an advance; (2) a lender may not charge a transaction fee after closing solely in connection with any debit or advance; and (3) a lender or holder of the reverse mortgage may not unilaterally amend the terms of the extension of credit. Tex. Const. art. XVI, § 50(v).

§ 11.41 Future Advances; Priority of Lien

Advances made and to be made in the future under a recorded reverse mortgage, and interest on those advances, have lien priority over any subsequently filed lien. Therefore, future advances under a reverse mortgage recorded in the real property records of the county in which the homestead property is located will have lien priority over any other lien filed for record after the reverse mortgage instrument has been recorded. Tex. Const. art. XVI, § 50(l).

§ 11.42 Interest; Shared Appreciation

Interest may be charged on a reverse mortgage loan at any fixed or adjustable rate that the parties may agree on (and which, if secured by other than a first lien, does not exceed the maximum lawful rate under the Texas Finance Code), and interest may accrue and be compounded during the term of the loan according to the terms of the loan agreement. Furthermore, interest expressly may be contingent on appreciation in the fair market value of the homestead property, apparently allowing for lenders to charge “equity share” fees based on the appreciation of appraised value of the homestead when the loan matures. Tex. Const. art. XVI, § 50(m).

§ 11.43 Reducing or Failing to Make Advances; Forfeiture

If an adjustable rate of interest is charged, the lender under a reverse mortgage is expressly prohibited from reducing the amount or number of advances made to the borrower because of an adjustment in the interest rate. Tex. Const. art. XVI, § 50(k)(5). The lender is obligated to make loan advances as required by the loan documents under the penalty of forfeiture. If the lender fails for any reason to make loan advances according to the terms of the loan documents and, after notice from the borrower, fails to cure the default as required in the loan documents, the constitution provides that the lender forfeits all principal and interest on the reverse mortgage. This forfeiture provision does not apply, however, when a governmental agency, such as the Federal Housing Administration under its Home Equity Conversion Mortgage reverse mortgage insurance, takes an assignment of the loan to cure the default. Tex. Const. art. XVI, § 50(k)(7).

§ 11.44 Preemptive Authority

Texas reverse mortgage law as authorized and effected by the constitution expressly supersedes any statutes, including the Texas Property Code, that purport to limit encumbrances that may be fixed on homestead property. Furthermore, a reverse mortgage may be made without regard to any other conflicting state law, including any purported limitations on future advances; any requirement that a maximum loan amount be stated in the reverse mortgage loan documents or that a percentage of reverse mortgage proceeds be advanced before the assignment of the reverse mortgage; or any prohibition on balloon payments, compound interest or interest on interest, or contracting for, charging, or receiving any rate of interest authorized by Texas law. Tex. Const. art. XVI, § 50(q).
§ 11.45 Title Insurance Considerations

The Texas Reverse Mortgage Endorsement (T-43) and Procedural Rule P-45, Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas, insure against claims of lien invalidity of a covered reverse mortgage arising out of a lender’s failure to satisfy certain of the constitutional conditions. See Procedural Rule P-45, Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

The Texas Reverse Mortgage Endorsement (T-43) to the Mortgagee Policy of Title Insurance (T-2) excludes from coverage any loss or damage based on usury or on any consumer credit protection or truth-in-lending law or violation of any subsections of Tex. Const. art. XVI, § 50(k)(3)–(11), (m), (p), (v), and any regulatory or statutory requirements for a mortgage made pursuant to Tex. Const. art. XVI, § 50(a)(7), except as expressly provided in paragraph 3 of the endorsement. Form T-43, in paragraphs 1 and 2, insures the validity of future advances made under a reverse mortgage, with certain exceptions, up to the outstanding aggregate amount of loan proceeds actually disbursed and the amount of its unpaid, accrued interest as of the time a loss occurs under the policy. In paragraph 3, form T-43 expressly insures against loss sustained by the lender under the mortgagee policy because of invalidity or unenforceability of the reverse mortgage lien by reason of any of the following: (1) the failure of the insured mortgage to be created under a written agreement with the consent of each owner of the insured homestead property and each owner’s spouse; (2) the failure of the insured mortgage to be made to a person who is, or whose spouse is, sixty-two years of age or older; (3) the failure of the written document purporting to be made pursuant to Tex. Const. art. XVI, § 50(k)(8), to be executed by the homeowner on the date that the insured mortgage and promissory note it secures are executed by the owner (provided that the policy does not insure that the document itself complies with section 50(k)(8)); and (4) the failure of the title company or its agents to furnish the homeowner a copy of written notice purporting to be made pursuant to Tex. Const. art. XVI, § 50(k)(9), on the date that the owner executed the insured mortgage and promissory note it secures (provided that the policy does not insure that the written document itself complies with section 50(k)(9)).

While attachment of the T-43 endorsement to any mortgagee policy of title insurance issued in connection with a reverse mortgage loan is mandatory, under Procedural Rule P-45 the issuing agency may delete any of these four subdivisions of paragraph 3 if it does not consider the additional risk insurable and must delete all four subdivisions if the promissory note and the insured mortgage instrument for the loan are not executed by the borrower at the office of the title company. Furthermore, the insuring agency must delete the second subdivision of paragraph 3 if the age of the owner or spouse is not verifiable “with government issued photographic identification” furnished the title agency and must delete the second and fourth subdivisions if the related documents furnished by the insured are not executed by the homeowner at the office of the title company on the date that the insured mortgage and promissory note it secures are executed. Procedural Rule P-45, Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

§ 11.46 Truth-in-Lending Disclosure Considerations

Reverse mortgage loans are subject to the federal Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, and its Regulation Z, 12 C.F.R. pt. 1026. In addition to other consumer disclosures required under the Truth in Lending Act, the lender in a reverse mortgage is required to provide the borrower written disclosures under 12 C.F.R. § 1026.33 of the total annual loan cost of credit in the form of appendix K, paragraph (d), of Regulation Z. Generally referred to as the “Total Annual Loan Cost Rate Disclosure,” or “TALC,” this disclosure contains (1) a statement that the borrower is not obligated to complete the transaction merely because the borrower has received the disclosures or has signed an application for a reverse mortgage loan; (2) a good-faith projection of the total cost of the credit expressed as a table of “Total Annual Loan Cost Rates,” using that term, that reflects (a) costs and charges to the borrower, (b) payments (advances) to, or for the benefit of, the borrower, (c) additional
compensation to the lender (such as shared appreciation the lender is entitled to), (d) any limitations on the borrower’s liability (such as nonrecourse limits), (e) assumed appreciation rates for the dwelling securing the loan at rates of 0 percent, 4 percent, and 8 percent, and (f) assumed loan periods, alternatively, of two years, the actuarial life expectancy of the borrower (or youngest of the borrowers), and that same life expectancy multiplied by a factor of 1.4 and rounded to the nearest full year (and, at the option of the borrower, that same actuarial life expectancy multiplied by a factor of 0.5 and rounded to the nearest full year); (3) an itemization of loan terms, charges, the age of the youngest borrower, and the appraised property value; and (4) an explanation of the total annual loan cost rates as provided in the model form. 12 C.F.R. § 1026.33, pt. 1026 app. K(d).

§ 11.47 Federal Home Equity Conversion Mortgage (HECM) Loan Program

More than 90 percent of all reverse mortgage loan originations nationwide are made under the Home Equity Conversion Mortgage (HECM) program insured by the Federal Housing Administration (FHA) under the Department of Housing and Urban Development (HUD). The HECM program in Texas is regulated by HUD Handbook 4235.1 Rev-1, as supplemented and amended from time to time, and mortgagee letters ML 00-09 and ML 00-10, each dated March 8, 2000; ML 00-34, dated August 30, 2000 (supplementing ML 00-09); ML 00-39, dated November 7, 2000 (supplementing ML 00-09, ML 00-10, and ML 00-34); and ML 06-06, dated March 17, 2006 (in part replacing the guidance set out in ML 00-09, ML 00-34, and ML 00-39). Regulations for the HECM program are codified in 24 C.F.R. pt. 206. Effective January 1, 2014, Tex. Const. art. XVI, § 50(k), was amended to authorize a reverse mortgage also to be used to finance the purchase of a Texas homestead. Texas homeowners are now able to participate in the FHA’s “HECM for Purchase” loan program for the first time. See Tex. S.J. Res. 18, 83d Leg., R.S., 2013 Tex. Gen. Laws Pamph. 3, at A-7.

Model forms set out in full and attached to ML 00-39 replaced earlier versions of Texas model forms published in ML 00-09 and ML 00-34, which at that time constituted the only forms approved by HUD for use to document an HECM loan in Texas. These model forms included Texas forms of a home equity conversion loan agreement, an adjustable rate deed of trust, an adjustable rate note, an adjustable rate second deed of trust, an adjustable rate second note, and a repair rider. With the adoption of the 2005 constitutional amendment authorizing line-of-credit advances under a Texas reverse mortgage loan, however, HUD chose not to publish revised model forms and instead imposed on approved mortgagees the obligation, in consultation with their attorneys, to adapt all forms to ensure compliance with FHA requirements and the Texas Constitution and statutes. These requirements are set forth in ML 06-06, issued March 17, 2006, which authorizes Texas borrowers to choose a line-of-credit payment option, a modified tenure option (a combination of tenure and line-of-credit payment options), or a modified term option (a combination of term and line-of-credit payment options) and provides guidance regarding such matters as the adaptation and preparation of the form of loan documents, including the repair rider, the timing of loan closings and disbursements by the lender, the conditions under which the loan may be accelerated under applicable Texas law, and procedures to be followed under Texas law to conduct foreclosures. ML 06-06 expressly replaces guidance previously issued in ML 00-09, ML 00-34, and ML 00-39 on the same topics.

Model Texas forms were set out as attachments to HUD ML 00-39, dated November 7, 2000, with such adaptations by counsel as may be necessary to conform the instruments to state or local requirements. When adapting these model forms to Texas law and practices, counsel must consult the footnotes to each model form regarding state-specific modifications; instructions in chapter 6 to Handbook 4235.1 Rev-3; Handbook 4165.1 Rev-1 Chg-3, issued November 30, 1995, regarding model mortgage and note forms; ML 97-15; ML 00-09 regarding Texas modifications of the loan agreement form and repair rider; and ML 06-06 regarding line-of-credit terms and other provisions of the 2005 constitutional amendment.
II. General Instructions for Completing Forms

§ 11.51 Introduction

For information about completing forms generally, see chapter 3 in this manual. In most forms the information that the attorney must provide is listed at the beginning of the form. Of course, the attorney may add other specific provisions, references, exhibits, and riders as necessary for each specific transaction.

The forms in this chapter are applicable to a first-lien home equity loan. Tex. Fin. Code ch. 342 imposes additional duties, prohibitions, and disclosure requirements in connection with secondary mortgage loans. Attorneys are cautioned that some forms in this chapter may require modification for use with a secondary mortgage loan transaction.

A home equity loan transaction must require documentation in addition to that provided by this chapter. For example, a “loan agreement” as defined in Texas Business and Commerce Code section 26.02 requires the notice prescribed therein. Form 10-14 in this manual, notice of final agreement, may be modified for use in a home equity transaction. Each transaction is unique, and the practitioner must use individual judgment in ensuring that all required documentation has been adequately prepared.

A home equity loan transaction must be closed at the offices of the lender, an attorney at law, or a title company. Tex. Const. art. XVI, § 50(a)(6)(N). The owner may not be required to sign any instrument in which blanks are left to be filled in. Tex. Const. art. XVI, § 50(a)(6)(Q)(iii). The lender must provide copies of all instruments related to the loan to the homestead owner at the time of closing. Tex. Const. art. XVI, § 50(a)(6)(Q)(v).

§ 11.52 Instructions for Completing Notice Concerning Extensions of Credit

The notice concerning extensions of credit (form 11-1 in this chapter) defined by section 50(a)(6), article XVI, of the Texas Constitution is the preloan disclosure required to be given to the homestead owner under Tex. Const. art. XVI, § 50(g). The home equity loan cannot be closed until the twelfth day after the notice is given. If discussions with the borrower are conducted primarily in a language other than English, the lender must provide the owner with an additional copy of the notice translated into the written language in which discussions were conducted. The Office of the Consumer Credit Commissioner has provided a Spanish language translation of the notice on its website at http://occc.texas.gov. No foreign-language translations of forms are included in this manual.

§ 11.53 Instructions for Completing Home Equity Extension of Credit (Promissory Note)

The form for the home equity extension of credit (form 11-2 in this chapter) is principally adapted from form 6-1 (promissory note) in this manual and is redesignated to conform with the terminology used in Tex. Const. art. XVI, § 50(a)(6). The attorney is referred to chapter 6 in this manual for general commentary and instructions for completing promissory notes.

Note that the extension of credit makes no provision for late charges. The attorney is referred to section 6.4:3 and the clauses referenced therein for commentary and instructions on late charges.
As reflected in the “Terms of Payment” paragraph, the home equity extension of credit must be repaid in substantially equal successive periodic installments. Tex. Const. art. XVI, § 50(a)(6)(L). The installments must begin not later than two months from the date of the instrument. Each installment must equal or exceed the amount of accrued interest as of the date of the scheduled installment.

The home equity extension of credit can be converted for a variable rate of interest by deleting the heading for “Annual Interest Rate” and modifying the heading “Terms of Payment” to read “Terms of Payment, Including Variable Interest Rate on Unpaid Principal.” A variable rate interest clause appears at clause 6-2-18.

The security for payment for a home equity extension of credit is fixed by Tex. Const. art. XVI, § 50(a)(6)(A), (H). The home equity extension of credit may be secured only by a lien on the borrower’s homestead. Additional collateral is prohibited. The home equity extension of credit has no provision referring to a guaranty or guarantor. A guaranty is construed as prohibited additional collateral.

As required by Tex. Const. art. XVI, § 50(a)(6)(C), the home equity extension of credit is a nonrecourse obligation. In addition, the home equity extension of credit contains many other limitations and restrictions unique to home equity lending and required by Tex. Const. art. XVI, § 50(a)(6). These restrictions are discussed in detail in the commentary in this chapter. A lender forfeits all principal and interest if the lender fails to cure a failure to comply with constitutional restrictions on home equity lending after sixty days’ notice of the violation given by the borrower. Tex. Const. art. XVI, § 50(a)(6)(Q)(x). These cure provisions are discussed in detail in section 11.25 above.

If the lender of a home equity extension of credit has a license from the Office of Consumer Credit Commissioner, the home equity extension of credit must contain the name, mailing address, and telephone number of the OCCC. Tex. Fin. Code § 14.104. Additionally, if the home equity loan is a secondary mortgage loan, the alternative attorney’s fee provision should be used. See section 8.4 for a discussion of secondary mortgage loans and see the discussion in section 11.20:7 above concerning alternative provisions.

§ 11.54 Instructions for Completing Deed of Trust (Home Equity Loan)

The form for the deed of trust (form 11-3 in this chapter) is adapted from form 8-1 in this manual. The attorney is referred to chapter 8 for general commentary and instructions for completing deeds of trust.

A lien securing a home equity loan may be foreclosed only after court order. Tex. Const. art. XVI, § 50(a)(6)(D). The power of sale of the deed of trust (home equity loan) is conditioned on the lender obtaining a court order allowing foreclosure under any proceeding authorized by the Texas Rules of Civil Procedure and other applicable law.

A question remains whether the assignment of rents in a deed of trust securing a home equity loan constitutes prohibited additional collateral under Tex. Const. art. XVI, § 50(a)(6)(H). The deed of trust (home equity loan) does not contain an assignment of rents clause. In the absence of definitive authority on this question, the attorney is cautioned to exercise professional judgment regarding this provision.

If the home equity extension of credit is a junior lien and if the lender is a bank, savings and loan association, credit union, or lender with a license from the Office of Consumer Credit Commissioner, the deed of trust (home equity) should be modified as discussed in section 11.20:7 above to comply with requirements applicable to secondary mortgage loans governed by Texas Finance Code chapter 342.
The deed of trust (home equity loan) also contains a notice of confidentiality rights as required by Tex. Prop. Code § 11.008(b). See section 3.16 in this manual.

§ 11.55 Instructions for Completing Home Equity Certificate and Agreement

The home equity certificate and agreement contains a written acknowledgment of the fair market value of the homestead as required by Tex. Const. art. XVI, § 50(a)(6)(Q)(ix). The acknowledgment of value is necessary to assure compliance with the 80 percent loan-to-value restriction of Tex. Const. art. XVI, § 50(a)(6)(B). The acknowledgment is conclusive evidence of the fair market value of the homestead if the acknowledgment is made under the conditions set out at Tex. Const. art. XVI, § 50(h). To comply with restrictions against additional collateral, the home equity compliance certificate and agreement (form 11-5 in this chapter) contains a waiver by the lender of cross-collateral provisions contained in other debt instruments. In addition, the form contains other representations and warranties to be made by the borrower at closing, evidencing compliance with certain constitutional requirements for creating a valid home equity lien.

The home equity certificate and agreement must be signed on the date that the extension of credit is made. Tex. Const. art. XVI, § 50(a)(6)(Q)(ix).

§ 11.56 Instructions for Completing Election Regarding Right of Rescission

The election regarding right of rescission (form 11-6 in this chapter) confirms the borrower’s election to rescind or decline to rescind the home equity extension of credit under Tex. Const. art. XVI, § 50(a)(6)(Q)(viii). For married couples, a separate notice of right of rescission should be given by each spouse. Funding of the home equity loan should be delayed until the rescission period has expired.
Additional Resources


Notice Concerning Extensions of Credit Form 11-1

Notice Concerning Extensions of Credit

NOTICE CONCERNING EXTENSIONS OF CREDIT DEFINED BY
SECTION 50(a)(6), ARTICLE XVI, TEXAS CONSTITUTION:

SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION ALLOWS CERTAIN
LOANS TO BE SECURED AGAINST THE EQUITY IN YOUR HOME. SUCH LOANS ARE COMMONLY
KNOWN AS EQUITY LOANS. IF YOU DO NOT REPAY THE LOAN OR IF YOU FAIL TO MEET THE
TERMS OF THE LOAN, THE LENDER MAY FORECLOSE AND SELL YOUR HOME. THE CONSTITU-
TION PROVIDES THAT:

(A) THE LOAN MUST BE VOLUNTARILY CREATED WITH THE CONSENT OF EACH OWNER
OF YOUR HOME AND EACH OWNER’S SPOUSE;

(B) THE PRINCIPAL LOAN AMOUNT AT THE TIME THE LOAN IS MADE MUST NOT EXCEED
AN AMOUNT THAT, WHEN ADDED TO THE PRINCIPAL BALANCES OF ALL OTHER LIENS AGAINST
YOUR HOME, IS MORE THAN 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME;

(C) THE LOAN MUST BE WITHOUT RECOURSE FOR PERSONAL LIABILITY AGAINST YOU
AND YOUR SPOUSE UNLESS YOU OR YOUR SPOUSE OBTAINED THIS EXTENSION OF CREDIT BY
ACTUAL FRAUD;

(D) THE LIEN SECURING THE LOAN MAY BE FORECLOSED UPON ONLY WITH A COURT
ORDER;

(E) FEES AND CHARGES TO MAKE THE LOAN MAY NOT EXCEED 2 PERCENT OF THE
LOAN AMOUNT, EXCEPT FOR A FEE OR CHARGE FOR AN APPRAISAL PERFORMED BY A THIRD-
PARTY APPRAISER, A PROPERTY SURVEY PERFORMED BY A STATE-REGISTERED OR LICENSED
SURVEYOR, A STATE BASE PREMIUM FOR A MORTGAGEE POLICY OF TITLE INSURANCE WITH ENDORSEMENTS, OR A TITLE EXAMINATION REPORT;

(F) THE LOAN MAY NOT BE AN OPEN-END ACCOUNT THAT MAY BE DEBITED FROM TIME TO TIME OR UNDER WHICH CREDIT MAY BE EXTENDED FROM TIME TO TIME UNLESS IT IS A HOME EQUITY LINE OF CREDIT;

(G) YOU MAY PREPAY THE LOAN WITHOUT PENALTY OR CHARGE;

(H) NO ADDITIONAL COLLATERAL MAY BE SECURITY FOR THE LOAN;

(I) (REPEALED);

(J) YOU ARE NOT REQUIRED TO REPAY THE LOAN EARLIER THAN AGREED SOLELY BECAUSE THE FAIR MARKET VALUE OF YOUR HOME DECREASES OR BECAUSE YOU DEFAULT ON ANOTHER LOAN THAT IS NOT SECURED BY YOUR HOME;

(K) ONLY ONE LOAN DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MAY BE SECURED WITH YOUR HOME AT ANY GIVEN TIME;

(L) THE LOAN MUST BE SCHEDULED TO BE REPAYED IN PAYMENTS THAT EQUAL OR EXCEED THE AMOUNT OF ACCRUED INTEREST FOR EACH PAYMENT PERIOD;

(M) THE LOAN MAY NOT CLOSE BEFORE 12 DAYS AFTER YOU SUBMIT A LOAN APPLICATION TO THE LENDER OR BEFORE 12 DAYS AFTER YOU RECEIVE THIS NOTICE, WHICHEVER DATE IS LATER AND MAY NOT WITHOUT YOUR CONSENT CLOSE BEFORE ONE BUSINESS DAY AFTER THE DATE ON WHICH YOU RECEIVE A COPY OF YOUR LOAN APPLICATION IF NOT PREVIOUSLY PROVIDED AND A FINAL ITEMIZED DISCLOSURE OF THE ACTUAL FEES, POINTS, INTERESTS, COSTS, AND CHARGES THAT WILL BE CHARGED AT CLOSING; AND IF YOUR HOME WAS SECURITY FOR THE SAME TYPE OF LOAN WITHIN THE PAST YEAR, A NEW LOAN SECURED BY THE SAME PROPERTY MAY NOT CLOSE BEFORE ONE YEAR HAS PASSED FROM THE CLOSING
DATE OF THE OTHER LOAN, UNLESS ON OATH YOU REQUEST AN EARLIER CLOSING DATE DUE TO A DECLARED STATE OF EMERGENCY;

(N) THE LOAN MAY CLOSE ONLY AT THE OFFICE OF THE LENDER, TITLE COMPANY, OR AN ATTORNEY AT LAW;

(O) THE LENDER MAY CHARGE ANY FIXED OR VARIABLE RATE OF INTEREST AUTHORIZED BY STATUTE;

(P) ONLY A LAWFULLY AUTHORIZED LENDER MAY MAKE LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;

(Q) LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MUST:

(1) NOT REQUIRE YOU TO APPLY THE PROCEEDS TO ANOTHER DEBT EXCEPT A DEBT THAT IS SECURED BY YOUR HOME OR OWED TO ANOTHER LENDER;

(2) NOT REQUIRE THAT YOU ASSIGN WAGES AS SECURITY;

(3) NOT REQUIRE THAT YOU EXECUTE INSTRUMENTS WHICH HAVE BLANKS FOR SUBSTANTIVE TERMS OF AGREEMENT LEFT TO BE FILLED IN;

(4) NOT REQUIRE THAT YOU SIGN A CONFESSION OF JUDGMENT OR POWER OF ATTORNEY TO ANOTHER PERSON TO CONFESS JUDGMENT OR APPEAR IN A LEGAL PROCEEDING ON YOUR BEHALF;

(5) PROVIDE THAT YOU RECEIVE A COPY OF YOUR FINAL LOAN APPLICATION AND ALL EXECUTED DOCUMENTS YOU SIGN AT CLOSING;
(6) PROVIDE THAT THE SECURITY INSTRUMENTS CONTAIN A DISCLOSURE THAT THIS LOAN IS A LOAN DEFINED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;

(7) PROVIDE THAT WHEN THE LOAN IS PAID IN FULL, THE LENDER WILL SIGN AND GIVE YOU A RELEASE OF LIEN OR AN ASSIGNMENT OF THE LIEN, WHICHEVER IS APPROPRIATE;

(8) PROVIDE THAT YOU MAY, WITHIN 3 DAYS AFTER CLOSING, RESCIND THE LOAN WITHOUT PENALTY OR CHARGE;

(9) PROVIDE THAT YOU AND THE LENDER ACKNOWLEDGE THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LOAN CLOSES; AND

(10) PROVIDE THAT THE LENDER WILL FORFEIT ALL PRINCIPAL AND INTEREST IF THE LENDER FAILS TO COMPLY WITH THE LENDER’S OBLIGATIONS UNLESS THE LENDER CURES THE FAILURE TO COMPLY AS PROVIDED BY SECTION 50(a)(6)(Q)(x), ARTICLE XVI, OF THE TEXAS CONSTITUTION; AND

(R) IF THE LOAN IS A HOME EQUITY LINE OF CREDIT:

(1) YOU MAY REQUEST ADVANCES, REPAY MONEY, AND REBORROW MONEY UNDER THE LINE OF CREDIT;

(2) EACH ADVANCE UNDER THE LINE OF CREDIT MUST BE IN AN AMOUNT OF AT LEAST $4,000;

(3) YOU MAY NOT USE A CREDIT CARD, DEBIT CARD, OR SIMILAR DEVICE, OR PREPRINTED CHECK THAT YOU DID NOT SOLICIT, TO OBTAIN ADVANCES UNDER THE LINE OF CREDIT;
(4) ANY FEES THE LENDER CHARGES MAY BE CHARGED AND COLLECTED ONLY AT THE TIME THE LINE OF CREDIT IS ESTABLISHED AND THE LENDER MAY NOT CHARGE A FEE IN CONNECTION WITH ANY ADVANCE;

(5) THE MAXIMUM PRINCIPAL AMOUNT THAT MAY BE EXTENDED, WHEN ADDED TO ALL OTHER DEBTS SECURED BY YOUR HOME, MAY NOT EXCEED 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LINE OF CREDIT IS ESTABLISHED;

(6) IF THE PRINCIPAL BALANCE UNDER THE LINE OF CREDIT AT ANY TIME EXCEEDS 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME, AS DETERMINED ON THE DATE THE LINE OF CREDIT IS ESTABLISHED, YOU MAY NOT CONTINUE TO REQUEST ADVANCES UNDER THE LINE OF CREDIT UNTIL THE BALANCE IS LESS THAN 80 PERCENT OF THE FAIR MARKET VALUE; AND

(7) THE LENDER MAY NOT UNILATERALLY AMEND THE TERMS OF THE LINE OF CREDIT.

THIS NOTICE IS ONLY A SUMMARY OF YOUR RIGHTS UNDER THE TEXAS CONSTITUTION. YOUR RIGHTS ARE GOVERNED BY SECTION 50, ARTICLE XVI, OF THE TEXAS CONSTITUTION, AND NOT BY THIS NOTICE.

I have received a copy of this notice concerning extensions of credit defined by section 50(a)(6), article XVI, of the Texas Constitution.

[Name of borrower]
Date:
Home Equity Extension of Credit

[Promissory Note]

Basic Information

THE LOAN EVIDENCED BY THIS INSTRUMENT IS AN EXTENSION OF CREDIT AS DEFINED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION (“HOME EQUITY EXTENSION OF CREDIT”).

Date:

Borrower:

Borrower’s Mailing Address:

Lender:

Place for Payment:

Principal Amount:

Annual Interest Rate:

Maturity Date:

Annual Interest Rate on Matured, Unpaid Amounts:

Terms of Payment (principal and interest): The Principal Amount and interest are due and payable in equal periodic installments of [amount] DOLLARS ($[amount]), on the [specify] day[s] of each month, beginning [date] and continuing until the unpaid principal and accrued, unpaid interest have been paid in full. Payments will be applied first to accrued interest and the remainder to the Principal Amount.
Security for Payment: This Home Equity Extension of Credit is secured by a deed of trust dated [date] from [Borrower/[name of grantor in deed of trust]] to [name of trustee], trustee, which covers the following real property: [property description] (the “Property”).

A. Promise to Pay

Borrower promises to pay to the order of Lender the Principal Amount plus interest at the Annual Interest Rate. This Home Equity Extension of Credit is payable at the Place for Payment and according to the Terms of Payment. All unpaid amounts are due by the Maturity Date. If any amount is not paid either when due under the Terms of Payment or on acceleration of maturity, Borrower promises to pay any unpaid amount plus interest from the date the payment was due to the date of payment at the Annual Interest Rate on Matured, Unpaid Amounts.

B. Default and Remedies

If Borrower defaults in the payment of this Home Equity Extension of Credit or in the performance of any obligation in any instrument securing this Home Equity Extension of Credit, Lender may declare the unpaid principal balance and earned interest on the Home Equity Extension of Credit due. Borrower waives all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

C. Attorney’s Fees

Borrower also promises to pay reasonable attorney’s fees and court and other costs if an attorney is retained to collect or enforce the Home Equity Extension of Credit. These expenses will bear interest from the date of advance at the Annual Interest Rate on Matured, Unpaid...
Amounts. Borrower will pay Lender these expenses and interest on demand at the Place for Payment. These expenses and interest will become part of the Home Equity Extension of Credit and will be secured by the Security for Payment.

Include the following paragraph for a secondary mortgage loan.

Borrower also promises to pay reasonable attorney’s fees and court costs and other fees incurred if this Home Equity Extension of Credit is placed in the hands of an attorney who is not an employee of Lender to collect or enforce the Home Equity Extension of Credit. Borrower will pay Lender these expenses on demand at the Place for Payment. These expenses will become part of the Home Equity Extension of Credit and will be secured by the Security for Payment.

Continue with the following.

D. Loan Conditions

The Home Equity Extension of Credit is made on condition that—

D.1. Borrower not be required to apply the proceeds of the Home Equity Extension of Credit to repay another debt except debt secured by the Property or debt to another lender;

D.2. Borrower not assign wages as security for the Home Equity Extension of Credit;

D.3. Borrower not sign any instrument in which blanks are left to be filled in;

D.4. Borrower not sign a confession of judgment or power of attorney to Lender or to a third person to confess judgment or to appear for Borrower in a judicial proceeding;

D.5. Lender, at the time the Home Equity Extension of Credit is made, provide Borrower a copy of all documents signed by Borrower related to the Home Equity Extension of Credit;
D.6. within a reasonable time after termination and full payment of the Home Equity Extension of Credit, Lender cancel and return the Home Equity Extension of Credit to Borrower and deliver, in recordable form, a release of the lien securing the Home Equity Extension of Credit or a copy of an endorsement or assignment of the lien to a lender that is refinancing the Home Equity Extension of Credit;

D.7. Borrower and Borrower’s spouse may, within three days after the Home Equity Extension of Credit is made, rescind the Home Equity Extension of Credit without penalty or charge;

D.8. Borrower and Lender sign a written acknowledgment of the fair market value of the Property on the date the Home Equity Extension of Credit is made;

D.9. except as otherwise provided in this paragraph, Lender or any holder of the Home Equity Extension of Credit will forfeit all principal and interest of the Home Equity Extension of Credit if Lender or the holder fails to comply with Lender’s or the holder’s obligations under Tex. Const. art. XVI, § 50(a)(6), and fails to correct the failure not later than the sixtieth day after the date that the Lender or the holder is notified by Borrower of failure to comply; except as otherwise provided in this paragraph, Lender or holder may correct a failure to comply with Tex. Const. art. XVI, § 50(a)(6), by—

a. paying to Borrower an amount equal to any overcharge paid by Borrower under or related to the Home Equity Extension of Credit if Borrower has paid an amount that exceeds an amount stated in Tex. Const. art. XVI, § 50(a)(6)(E), (G), or (O);

b. sending Borrower a written acknowledgment that the lien securing the Home Equity Extension of Credit is valid only in the amount that the Home Equity Extension of Credit does not exceed the percentage described by Tex. Const. art. XVI, § 50(a)(6)(B), if applicable, or is not
secured by property described in Tex. Const. art. XVI, § 50(a)(6)(H) or (I), if applicable;

c. sending Borrower a written notice modifying any other amount, percentage, term, or other provision prohibited by Tex. Const. art. XVI, § 50(a)(6), to a permitted amount, percentage, term, or other provision and adjusting the account of Borrower to ensure that Borrower is not required to pay more than an amount permitted by Tex. Const. art. XVI, § 50, and is not subject to any other term or provision prohibited by Tex. Const. art. XVI, § 50;

d. delivering the required documents to Borrower if Lender or holder fails to comply with Tex. Const. art. XVI, § 50(a)(6)(Q)(v), or obtaining the appropriate signatures if Lender or holder fails to comply with Tex. Const. art. XVI, § 50(a)(6)(Q)(ix);

e. sending Borrower a written acknowledgment, if the failure to comply is prohibited by Tex. Const. art. XVI, § 50(a)(6)(K), that the accrual of interest and all of Borrower’s obligations under the Home Equity Extension of Credit are abated while any prior lien prohibited under Tex. Const. art. XVI, § 50(a)(6)(K), remains secured by the homestead; or

f. if the failure to comply cannot be cured by (a)–(e) above, curing the failure to comply by refund or credit to Borrower of $1,000 and offering Borrower the right to refinance the Home Equity Extension of Credit with Lender or holder for the remaining term of this Home Equity Extension of Credit at no cost to Borrower on the same terms, including interest, as the original Home Equity Extension of Credit with any modifications necessary to comply with Tex. Const. art. XVI, § 50, or terms on which Borrower and
Lender or holder otherwise agree that comply with Tex. Const. art. XVI, § 50;

D.10. Lender or any holder of this Home Equity Extension of Credit shall forfeit all principal and interest of this Home Equity Extension of Credit if this Home Equity Extension of Credit is made by a person other than a person described in Tex. Const. art. XVI, § 50(a)(6)(P), or if the lien is not created under a written agreement with consent of Borrower and Borrower’s spouse, unless Borrower and Borrower’s spouse who did not initially consent subsequently consent to this Home Equity Extension of Credit;

D.11. the Home Equity Extension of Credit is without recourse for personal liability against Borrower or Borrower’s spouse unless the Home Equity Extension of Credit was obtained by actual fraud;

D.12. the Home Equity Extension of Credit is not a form of open-end account that may be debited from time to time or under which credit may be extended from time to time unless this Home Equity Extension of Credit is a home equity line of credit as defined by Tex. Const. art. XVI, § 50(t);

D.13. the Home Equity Extension of Credit is payable in advance without penalty or charge; unless Lender agrees otherwise in writing, prepayments will be applied to the last maturing principal; installments will continue as scheduled until the Principal Amount and all accrued interest are paid;

D.14. the Home Equity Extension of Credit may not be accelerated because of a decrease in the market value of the Property or Borrower’s default under other indebtedness not secured by a prior valid encumbrance against the Property; and

D.15. the Home Equity Extension of Credit is closed only at the office of Lender, an attorney at law, or a title company.
E. Prepayments

Borrower may at any time make full or partial prepayments on the principal without paying any penalty, in addition to making regularly scheduled payments. Unless Lender agrees otherwise in writing, the making of partial prepayments will not alter the dates or amounts of regularly scheduled payments.

F. Usury Savings

Interest on the debt evidenced by this Home Equity Extension of Credit will not exceed the maximum rate or amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the Principal Amount or, if the Principal Amount has been paid, refunded. On any acceleration or required or permitted prepayment, any excess interest will be canceled automatically as of the acceleration or prepayment or, if the excess interest has already been paid, credited on the Principal Amount or, if the Principal Amount has been paid, refunded. Loan charges, fees, or similar amounts other than interest will not exceed the maximum amount or rate that may be contracted for, taken, reserved, charged, or received under law. Any loan charges, fees, or similar amounts other than interest in excess of that maximum rate or amount will be credited on the Principal Amount or, if the Principal Amount has been paid, refunded. This provision overrides any conflicting provisions in this Home Equity Extension of Credit and all other instruments concerning the debt.

G. Other Clauses

Borrower will provide written notice to Lender or a holder of Lender’s on the holder’s failure to comply with any obligations of Tex. Const. art. XVI, § 50, the deed of trust, or applicable law delivered by certified or registered mail, licensed courier, or express mail service providing proof of delivery.
When the context requires, singular nouns and pronouns include the plural.

[Name of borrower]
Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

THE LOAN SECURED BY THIS DEED OF TRUST IS AN EXTENSION OF CREDIT AS DEFINED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION.

Basic Information

Date:

Grantor:

Grantor’s Mailing Address:

Trustee:

Trustee’s Mailing Address:

Lender:

Lender’s Mailing Address:

Home Equity Extension of Credit (Promissory Note)

Date:

Original principal amount:

Borrower:
Lender:

Maturity date:

Property (including any improvements):

Prior Lien: [include recording information]

Other Exceptions to Conveyance and Warranty:

A. Granting Clause

For value received and to secure payment of the Home Equity Extension of Credit, Grantor conveys the Property to Trustee in trust. Grantor warrants and agrees to defend the title to the Property, subject to the Other Exceptions to Conveyance and Warranty. On payment of the Home Equity Extension of Credit and all other amounts secured by this deed of trust, this deed of trust will have no further effect.

B. Grantor’s Obligations

Grantor agrees to—

B.1. keep the Property in good repair and condition;

B.2. pay all taxes and assessments on the Property before delinquency, not authorize a taxing entity to transfer its tax lien on the Property to anyone other than Lender, and not request a deferral of the collection of taxes pursuant to section 33.06 of the Texas Tax Code;

B.3. defend title to the Property subject to the Other Exceptions to Conveyance and Warranty and preserve the lien’s priority as it is established in this deed of trust;

B.4. maintain, in a form acceptable to Lender, an insurance policy that—
a. covers all improvements for their full insurable value as determined when the policy is issued and renewed, unless Lender approves a smaller amount in writing;

b. contains an 80 percent coinsurance clause;

c. provides fire and extended coverage, including windstorm coverage;

d. protects Lender with a standard mortgage clause;

e. provides flood insurance at any time the Property is in a flood hazard area; and

f. contains such other coverage as Lender may reasonably require;

B.5. comply at all times with the requirements of the 80 percent coinsurance clause;

B.6. deliver the insurance policy to Lender within ten days of the date of this deed of trust and deliver renewals to Lender at least fifteen days before expiration;

B.7. obey all laws, ordinances, and restrictive covenants applicable to the Property;

B.8. keep any buildings occupied as required by the insurance policy; and

B.9. if the lien of this deed of trust is not a first lien, pay or cause to be paid all prior lien notes and abide by or cause to be abided by all prior lien instruments.

C. Lender’s Rights

C.1. Lender may appoint in writing a substitute trustee, succeeding to all rights and responsibilities of Trustee.
C.2. If the proceeds of the Home Equity Extension of Credit are used to pay any debt secured by prior liens, Lender is subrogated to all the rights and liens of the holders of any debt so paid.

C.3. Lender may apply any proceeds received under the insurance policy either to reduce the Home Equity Extension of Credit or to repair or replace damaged or destroyed improvements covered by the policy. If Lender reasonably determines that repairs to the improvements are economically feasible, Lender will make the insurance proceeds available to Grantor for repairs.

C.4. Notwithstanding the terms of the Home Equity Extension of Credit to the contrary, and unless applicable law prohibits, all payments received by Lender from Grantor under the Home Equity Extension of Credit or this deed of trust may, at Lender’s discretion, be applied first to amounts payable under this deed of trust and then to amounts due and payable to Lender under the Home Equity Extension of Credit, to be applied to principal or interest in the order Lender in Lender’s discretion determines.

C.5. If Grantor fails to perform any of Grantor’s obligations, including obligations contained in the Home Equity Extension of Credit or any instrument securing the Home Equity Extension of Credit, Lender may perform those obligations and be reimbursed by Grantor on demand for any amounts so paid, including attorney’s fees, plus interest on those amounts from the dates of payment at the rate stated in the Home Equity Extension of Credit for matured, unpaid amounts. The amount to be reimbursed will be secured by this deed of trust.

C.6. If there is a default in the payment of the Home Equity Extension of Credit or if Grantor fails to perform any of Grantor’s obligations in any instrument securing the Home Equity Extension of Credit, and the default continues after any required notice of default and time allowed to cure, Lender may—
a. declare the unpaid principal balance and earned interest on the Home
   Equity Extension of Credit immediately due; and

b. foreclose this lien under any proceeding authorized by the Texas Rules of
   Civil Procedure and other applicable law.

C.7. The lien of this deed of trust may be foreclosed only by court order. On obtaining
     a court order allowing a foreclosure of this lien under this deed of trust and the Texas
     Property Code as then in effect, Lender may—

     a. direct Trustee to foreclose this lien, in which case Lender or Lender’s
        agent will cause notice of the foreclosure sale to be given as provided by
        the Texas Property Code as then in effect; and
     
     b. purchase the Property at any foreclosure sale by offering the highest bid
        and then have the bid credited on the Home Equity Extension of Credit.

C.8. Lender may remedy any default without waiving it and may waive any default
     without waiving any prior or subsequent default.

D. Trustee’s Rights and Duties

If directed by Lender to foreclose this lien, Trustee will—

D.1. either personally or by agent give notice of the foreclosure sale as required by
     the Texas Property Code as then in effect;

D.2. sell and convey all or part of the Property “AS IS” to the highest bidder for cash
     with a general warranty binding Grantor, subject to the Prior Lien and to the Other Exceptions
     to Conveyance and Warranty and without representation or warranty, express or implied, by
     Trustee;
D.3. from the proceeds of the sale, pay, in this order—

   a. expenses of foreclosure, including a reasonable commission to Trustee;
   b. to Lender, the full amount of principal, interest, attorney’s fees, and other charges due and unpaid;
   c. any amounts required by law to be paid before payment to Grantor; and
   d. to Grantor, any balance; and

D.4. be indemnified by Lender against all costs, expenses, and liabilities incurred by Trustee for acting in the execution or enforcement of the trust created by this deed of trust, which includes all court and other costs, including attorney’s fees, incurred by Trustee in defense of any action or proceeding taken against Trustee in that capacity.

E. General Provisions

E.1. If any of the Property is sold under this deed of trust, Grantor must immediately surrender possession to the purchaser. If Grantor does not, Grantor will be a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

E.2. Recitals in any trustee’s deed conveying the Property will be presumed to be true.

E.3. Proceeding under this deed of trust, filing suit for foreclosure, filing application for expedited foreclosure proceeding, or pursuing any other remedy will not constitute an election of remedies.

E.4. This lien will remain superior to liens later created even if the time of payment of all or part of the Home Equity Extension of Credit is extended or part of the Property is released.
E.5. If any portion of the Home Equity Extension of Credit cannot be lawfully secured by this deed of trust, payments will be applied first to discharge that portion to the extent permitted by law.

E.6. Grantor assigns to Lender all amounts payable to or received by Grantor from condemnation of all or part of the Property, from private sale in lieu of condemnation, and from damages caused by public works or construction on or near the Property. After deducting any expenses incurred, including attorney’s fees and court and other costs, Lender will either release any remaining amounts to Grantor or apply such amounts to reduce the Home Equity Extension of Credit. Lender will not be liable for failure to collect or to exercise diligence in collecting any such amounts. Grantor will immediately give Lender notice of any actual or threatened proceedings for condemnation of all or part of the Property.

E.7. Interest on the debt secured by this deed of trust will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. Loan charges, fees, or similar amounts other than interest will not exceed the maximum amount or rate that may be contracted for, taken, reserved, charged, or received under law. Any loan charges, fees, or similar amounts other than interest in excess of that maximum rate or amount will be credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Home Equity Extension of Credit.

E.8. In no event may this deed of trust secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.
E.9. Grantor waives all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest to the extent permitted by applicable law.

E.10. Grantor agrees to pay reasonable attorney’s fees, trustee’s fees, and court and other costs of enforcing Lender’s rights under this deed of trust if an attorney [include if the transaction is a secondary mortgage loan: who is not an employee of Lender] is retained for its enforcement.

E.11. If any provision of this deed of trust is determined to be invalid or unenforceable, the validity or enforceability of any other provision will not be affected.

E.12. The term Home Equity Extension of Credit includes all extensions and renewals of the Home Equity Extension of Credit and all amounts secured by this deed of trust.

E.13. This deed of trust binds, benefits, and may be enforced by the successors in interest of all parties.

E.14. If Grantor and Borrower are not the same person, the term Grantor includes Borrower.

E.15. Grantor represents to Lender that all of the Property is Grantor’s homestead.

E.16. The Home Equity Extension of Credit will conform strictly to the provisions of the Texas Constitution applicable to extensions of credit as defined by Tex. Const. art. XVI, § 50(a)(6). In no event will Grantor or Lender be obligated to perform any act or be bound by any requirement that would conflict therewith. If any term, obligation, privilege, or right of the Home Equity Extension of Credit, this deed of trust, any instrument to which Lender is subrogated hereunder, any instrument renewed or extended hereby, or any other document executed in connection with the Home Equity Extension of Credit fails to conform to Tex. Const. art. XVI, § 50(a)(6), or in the event Lender or any holder of the Home Equity Exten-
sion of Credit fails to comply with Tex. Const. art. XVI, § 50(a), then, to the extent provided by applicable law, such violation may be cured as set out in Tex. Const. art. XVI, § 50(a)(6).

[Name of grantor]

Include acknowledgment.
Form 11-4

Additional Clauses for Deeds of Trust (Home Equity Loan)

Refinance and Extension of Existing Texas Home Equity Deed of Trust

Clause 11-4-1

The Note secured by this Security Instrument is given to refinance and extend the amount left owing and unpaid by Grantor upon that one certain Promissory Note in the original principal amount of [amount] DOLLARS ($[amount]), which is dated [date], executed by [name], and payable to the order of [name], secured by a Texas Home Equity Security Instrument from [name] to [name], dated [date] and recorded in [recording data] of the real property records of [county] County, Texas against the Property. Lender is subrogated to all rights and remedies of the holder of the obligations. The lien is hereby refinanced, extended and continued in full force and effect to secure the payment of the Note secured by this Security Instrument. The lien is a lien described in section 50(a)(4), article 16, of the Texas Constitution.

Extension of Mechanic’s Lien Contract and Security for Cash Advanced

Clause 11-4-2

The Home Equity Extension of Credit renews and extends the balance of [amount] DOLLARS ($[amount]) that Grantor owes on a prior note in the original principal amount of [amount] DOLLARS ($[amount]), which is dated [date], executed by [name], and payable to the order of [name]. The prior note is secured by a mechanic’s lien contract creating a lien on the Property, dated [date] and recorded in [recording data] of the real property records of [county] County, Texas. [Include if applicable: The prior note and the lien securing it...
have been transferred to Lender.] The Home Equity Extension of Credit also
represents [amount] DOLLARS ($[amount]) in cash that Lender advanced to
Grantor on [date] at Grantor’s request. Grantor acknowledges that the lien
securing the prior note is valid, that it subsists against the Property, and that by
this deed of trust it is renewed and extended in full force until the Home Equity
Extension of Credit is paid.

To Pay Ad Valorem Taxes and Security for Cash Advanced

Clause 11-4-3

The Home Equity Extension of Credit represents [amount] DOLLARS
($[amount]) in cash that, at Grantor’s request, Lender advanced to pay the fol-
lowing taxes [include if applicable: ], including penalties, interest, and collec-
tion expenses] assessed and owed on the Property, which Grantor now owns:
[amount] DOLLARS ($[amount]) to [county] County in payment of taxes for
the years [specify]; and [amount] DOLLARS ($[amount]) to the city of [city] in payment of taxes for the years [specify]. The Home Equity Extension of
Credit also represents [amount] DOLLARS ($[amount]) in cash that Lender
advanced to Grantor on [date] at Grantor’s request.

To Pay Income Taxes and Security for Cash Advanced

Clause 11-4-4

The Home Equity Extension of Credit includes [amount] DOLLARS
($[amount]) that, at Grantor’s request, Lender advanced to the United States
Internal Revenue Service to discharge federal tax lien number [number], which
is recorded in [recording data] of the federal tax lien records of [county]
County, Texas. Grantor acknowledges this federal tax lien to be valid and sub-
sisting, and the same is renewed and extended by this deed of trust until the 
Home Equity Extension of Credit is fully paid. This Home Equity Extension of 
Credit also represents [amount] DOLLARS ($[amount]) in cash that Lender 
advanced to Grantor on [date] at Grantor’s request.

Tax and Insurance Reserve or Escrow Account

Clause 11-4-5

Grantor agrees to make an initial deposit in a reasonable amount to be 
determined by Lender and then make periodic payments to a fund for taxes and 
insurance premiums on the Property. Periodic payments will be made on the 
payment dates specified in the Home Equity Extension of Credit, and each 
payment will be in an amount that Lender estimates will be sufficient to pay 
taxes and insurance premiums. The fund will accrue no interest, and Lender 
will hold it without bond in escrow and use it to pay the taxes and insurance 
premiums. If Grantor has complied with the requirements of this paragraph, 
Lender must pay taxes before [the end of the calendar year/delinquency].

Grantor agrees to make additional deposits on demand if the fund is ever insuf-
ficient for its purpose. If an excess accumulates in the fund, Lender may either 
credit it to future periodic deposits until the excess is exhausted or refund it to 
Grantor. When Grantor makes the final payment on the Home Equity Extention of Credit, Lender will credit to that payment the whole amount then in the 
fund [include if applicable: or, at Lender’s option, refund it after the Home 
Equity Extension of Credit is paid]. If this deed of trust is foreclosed, any bal-
ance in the fund over that needed to pay taxes, including taxes accruing but not 
yet payable, and to pay insurance premiums will be paid under section D.,

“Trustee’s Rights and Duties.” [Include if applicable: If the Property is trans-
ferred, any balance then in the fund will still be subject to the provisions of this
paragraph and will inure to the benefit of the transferee.] Deposits to the fund described in this paragraph are in addition to the periodic payments provided for in the Home Equity Extension of Credit.

Assignment of Insurance Policies

Clause 11-4-6

If the Property is transferred by foreclosure, the transferee will acquire title to all insurance policies on the Property.

Evidence of Payment of Taxes

Clause 11-4-7

Grantee agrees to furnish on Lender’s request evidence satisfactory to Lender that all taxes and assessments on the Property have been paid when due.

Consumer Credit Insurance Notice

Clause 11-4-8

GRANTOR MAY FURNISH ANY INSURANCE REQUIRED BY THIS DEED OF TRUST EITHER THROUGH EXISTING POLICIES OWNED OR CONTROLLED BY GRANTOR OR THROUGH EQUIVALENT COVERAGE FROM ANY INSURANCE COMPANY AUTHORIZED TO TRANSACT BUSINESS IN TEXAS.
Due-on-Sale Clause

Clause 11-4-9

If Grantor transfers any part of the Property without Lender’s prior written consent, Lender may declare the debt secured by this deed of trust immediately payable and invoke any remedies provided in this deed of trust for default. If the Property is residential real property containing less than five dwelling units or a residential manufactured home occupied by Grantor, exceptions to this provision are limited to (a) a subordinate lien or encumbrance that does not transfer rights of occupancy of the Property; (b) creation of a purchase-money security interest for household appliances; (c) transfer by devise, descent, or operation of law on the death of a co-Grantor; (d) grant of a leasehold interest of three years or less without an option to purchase; (e) transfer to a spouse or children of Grantor or between co-Grantors; (f) transfer to a relative of Grantor on Grantor’s death; and (g) transfer to an inter vivos trust in which Grantor is or remains a beneficiary and occupant of the Property.

Subordinate Lien Clause

Clause 11-4-10

The lien created by this deed of trust is subordinate to the lien securing payment of a note, and any renewals, extensions, and modifications thereof, in the original principal amount of [amount] DOLLARS ($[amount]), which is dated [date], executed by [name], payable to the order of [name], and more fully described in a deed of trust recorded in [recording data] of the real property records of [county] County, Texas. If default occurs in payment of any part of principal or interest of that $[amount] note or in observance of any cov-
enants of the deed of trust securing it, the entire debt secured by this deed of trust will immediately become payable at the option of Lender.

Or

Clause 11-4-11

If Grantor fails to pay any part of principal or interest secured by a prior lien or liens on the Property when it becomes payable or defaults on any prior lien instrument, the entire debt secured by this deed of trust will immediately become payable at the option of Lender.
Form 11-5

Home Equity Compliance Certificate and Agreement

Basic Information

Date:

Borrower:

[Borrower’s Spouse:]  

Borrower’s Mailing Address:

[Borrower’s Spouse’s Mailing Address:]

Lender:

Lender’s Mailing Address:

Home Equity Extension of Credit (Promissory Note)

Date:

Original principal amount:

Maturity date:

Property (including any improvements):

Fair Market Value of the Property:
A. Agreement of Parties

A.1. Borrower and Lender acknowledge and agree on the Fair Market Value of the Property and have signed a written acknowledgment of the Fair Market Value of Property on the date the Home Equity Extension of Credit is made.

A.2. The Home Equity Extension of Credit is not secured by any additional real or personal property other than the Property. Any provision contained in any other agreement between the Parties or any third party that gives Lender a security interest in any personal or real property other than the Property will not apply to the Home Equity Extension of Credit.

B. Representation and Warranties of Borrower

Borrower represents and warrants the following:

B.1. The Fair Market Value of the Property is an accurate value estimate based on an appraisal or evaluation not disputed by Borrower.

B.2. The original principal amount of the Home Equity Extension of Credit, when added to the aggregate total of the outstanding principal balances of any other indebtedness secured by valid encumbrances of record against the Property, does not exceed 80 percent of the Fair Market Value of the Property.

B.3. Borrower has not been required to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the Home Equity Extension of Credit that exceed, in the aggregate, 2 percent of the original principal amount of the Home Equity Extension of Credit.

B.4. The lien securing the Home Equity Extension of Credit is a voluntary lien on the Property created with the consent of all owners and their spouses.
B.5. The Home Equity Extension of Credit is not secured by any additional property other than the collateral.

Select one of the following.

B.6. The Home Equity Extension of Credit is the only debt secured by the Property.

Or

B.6. The Home Equity Extension of Credit is the only loan made pursuant to section 50(a)(6) of article 16 of the Texas Constitution and the only debt secured by the Property except the debts and liens described in the following documents: [specify].

Continue with the following.

B.7. The closing of the Home Equity Extension of Credit did not occur before the twelfth day after the later of the date that Borrower submitted a loan application to Lender for the Home Equity Extension of Credit or the date that Lender provided Borrower a copy of a notice concerning the Home Equity Extension of Credit making all disclosures required by section 50(g), article XVI, of the Texas Constitution.

Select one of the following.

B.8. The closing of the Home Equity Extension of Credit did not occur before one business day after the date that Borrower received a copy of the loan application if not previously provided and a final itemized disclosure of the actual fees, points, interest, costs, and charges that were charged at closing.

Or

B.8. Borrower understands that under the Texas Constitution this home equity loan may not be closed before one business day after the date that Borrower receives a copy of the loan application if not previously provided and a final itemized disclosure of actual fees, points, interest, costs, and charges to be charged at the closing of the loan unless Borrower
consents in writing for this information to be originally given or modified on the date of closing because of the existence of a bona fide emergency or other good cause. Borrower acknowledges the existence of a bona fide emergency or other good cause being [specify nature of bona fide emergency or other good cause; see 7 Tex. Admin. Code § 153.13] and consents to Lender providing a final itemized disclosure of actual fees, points, interest, costs, and charges to be charged on the loan on the loan closing date.

B.9. The closing of the Home Equity Extension of Credit did not occur before the first anniversary of the closing date of any other home equity extension of credit made under section 50(a)(6), article XVI, of the Texas Constitution and secured by part or all of the Property.

Or

B.9. Borrower requests a closing of the Home Equity Extension of Credit before the first anniversary of the closing date of any other extension of credit made under section 50(a)(6), article XVI, of the Texas Constitution and secured by part or all of the property due to an emergency that has been declared by the President of the United States or the governor as provided by law and that applies to the area where the property is located.

Continue with the following.

B.10. The closing of the Home Equity Extension of Credit has taken place at the office of Lender, an attorney at law, or a title company.

Select one of the following.

B.11. Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt.

Or
B.11. Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt except debt to another lender.

Or

B.11. Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt except debt secured by the Property.

Or

B.11. Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt except debt to another lender and debt secured by the Property.

Continue with the following.

B.12. Borrower has not assigned wages as security for the Home Equity Extension of Credit or signed a confession of judgment or power of attorney to Lender or anyone to confess judgment or appear for Borrower in a judicial proceeding.

B.13. Borrower has not signed any instrument relating to the Home Equity Extension of Credit in which blanks relating to substantive terms of the agreement were left to be filled in.

B.14. Borrower has received, as of the time the Home Equity Extension of Credit was made, a copy of the loan application and all executed documents signed by Borrower at closing related to the Home Equity Extension of Credit.

B.15. All of the Property is the homestead of Borrower. No portion of the Property is nonhomestead.

Select one of the following.
B.16. The Home Equity Extension of Credit is not a form of open-end account that may be debited from time to time or under which credit may be extended from time to time.

Or

B.16. The Home Equity Extension of Credit is a home equity line of credit constituting an open-end account that may be debited from time to time and under which credit may be extended from time to time subject to the restrictions found at Tex. Const. art. XVI, § 50(t).

Continue with the following.

B.17. Borrower has been advised that Borrower may, within three days after the Home Equity Extension of Credit is made, rescind the Home Equity Extension of Credit without penalty or charge. [Include if applicable: Borrower’s Spouse has been advised that Borrower’s Spouse may, within three days after the Home Equity Extension of Credit is made, rescind the Home Equity Extension of Credit without penalty or charge.]

B.18. Borrower understands and agrees that Lender is relying on the truth and accuracy of each of the representations and warranties in this Certificate and Agreement. Borrower acknowledges that Lender would not make the Home Equity Extension of Credit if any of the representations and warranties were not true and accurate.

[Name of borrower]

SUBSCRIBED AND SWORN TO before me on ________________ by [name of affiant].

Notary Public, State of Texas

Include the following if applicable.

[Name of borrower’s spouse]
Home Equity Compliance Certificate and Agreement

SUBSCRIBED AND SWORN TO before me on ________________ by [name of affiant].

__________________________________________________________________________________________________________________________
__________________________________________________________________________________________________________________________
__________________________________________________________________________________________________________________________
__________________________________________________________________________________________________________________________

Notary Public, State of Texas

[Name of lender]

SUBSCRIBED AND SWORN TO before me on ________________ by [name of affiant].

__________________________________________________________________________________________________________________________
Notary Public, State of Texas
Form 11-6

Election Regarding Right of Rescission

Note: For married couples, a separate election regarding right of rescission should be given by each spouse.

Date:

Borrower:

[Borrower’s Spouse:]

Borrower’s Mailing Address:

[Borrower’s Spouse’s Mailing Address:]

Lender:

Lender’s Mailing Address:

Home Equity Extension of Credit

Date:

Original principal amount:

In accordance with Tex. Const. art. XVI, § 50(a)(6)(Q)(viii), [Borrower/Borrower’s Spouse] provides Lender with the following notice regarding the Home Equity Extension of Credit:

☐ I have elected not to rescind the Home Equity Extension of Credit. I acknowledge that more than three days have expired from the date that the Home Equity Extension of Credit was made.
☐ I have elected to rescind the Home Equity Extension of Credit. This notice is given within three days from the date that the Home Equity Extension of Credit was made.

[Name of [borrower/borrower’s spouse]]
Form 11-7

Important Notice to Borrowers Related to Reverse Mortgage

This form provides the notice required by Tex. Const. art. XVI, § 50(k)(9), as amended November 5, 2013.

IMPORTANT NOTICE TO BORROWERS RELATED TO YOUR REVERSE MORTGAGE

UNDER THE TEXAS TAX CODE, CERTAIN ELDERLY PERSONS MAY DEFER THE COLLECTION OF PROPERTY TAXES ON THEIR RESIDENCE HOMESTEAD. BY RECEIVING THIS REVERSE MORTGAGE YOU MAY BE REQUIRED TO FORGO ANY PREVIOUSLY APPROVED DEFERRAL OF PROPERTY TAX COLLECTION AND YOU MAY BE REQUIRED TO PAY PROPERTY TAXES ON AN ANNUAL BASIS ON THIS PROPERTY.

THE LENDER MAY FORECLOSE THE REVERSE MORTGAGE AND YOU MAY LOSE YOUR HOME IF:

(A) YOU DO NOT PAY THE TAXES OR OTHER ASSESSMENTS ON THE HOME EVEN IF YOU ARE ELIGIBLE TO DEFER PAYMENT OF PROPERTY TAXES;

(B) YOU DO NOT MAINTAIN AND PAY FOR PROPERTY INSURANCE ON THE HOME AS REQUIRED BY THE LOAN DOCUMENTS;

(C) YOU FAIL TO MAINTAIN THE HOME IN A STATE OF GOOD CONDITION AND REPAIR;

(D) YOU CEASE OCCUPYING THE HOME FOR A PERIOD LONGER THAN 12 CONSECUTIVE MONTHS WITHOUT THE PRIOR WRITTEN APPROVAL FROM THE LENDER OR, IF THE EXTENSION OF CREDIT IS USED FOR THE PURCHASE OF THE HOME, YOU FAIL TO TIMELY OCCUPY THE HOME AS YOUR PRINCIPAL RESIDENCE WITHIN A PERIOD OF TIME AFTER THE EXTENSION OF CREDIT IS MADE THAT IS STIPULATED IN THE WRITTEN AGREEMENT CREATING THE LIEN ON THE HOME;

(E) YOU SELL THE HOME OR OTHERWISE TRANSFER THE HOME WITHOUT PAYING OFF THE LOAN;

(F) ALL BORROWERS HAVE DIED AND THE LOAN IS NOT REPAID;

(G) YOU COMMIT ACTUAL FRAUD IN CONNECTION WITH THE LOAN; OR

(H) YOU FAIL TO MAINTAIN THE PRIORITY OF THE LENDER’S LIEN ON THE HOME, AFTER THE LENDER GIVES NOTICE TO YOU, BY PROMPTLY DISCHARGING ANY LIEN THAT HAS PRIORITY OR MAY OBTAIN PRIORITY OVER THE LENDER'S LIEN WITHIN 10 DAYS AFTER THE DATE YOU RECEIVE THE NOTICE, UNLESS YOU:
(1) AGREE IN WRITING TO THE PAYMENT OF THE OBLIGATION SECURED BY THE LIEN IN A MANNER ACCEPTABLE TO THE LENDER;

(2) CONTEST IN GOOD FAITH THE LIEN BY, OR DEFEND AGAINST ENFORCEMENT OF THE LIEN IN, LEGAL PROCEEDINGS SO AS TO PREVENT THE ENFORCEMENT OF THE LIEN OR FORFEITURE OF ANY PART OF THE HOME; OR

(3) SECURE FROM THE HOLDER OF THE LIEN AN AGREEMENT SATISFACTORY TO THE LENDER SUBORDINATING THE LIEN TO ALL AMOUNTS SECURED BY THE LENDER’S LIEN ON THE HOME.

IF A GROUND FOR FORECLOSURE EXISTS, THE LENDER MAY NOT COMMENCE FORECLOSURE UNTIL THE LENDER GIVES YOU WRITTEN NOTICE BY MAIL THAT A GROUND FOR FORECLOSURE EXISTS AND GIVES YOU AN OPPORTUNITY TO REMEDY THE CONDITION CREATING THE GROUND FOR FORECLOSURE OR TO PAY THE REVERSE MORTGAGE DEBT WITHIN THE TIME PERMITTED BY SECTION 50(k)(10), ARTICLE XVI, OF THE TEXAS CONSTITUTION. THE LENDER MUST OBTAIN A COURT ORDER FOR FORECLOSURE EXCEPT THAT A COURT ORDER IS NOT REQUIRED IF THE FORECLOSURE OCCURS BECAUSE:

(1) ALL BORROWERS HAVE DIED; OR

(2) THE HOMESTEAD PROPERTY SECURING THE LOAN IS SOLD OR OTHERWISE TRANSFERRED.

YOU SHOULD CONSULT WITH YOUR HOME COUNSELOR OR AN ATTORNEY IF YOU HAVE ANY CONCERNS ABOUT THESE OBLIGATIONS BEFORE YOU CLOSE YOUR REVERSE MORTGAGE LOAN. TO LOCATE AN ATTORNEY IN YOUR AREA, YOU MAY WISH TO CONTACT THE STATE BAR OF TEXAS.

THIS NOTICE IS ONLY A SUMMARY OF YOUR RIGHTS UNDER THE TEXAS CONSTITUTION. YOUR RIGHTS ARE GOVERNED IN PART BY SECTION 50, ARTICLE XVI, OF THE TEXAS CONSTITUTION, AND NOT BY THIS NOTICE.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of borrower]

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of lender/originator]
Notice Concerning Refinance of Existing Home Equity Loan to Non–Home Equity Loan under Section 50(f)(2), Article XVI, Texas Constitution

Your existing loan that you desire to refinance is a home equity loan. You may have the option to refinance your home equity loan as either a home equity loan or as a non–home equity loan, if offered by your lender.

Home equity loans have important consumer protections. A lender may only foreclose a home equity loan based on a court order. A home equity loan must be without recourse for personal liability against you and your spouse.

If you have applied to refinance your existing home equity loan as a non–home equity loan, you will lose certain consumer protections. A non–home equity refinanced loan:

(1) will permit the lender to foreclose without a court order;

(2) will be with recourse for personal liability against you and your spouse; and

(3) may also contain other terms or conditions that may not be permitted in a traditional home equity loan.

Before you refinance your existing home equity loan to make it a non–home equity loan, you should make sure you understand that you are waiving important protections that home equity loans provide under the law and should consider consulting with an attorney of your choosing regarding these protections.
YOU MAY WISH TO ASK YOUR LENDER TO REFINANCE YOUR LOAN AS A HOME EQUITY LOAN. HOWEVER, A HOME EQUITY LOAN MAY HAVE A HIGHER INTEREST RATE AND CLOSING COSTS THAN A NON–HOME EQUITY LOAN.
Form 11-9

Affidavit of Compliance (Pursuant to Section 50(f)(2), Article XVI, Texas Constitution)

Date:

Affiant[s]: [name of owner] [include if applicable:, [name of owner’s spouse]]

Lender:

Home Equity Loan: [include recording information]

Property:

Affiant[s] on oath swear[s] that the following statements are true and within the personal knowledge of Affiant[s]:

1. I am a borrower named in the Note or the owner or spouse of any owner of the Property described in the Deed of Trust (which term includes any riders thereto), both dated [date], evidencing and securing a debt payable to the Lender and providing for a lien pursuant to section 50(a)(4), article XVI, of the Texas Constitution upon and against the Property (the “Loan”).

2. The Loan is secured by homestead property as defined under applicable Texas law.

3. All of the following conditions are met in connection with the Loan:

   a. The Property is not the subject of a Home Equity Loan that was closed within one year prior to the date of this Affidavit.

   b. The Loan does not include the advance of any additional funds, other than:
i. funds advanced to refinance a valid debt described by sections 50(a)(1) through (a)(7), article XVI, of the Texas Constitution; or

ii. actual costs and reserves required Lender to refinance the debt.

4. The principal amount of the Loan when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the Property does not exceed 80 percent of the fair market value of the Property on the date the Loan is made.

5. Lender provided me with the written notice required by section 50(f)(2)(D), article XVI, of the Texas Constitution not later than the third business day after the date I submitted my loan application to Lender and at least twelve days before the date the Loan is closed.

[Name of owner]

SUBSCRIBED AND SWORN TO before me on __________________ by [name of affiant].

Notary Public, State of Texas

Include the following if applicable.

[Name of owner's spouse]

SUBSCRIBED AND SWORN TO before me on __________________ by [name of affiant].

Notary Public, State of Texas

Include the following if applicable.
Affidavit of Compliance

[Name of nonborrowing owner]

SUBSCRIBED AND SWORN TO before me on _________________ by [name of affiant].

__________________________
Notary Public, State of Texas

Include the following if applicable.

[Name of nonborrowing owner’s spouse]

SUBSCRIBED AND SWORN TO before me on _________________ by [name of affiant].

__________________________
Notary Public, State of Texas
Chapter 12
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Chapter 12

Federal Consumer Disclosure Documents

Note: The Consumer Financial Protection Bureau (CFPB) was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") (Pub. L. No. 111-203, 124 Stat. 1376) in 2010 to administer and enforce federal consumer finance law. All rulemaking and enforcement authority for the Real Estate Settlement Procedures Act (RESPA and Regulation X), the Truth in Lending Act and Regulation Z, the Equal Credit Opportunity Act and Regulation B, the Home Mortgage Disclosure Act and Regulation C, and other federal statutes regulating consumer finance was transferred to, and consolidated within, the CFPB as of July 21, 2011. The CFPB is required to adopt new mortgage finance regulations to implement and interpret the extensive reform measures of the Dodd-Frank Act. The CFPB adopted final rules integrating the RESPA and Truth in Lending Act consumer disclosures on November 20, 2013. 78 Fed. Reg. 79,730 (Dec. 31, 2013). The rules may be found at https://www.federalregister.gov/d/2013-28210 (Final Rule). These rules became effective October 3, 2015. 80 Fed. Reg. 43,911 (July 24, 2015). Any references in this chapter made to the Final Rule incorporates any amendments thereto.

The CFPB has implemented these Title XIV consumer disclosures as part of rulemaking in which mortgage disclosure forms that consumers receive under the Truth in Lending Act and RESPA when applying for and closing on a home mortgage loan are integrated into a single set of disclosures as required by Title X of the Dodd-Frank Act. By delaying the implementation of the Title XIV disclosure rules to coincide with the integrated RESPA and Truth in Lending Act disclosure rules, the CFPB hoped to reduce the consumer confusion and compliance burden on the industry caused by a trickling down of multiple new rule releases.


I. Truth-in-Lending Disclosure Documents

§ 12.1 Overview of the Truth in Lending Act and Regulation Z

§ 12.1:1 Source of Authority

The federal Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, requires a creditor extending consumer credit, including mortgage credit secured by a dwelling, to make meaningful disclosures of actual credit terms that enable the consumer to more readily compare those terms with the terms of competitors and make an informed decision regarding the use and costs of credit. The Act is implemented by Regulation Z (12 C.F.R. pt. 1026), which is an official interpretive rule adopted and published by the CFPB, and the official staff interpretations of Regulation Z (12 C.F.R. pt. 1026, supp. I), which the CFPB staff updates and publishes annually. Reliance on and good-faith compliance with Regulation Z and the official staff interpretations afford creditors protection from civil liability and administrative penalties for failure to comply with disclosure and other requirements imposed on creditors under the Act. See 15 U.S.C. § 1640(f). Closed-end credit, including traditional mortgage loans, is regulated under subpart C of Regulation Z, 12 C.F.R. §§ 1026.17–.24.
§ 12.1:2 Coverage

Generally, the Act covers any credit transaction in which a creditor offers or extends a consumer credit at or below a threshold amount adjusted on January 1 each year that is primarily for personal, family, or household purposes and for which a finance charge is made in connection with the credit or, by written agreement, the credit is to be repaid in more than four installments. 12 C.F.R. § 1026.3(b). The threshold amount in 2015 was $54,600 and will adjust in tandem with the annual percentage increase in the Consumer Price Index in effect on June 1 of the preceding year. See Official Interpretation to 12 C.F.R. § 1026.3(b), Comment 3(b)-1. As discussed below, the Act also covers most consumer credit transactions secured by real property (or by personal property, such as a mobile home, used or intended to be used as the borrower’s principal dwelling) regardless of the loan amount. For the Act to apply in any case, the creditor must be a person (including a natural person or a corporate or other business organization) who regularly extends credit of this type, which generally means that the person has extended credit more than twenty-five times in the preceding calendar year or more than five times for transactions secured by a dwelling during the preceding or current calendar year, and the consumer must be a natural person. See 15 U.S.C. § 1603.

For the purposes of providing disclosures under the TILA-RESPA Integrated Disclosures Rule (TRID), the rule applies to most closed-end consumer credit transactions secured by real property but does not apply to home equity lines of credit, reverse mortgages, or chattel-dwelling loans such as mobile homes or other dwellings that are not attached to real property. 12 C.F.R. § 1026.19. Loans made by a person or entity not considered to be a creditor are not covered by the rule. 12 C.F.R. § 1026.2(a)(17). Certain transactions, such as down payment assistance loans, have a partial exemption. 12 C.F.R. § 1026.3(h). Construction-only loans and loans secured by vacant land or by twenty-five or more acres are not subject to RESPA but are still subject to the disclosure requirements of TRID. See 12 C.F.R. §§ 1024.5, 1026.19. Credit extended to land trusts or trusts for tax or estate planning purposes is also covered. Official Interpretation to 12 C.F.R. § 1026.3(a), Comment 3(a)-10.

§ 12.1:3 Required Consumer Disclosures

Written disclosures must be made for each credit transaction subject to the Act before consummation; must reflect the terms of the actual legal obligation between the parties; and must show the calculated annual percentage rate (APR), finance charge, amount financed, payment schedule, and total of payments and other material disclosures of the cost of credit within permitted tolerances for accuracy. Creditors must disclose information germane to a loan transaction, including the loan details, payment schedule, loan fees, cash to close, service providers, escrows, and relevant state law provisions. All of this information must be provided in a dynamic format, such that the form changes with changes in the loan data and contains only provisions that reflect the terms of the loan transaction. Creditors are further required to ensure that the disclosures are clearly and conspicuously in writing in a form that the consumer can keep. See Final Rule, 78 Fed. Reg. 79,730 (Dec. 31, 2013); see generally 12 C.F.R. §§ 1026.17, 1026.18, pt. 1026, app. H.

Under the final rule, the new initial disclosure is referred to as the loan estimate (LE) (which combines the good-faith estimate and initial truth-in-lending (TIL) disclosure statement); the new final disclosure is referred to as the closing disclosure (CD) (which combines the HUD-1 settlement statement and the final TIL disclosure statement). See Final Rule, 78 Fed. Reg. 79,730 (Dec. 31, 2013). For loan transactions not subject to the new disclosure requirements, the initial and final TIL disclosure statements, good-faith estimate, and HUD-1, as applicable, are still used. See Final Rule, 78 Fed. Reg. 79,730 (Dec. 31, 2013). The following consumer disclosures, as applicable, are required under the Act and Regulation Z.
**Early Disclosures:** Creditors must make early disclosures to the consumer within three business days after loan application and at least seven business days before loan closing. See 12 C.F.R. § 1026.19(e)(1)(iii). The disclosures must be made before the consumer pays any fee other than a bona fide and reasonable fee for obtaining credit history. See 12 C.F.R. § 1026.19(e)(2)(i)(B).

**Correction Disclosures:** Creditors are permitted to provide a revised LE only if there is a “changed circumstance” defined as (1) an extraordinary event beyond the control of any interested party or other unexpected event specific to the consumer or transaction; (2) information specific to the consumer or transaction that the creditor relied on when providing the disclosures that was inaccurate or changed after the disclosures were provided; or (3) new information specific to the consumer or transaction that the creditor did not rely on when providing the original disclosures. 12 C.F.R. § 1026.19(e)(3)(iv)(A). Revised CDs must be received no later than three days before loan consummation if the disclosed APR becomes inaccurate, the loan product changes, or a prepayment penalty is added; for any other changes, the creditor must ensure receipt of the revised CD at or before loan consummation. 12 C.F.R. § 1026.19(f)(2)(i). If a subsequent event causes the disclosure of the APR to be inaccurate outside of permitted tolerances, the creditor must make a correction disclosure of the APR and all other changed terms at least three business days before loan consummation. See 12 C.F.R. § 1026.19(a)(2)(ii).

**Final Disclosures:** Creditors must ensure that the borrower receives a final CD no later than three business days before loan consummation. See 12 C.F.R. § 1026.19(f).

**Notice of Right of Rescission:** If a security interest is or will be retained or acquired in the consumer’s principal dwelling in connection with a mortgage loan, the Act provides the consumer a right to rescind the loan transaction within three business days. The consumer may exercise the right to rescind until midnight of the third business day after loan consummation, delivery of notice of right of rescission, or delivery of the material disclosures, whichever occurs last. Certain loan transactions, including a loan to finance the purchase or initial construction of the consumer’s principal dwelling, are exempt from the right of rescission. See 12 C.F.R. § 1026.23(f). Certain required disclosures, such as the amount of the finance charge, the amount financed, and the APR, are regarded as material disclosures and must be provided to the consumer before the prescribed three-business-day rescission period begins to run. The failure to timely provide these material disclosures within prescribed tolerances for accuracy not only subjects the creditor to substantial liability under the Act for administrative penalties and costs, restitution, and civil damages but may also have the legal effect of extending the rescission period for up to three years after loan closing. See 12 C.F.R. § 1026.23(a)(3). The content and model form of the required rescission notice is set out in 12 C.F.R. § 1026.23(b)(1), (2) and appendix H to Regulation Z.

**Variable-Rate Loan Disclosures:** Special disclosure requirements apply to variable-rate transactions secured by a principal dwelling under 12 C.F.R. § 1026.19(b), requiring (1) delivery to the consumer at the time of loan application of detailed written adjustable-rate mortgage loan program disclosures and a preprinted disclosure booklet titled Consumer Handbook on Adjustable Rate Mortgages, published by the CFPB, and (2) a loan program disclosure for each variable-rate program for which the consumer expresses an interest, with periodic written disclosures of adjustments made to the interest rate in a variable-rate transaction subject to section 1026.19(b). See 12 C.F.R. § 1026.20(c). Home equity lines of credit and other open-end credit secured by residential dwellings require written disclosures and are subject to substantive rules under subpart B, 12 C.F.R. §§ 1026.5–.13.

**Loan Assumption Disclosures:** A creditor must provide a consumer new written disclosures when the consumer assumes an existing residential mortgage obligation with the written consent of the creditor and the creditor agrees to accept that consumer as the principal obligor. See 12 C.F.R. § 1026.20(b).
Mortgage Loan Sale Disclosure: Creditors that purchase or accept the sale and assignment of a whole loan secured by a consumer’s principal dwelling on or after May 29, 2009, must provide the borrower obligated under the loan a written notice within thirty days after the sale or assignment containing information identifying the new creditor, the date of transfer of the loan, the location where the transfer of the loan is recorded, and other relevant information about the creditor. See section 404a of the Helping Families Save Their Homes Act of 2009 (Pub. L. No. 111-22), codified at 15 U.S.C. § 1641(g), amending section 131 of the Truth in Lending Act (15 U.S.C. §§ 1601–1667f), and Final Rule, Federal Reserve Board of Governors, published September 24, 2010, at 75 Fed. Reg. 58,489. See also 12 C.F.R. § 1026.39.

HOEPA and Higher-Priced Loan Disclosures: Special rules regarding high-rate, high-cost loans (generally referred to as “Section 32,” or Home Ownership and Equity Protection Act (HOEPA) loans) are set out under subpart E, 12 C.F.R. §§ 1026.31, 1026.32, 1026.34. Creditors making HOEPA loans must furnish consumers a written disclosure meeting the requirements of section 1026.32(c) at least three business days before loan consummation and abide by certain substantive terms of that section. Special rules effective October 1, 2009, regarding a new category of higher-priced mortgage loans (HPMLs) are also set out in 12 C.F.R. § 1026.35. The Home Ownership and Equity Protection Act is codified at 15 U.S.C. § 1639.

Reverse Mortgage Loan Disclosures: Creditors making reverse mortgage loans subject to 12 C.F.R. § 1026.33(a) must provide consumers an additional written disclosure of the “total annual loan cost of credit” (generally referred to as the “TALC” disclosure) in content set out in 12 C.F.R. § 1026.33(b) and substantially in the model form found in paragraph (d) of appendix K to 12 C.F.R. pt. 1026.


Regulation Z contains various substantive provisions intended to protect consumers from certain unfair, deceptive, and abusive practices of originators and servicers of home mortgage loans. See 73 Fed. Reg. 44,522 (July 30, 2008).

Prohibited Deceptive Advertising: Advertising rules targeting deceptive and misleading practices apply to all consumer credit transactions secured by dwellings. Advertisements occurring on or after October 1, 2009, that promote mortgage credit secured by a dwelling are regulated by extensive new advertising rules set out in amendments to 12 C.F.R. §§ 1026.16, 1026.24 (open- and closed-end credits, respectively). The rules are intended to ensure that advertisements for credit clearly and conspicuously provide accurate and balanced information about rates, monthly payments, and other loan features and that several deceptive and misleading advertising practices are banned. The advertising regulations apply to any advertisement (including promotional materials accompanying applications) in any medium promoting a credit transaction secured by a dwelling (except radio and television advertisements, to which new alternative regulations apply).

Unfair or deceptive acts and practices in home mortgage advertising are also regulated by a final rule of the Federal Trade Commission (FTC) for business entities under its regulatory jurisdiction, including “nondepository covered persons” such as independent mortgage bankers and brokers. See 76 Fed. Reg. 43,826 (July 22, 2011); 16 C.F.R. pt. 321. The regulations prohibit any misrepresentation in any commercial communication regarding any term or feature of any mortgage credit product and impose certain recordkeeping requirements. Rulemaking authority of the FTC was transferred to the CFPB on July 21, 2011, pursuant to Title X of the Dodd-Frank Act, but the FTC, the CFPB, and any state’s attorney general or other authorized state officer have statutory authority to bring enforcement actions and seek civil penalties under these deceptive advertising regulations.
Prohibited Coercion of Appraisers: Creditors, mortgage brokers, and their affiliates are prohibited from coercing, influencing, or otherwise encouraging an appraiser to misstate or misrepresent the value of a consumer’s principal dwelling securing a covered loan. Any creditor who knows at or before a loan closing of a violation of these anticoercion regulations is prohibited from extending credit based on such an appraisal unless the creditor documents that it has acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the value of the appraised property. See 12 C.F.R. § 1026.42.

Prohibited Servicing Practices: Mortgage servicers of loans secured by principal dwellings are prohibited from (1) failing to timely credit payments as of the date of receipt, with certain exceptions, (2) imposing a late charge on a consumer in connection with the receipt of a payment when the only delinquency is attributable to a late fee or delinquency charge assessed on an earlier payment (and the current payment is otherwise a full payment made on or before its due date or within an applicable grace period), and (3) failing to provide an accurate payoff statement within a reasonable time after receiving a request for it by a consumer (or a person acting on behalf of a consumer). See 12 C.F.R. § 1026.36(c).

Prohibited Steering and Certain Loan Originator Compensation Practices: Effective for closed-end loans secured by a dwelling for which creditors receive the application on or after April 1, 2011, amendments to 12 C.F.R. § 1026.36 prohibit three certain loan originator compensation practices:

1. Compensation Based on Loan Terms. Mortgage brokers and other loan originators are prohibited from charging or receiving compensation based on any terms and conditions of the loan transaction other than the loan amount. This has the effect of prohibiting creditors from paying so-called yield-spread premiums to mortgage brokers (that is, compensation based on spreads in the interest rate) although paying a fee based on a fixed percentage of the loan amount is authorized. “Compensation,” for purposes of the rule, means all amounts paid to and retained by the mortgage broker or other loan originator from salaries, commissions, annual or periodic bonuses, incentive compensation, or awards of merchandise, services, trips, or similar prizes but does not include fees charged to the consumer that are passed through by the loan originator to third-party providers to pay for services such as a property appraisal and a consumer credit report.

2. Receiving Compensation from Both the Creditor and Consumer. Mortgage brokers and other loan originators are prohibited from directly receiving compensation from both the creditor, or any other person, and the consumer in the same loan transaction. That is to say, if any loan originator receives compensation directly from a consumer in a loan transaction, neither the creditor nor any other person may provide any compensation to the loan originator, directly or indirectly, in connection with that same loan transaction.

3. Steering Consumer to Loan Not in Consumer’s Interest for Greater Compensation. Mortgage brokers and other loan originators are prohibited from steering consumers to consummate a loan not in the consumer’s interest in order to receive greater compensation from the creditor for the loan than for other loan transactions that the loan originator offered or could have offered the consumer and for which the consumer likely could have qualified. “Steering” for this purpose means advising, counseling, or otherwise influencing a consumer to accept and actually consummate a particular loan transaction. “Safe harbor” procedures are set out in the C.F.R. that may be relied on to assure compliance under which the consumer must be presented with various loan options from a significant number of creditors to choose from.

The new rule applies to all loan originators, including mortgage brokers and loan officers employed by mortgage brokers, mortgage bankers, and financial institutions that, for compensation, arrange, negotiate, or otherwise obtain a consumer loan.
for another person. Managers, administrative staff, and other employees of such loan originators who do not engage in these activities (and whose compensation is not based on where any particular loan is originated) are not considered loan originators. The rule also applies to creditors who close transactions that are table funded (that is, closings in which the creditor named as payee on the promissory note does not actually fund the loan from its own resources or a bona fide warehouse line of credit for which it is obligated, but instead obtains funding by another party who is immediately assigned the loan). See Final Rule of the CFPB, published September 24, 2010, in the Federal Register at 75 Fed. Reg. 58,509–58,538, implementing 12 C.F.R. § 1026.36(d), (e).

Prohibited Practices Applicable to HOEPA and HPML Loans: Certain consumer protections apply only to so-called high-rate, high-cost loans ("Section 32" or HOEPA loans), which bear interest rates or fees above a certain percentage or amount described in 12 C.F.R. § 1026.32 and a new category of HPMLs, which bear interest rates above standards described in 12 C.F.R. § 1026.35.

1. Prohibited Lending without Regard to Repayment Ability. Creditors are prohibited from extending credit for HOEPA loans or HPMLs to any consumer based on the value of the consumer’s collateral without regard to the consumer’s ability as of the date of consummation to repay the loan from sources other than the collateral itself. Creditors are required to verify each borrower’s income and assets relied on in underwriting the loan and are prohibited from relying on stated amounts of income, including expected income, or assets unless the creditor verifies such amounts according to standards set out in the rules. See 12 C.F.R. §§ 1026.34(a)(4), 1026.35.

2. Restrictions on Prepayment Penalties. HOEPA loans and HPMLs may provide for a prepayment penalty only if (1) the penalty is otherwise permitted by state or other applicable law; (2) the source of prepayment funds is not a refinancing by the same creditor or its affiliate; (3) the prepayment penalty will not apply after the two-year period following loan consummation; and (4) the amount of the periodic payment of principal, interest, or both does not change during the four-year period following loan consummation. HOEPA loans have one additional condition not applicable to HPMLs: the consumer’s total monthly debt payments (including amounts owed under the mortgage loan) may not exceed 50 percent of the consumer’s gross monthly income as of the date of loan consummation and as verified under the standards set out in the regulations. See 12 C.F.R. §§ 1026.32(d)(6), 1026.35.

3. Mandatory Escrow Accounts. Before consummating a first-lien HPML, the creditor must establish, and thereafter maintain, an escrow account to collect reserves from the consumer for the payment of property taxes and premiums for mortgage-related insurance required by the creditor. The creditor or loan servicer may permit a consumer to cancel the mandatory escrow account if the consumer requests cancellation in a dated written request received by the creditor no earlier than 365 days after loan consummation. Mandatory escrow account regulations apply to covered loans for which applications are received on or after April 1, 2010, or, if such loans are secured by manufactured housing, October 1, 2010. See 12 C.F.R. § 1026.35(b).

§ 12.2 General Considerations

This chapter discusses four of the forms designed to comply with the consumer disclosure requirements applicable to closed-end credit under the Truth in Lending Act and Regulation Z. The following forms are the model forms in appendix H of Regulation Z:

• closing disclosure (fixed-rate loan) (from app. H-25(B)) (available at http://files.consumerfinance.gov/f/201403_cfpb_closing-disclosure_cover-H25B.pdf);
• truth-in-lending (sale) disclosure statement (from app. H-1);
• truth-in-lending (loan) disclosure statement (from app. H-2);
• notice of right of rescission (general) (from app. H, clause H-8) (form 12-1 in this chapter); and
• notice of right of rescission (refinancing) (from app. H, clause H-9) (form 12-2).

The forms may require modification to comply with federal and state consumer laws.

Regulation Z, a complex set of rules, mandates making certain disclosures at specified times to any person who obtains consumer credit from a creditor. “Consumer credit” means credit offered or extended to a consumer primarily for personal, family, or household purposes. A “creditor” is the person to whom a consumer credit obligation is initially payable. A creditor must give the consumer (the borrower) truth-in-lending disclosures in a consumer credit transaction if the creditor regularly extends consumer credit that is subject to a finance charge or that is payable by written agreement in more than four installments, not including a down payment, and to whom the obligation is initially payable. A person “regularly extends consumer credit” only if credit is extended in the current or preceding calendar year more than twenty-five times for general transactions or more than five times for transactions secured by dwellings. 12 C.F.R. § 1026.2. A credit transaction, other than one secured by real property or personal property used as the principal dwelling of the consumer, is exempt from Regulation Z if the total amount financed in the transaction exceeds the threshold amount. 12 C.F.R. § 1026.3(b).

By these definitions, most entities providing credit for home equity financing transactions or for building or improving homes are subject to the requirements of Regulation Z. Chapter 20 in this manual describes transactions involving mechanic’s liens and suggests which of those transactions require use of these forms.

For a description of home equity financing transactions, see chapter 11.

§ 12.2:1 Disclosure Statements

General requirements for the disclosure statements applicable to closed-end credit are set forth in 12 C.F.R. §§ 1026.17, 1026.18. Among other requirements, the disclosures must be made “clearly and conspicuously in writing, in a form that the consumer may keep.” They must be segregated from other information, and they “shall not contain any information not directly related to the disclosures required under § 1026.18 or § 1026.47.” 12 C.F.R. § 1026.17(a). These disclosures may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act). 15 U.S.C. §§ 7001–7031.

If the creditor is the seller, the (sale) disclosure is used.

Generally, disclosures must be made before the transaction is consummated, but certain transactions involving residential mortgages, mail or telephone orders, or a series of sales have different timing requirements. 12 C.F.R. § 1026.17(b). Disclosures for most residential mortgage transactions, for example, must be given at the time of loan application or delivered or placed in the mail not later than three business days after the creditor receives the consumer’s written loan application. Redis- closure may be required before loan consummation if there is a changed circumstance, if the disclosed annual percentage rate terms change before loan settlement, or if a subsequent event makes disclosed terms inaccurate. 12 C.F.R. §§ 1026.17(f), 1026.19(a).
The two notices of right of rescission, forms 12-1 and 12-2 in this chapter, differ only to the extent that one applies to original financing and the other to refinancing. A refinancing involves the satisfaction of one financing transaction with a new financing transaction by the same lender and borrower. 12 C.F.R. § 1026.20(a). In either case the notice provides a cooling-off period of three business days after a person obtains credit involving a lien against the person’s principal dwelling. During this period the homeowner may rescind the transaction.

Regulations governing the right to rescind appear at 12 C.F.R. § 1026.23, and forms 12-1 and 12-2 are drafted in accordance with that section.

Creditors subject to truth-in-lending requirements should provide the appropriate notice of right of rescission, form 12-1 or 12-2, if a transaction creates a lien or other security interest in a consumer’s principal dwelling, except when the transaction finances the acquisition or initial construction of the dwelling. 12 C.F.R. § 1026.23. Typical transactions requiring this form are a refinancing of a residential mortgage transaction by a new creditor, a home equity extension of credit, and a home improvement loan secured by a mechanic’s lien. A consumer’s principal dwelling may be an ordinary residence, a condominium, a cooperative unit, a mobile home, or a trailer. A person may have only one principal dwelling, and it may or may not be attached to real property. See 12 C.F.R. § 1026.2(a)(19).

All persons who have ownership interests in the dwelling used as security and who use it as their principal dwelling may be entitled to rescind the transaction. 12 C.F.R. § 1026.23(a).

Transactions exempt from the right of rescission and this notice requirement are described in 12 C.F.R. § 1026.23(f). A refinancing by the same creditor of an extension of credit already secured by the consumer’s principal dwelling is subject to the right of rescission only to the extent that the new loan amount exceeds the sum of the unpaid principal balance and accrued finance charges of the existing extension of credit and closing costs related to the refinancing transaction. Certain other transactions are also exempt from the right of rescission, including a residential mortgage transaction to finance the acquisition or initial construction of a principal residence. 12 C.F.R. § 1026.23(f).

Regulation Z requires strict compliance, and even minor errors or omissions in drafting truth-in-lending documents may lead to administrative enforcement actions, statutory penalties, and individual and class actions for civil liability against creditors. See 15 U.S.C. § 1640. Accordingly, attorneys should consult Regulation Z itself, especially the sections addressing these forms (12 C.F.R. §§ 1026.17–.24), for aid in drafting the documents. Section 1026.18 establishes contents for the disclosure statements, and section 1026.23 governs the right of rescission. Regulation Z is published in title 12 of the Code of Federal Regulations, part 1026.

The official commentary to Regulation Z offers additional useful information; commentaries are issued periodically by officials in the CFPB, and they are published in several places. One generally accessible source for these interpretations is CCH Incorporated’s Consumer Credit Guide, which may be ordered online at http://business.cch.com/creditRegulation. Another source is available online at https://www.fdic.gov/regulations/laws/rules/6500-100.html.
§ 12.3 Cautions

The disclosure statements must be completed in compliance with 12 C.F.R. § 1026.18. That section provides, among many other requirements, that if the consumer wishes to have an itemization of the amount financed, the itemization must be given in a separate writing.

For the notices of right of rescission, the creditor should observe certain cautions during the three-business-day cooling-off period: other than money in escrow, no funds should be disbursed; no improvements to the property should be made; no service related to the transaction should be provided to the consumer; and no goods or materials for construction should be delivered to the property. If the consumer rescinds the transaction, within twenty calendar days the creditor must return any money or property received from the consumer. 12 C.F.R. § 1026.23(d).

Any disclosure statements required at consummation, including notices of the right of rescission, and other documents related to the transaction should be signed or delivered to the consumer at loan settlement. The creditor must provide each consumer entitled to rescind two copies of the notice of the right to rescind. A consumer may exercise the right to rescind until midnight of the third business day following the last to occur of loan consummation, delivery of the material disclosures, or delivery of the notices of the right of rescission. A consumer may rescind by written notice to the creditor, which is effective when mailed, sent by other means, or delivered to the creditor. The creditor must delay disbursing funds and otherwise performing under the extension of credit until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded. Failure of the creditor to deliver required notices or statements can subject the creditor to statutory penalties and civil liability for damages and have the further legal effect of extending the period during which the consumer may rescind the transaction for up to three years after the date of consummation. 12 C.F.R. § 1026.23(a).

§ 12.4 Instructions for Completing Disclosure Statements

Attorneys completing the disclosure statements should follow closely the instructions in 12 C.F.R. § 1026.18 and should also consult the more detailed instructions promulgated by the CFPB (see section 12.2:3 above).

Disclosures not relevant to the transaction may be omitted; for example, the total sale price may be omitted in a loan transaction.

The creditor must be identified at least by name, but this disclosure may appear apart from the other disclosures. When a transaction involves multiple creditors, any one of them may make the disclosures, but the disclosing creditor must be identified. 12 C.F.R. §§ 1026.17(d), 1026.18(a).

The annual percentage rate is determined by methods set forth in 12 C.F.R. § 1026.22. The CFPB provides other useful aids for this calculation, including appendix J of Regulation Z and annual percentage rate tables available from the Board.

“Finance charge” is defined in 12 C.F.R. § 1026.4, which offers several examples and lists certain charges excluded from the finance charge. Calculating this charge is central to the disclosure statements, so it should be done with great care. Generally, any charge payable directly or indirectly by the consumer that is imposed directly or indirectly by the creditor as an incident to or condition of the extension of credit constitutes a finance charge unless the charge is expressly excluded under 12 C.F.R. § 1026.4. Most notable among the exclusions are charges of a type that would be payable in a comparable cash transaction and the “real estate related fees” enumerated in 12 C.F.R. § 1026.4(c)(7).
Section 1026.4 also excludes some insurance premiums under certain conditions. Many creditors find this exclusion highly desirable. Premiums for credit life, accident, health, or loss-of-income insurance may be excluded under the following conditions: the creditor does not require such coverage and discloses that fact; the creditor discloses the premium for the initial term of insurance coverage; and the consumer signs or initials an affirmative written request for the insurance after receiving the required disclosures. Premiums for insurance against loss of or damage to property or against liability arising from the ownership or use of property may be excluded under the following conditions: the coverage may be obtained from a person of the consumer’s choice, and that fact is disclosed; and if it is obtained from or through the creditor, the creditor discloses the premium for the initial term of coverage.

Determination of the amount financed under 12 C.F.R. § 1026.18(b) requires determining the principal loan amount or cash price less any down payment, adding other amounts financed except the finance charge, and subtracting any prepaid finance charge. The creditor may include other items in this amount, such as rebates or loan premiums.

If the consumer wants an itemization of the amount financed or if the creditor prefers to supply one as a matter of course, it must be provided in a separate document at the same time as other disclosures required by section 1026.18. A model for this disclosure appears in appendix H-3 of Regulation Z.

In the late-payment disclosure, the creditor must reveal any charge that may be imposed before maturity due to a late payment, other than a deferral or extension charge. 12 C.F.R. § 1026.18(//). If the creditor merely continues to assess interest at the rate charged before default, that fact need not be disclosed.

For a home equity extension of credit (see chapter 11 in this manual), the description of the security should be inserted as “your home.”

Regulation Z requires that the disclosure statement include an appropriate version of the assumption policy model clause when the transaction involves a residential mortgage. 12 C.F.R. § 1026.18(q). A “residential mortgage transaction” is defined as a transaction in which a “consensual security interest is created or retained in the consumer’s principal dwelling to finance the acquisition or initial construction of that dwelling.” 12 C.F.R. § 1026.2(a)(24). For this type of transaction, the appropriate form of this model clause (H-6), which can be found at appendix H of Regulation Z, should be added to the disclosure statement.

Appendix H of Regulation Z offers other model clauses that may be suitable for the disclosure statements: variable rate (H-4), demand feature (H-5), and required deposit (H-7).

The truth-in-lending disclosure statements are designed for simple, fixed-interest-rate transactions. If a variable-interest-rate transaction is involved, the disclosure statement forms in this manual must be revised to include variable-interest-rate disclosures. Additionally, if the interest rate on a loan secured by a consumer’s principal dwelling, such as a home equity extension of credit or credit for building or improving a consumer’s home, may increase after funding and the term of the credit exceeds one year, variable-interest-rate disclosures in addition to those contained in the truth-in-lending disclosure statement must be given by the creditor to the borrower at the earlier of the time the borrower either receives the loan application form or pays a nonrefundable fee. See 12 C.F.R. § 1026.19(b). These variable-rate mortgage loan disclosures are extensive and include twelve features of the variable-rate loan program that must be disclosed. The disclosures would thus be unique to any specific loan program offered by a creditor, and it would be impractical for this manual to provide a model variable-rate mortgage loan disclosure form. If a variable-rate credit secured by the consumer’s principal dwelling is desired, the attorney should be sure that the creditor has given appropriate variable-rate disclosures to the borrower.
The other information required in the disclosure statements should be provided in careful accordance with the guidelines of 12 C.F.R. § 1026.18 and the CFPB’s commentary on that section.

§ 12.5 Instructions for Completing Notices of Right of Rescission

The attorney should be careful to use the appropriate model form for the notice of right of rescission. The refinancing notice of right of rescission (form 12-2 in this chapter) should be used only for refinancings by the same creditor. See section 12.2:2 above. The general form (form 12-1) should be used in other consumer credit transactions requiring the notice.

The date of the transaction is the date the consumer initially becomes obligated, either by signing a note or retail installment contract (home improvement) or by assuming a contractual obligation, whichever is first.

The creditor’s name and mailing address must be provided.

The date of the end of the rescission period must be stated accurately; it is the third business day following the date of the transaction specified on the form. A definition of “business day” is given in 12 C.F.R. § 1026.2(a)(6).

Finally, the consumer should sign the form to acknowledge its receipt.

§ 12.6 Additional Documents

For other documents related to mechanic’s lien transactions that may require a disclosure statement and notice of right of rescission, see chapter 20 in this manual.

§ 12.7 Other Comments

Regulation Z requires that creditors give consumers the disclosure statements “in a form that the consumer may keep.” 12 C.F.R. § 1026.17(a). Also, the creditor must retain evidence of compliance, such as by keeping a copy of the executed form showing the consumer’s acknowledgment of receiving it, for two years after the date disclosures are required to be made or action is required to be taken. 12 C.F.R. § 1026.25. The form need not be filed or recorded.

Each consumer entitled to rescission must be provided two copies of the notice of right of rescission, one for potential use in canceling the transaction and one for recordkeeping. Each person whose ownership interest in the dwelling is subject to the security interest and who also uses it as his or her principal dwelling should receive two copies of the notice (one copy to each if the notice is provided in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act). As with the disclosure statement, the creditor should also keep a copy of the executed form for two years.

During the three-business-day rescission period provided by the notice, the creditor may accrue finance charges on the amount loaned.

Consumers may waive the right to rescind by providing a signed, dated statement that the loan is necessary to cope with a bona fide personal financial emergency. The waiver form must describe the emergency and specifically waive the right to rescind. Printed or otherwise standard waiver forms generally may not be used for this purpose, and everyone entitled to rescind must sign the waiver. 12 C.F.R. § 1026.23(e).
The borrower may not be charged for the preparation of truth-in-lending documents. If an attorney for the lender prepares truth-in-lending documents, the lender should pay any fee for that service separately and may not charge or pass through to the borrower (as part of loan settlement or closing costs or otherwise) that fee. 12 U.S.C. § 2610.

[Sections 12.8 through 12.10 are reserved for expansion.]

II. RESPA Consumer Disclosure Documents

§ 12.11 Overview of the Real Estate Settlement Procedures Act

§ 12.11:1 Source of Authority

The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. §§ 2601–2617, is a federal consumer disclosure and protection statute intended to ensure consumers are provided greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by abusive settlement practices, such as kickbacks or referral fees that tend to increase the costs of settlement services.

RESPA was implemented by Regulation X, 12 C.F.R. pt. 1024, which was an official interpretive rule adopted and published by the Department of Housing and Urban Development (HUD) under its previously congressionally delegated authority to interpret and implement the statute. The Consumer Financial Protection Bureau (CFPB) has enforcement authority. The CFPB reissued its regulation of these statutes under 12 C.F.R. pt. 1024. Regulation X provides “reliance on rule” protections to lenders and other settlement service providers. No provision of Regulation X imposing liability will apply to any act done or omitted in good-faith compliance with Regulation X or any other official HUD rule, regulation, or interpretation, even if after the act or omission has occurred the rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other means to be invalid for any reason. See 12 U.S.C. § 2617(b).

§ 12.11:2 Coverage

RESPA applies to all federally related mortgage loans, a term broadly defined by regulation in 12 C.F.R. § 1024.5(a) to include virtually any mortgage loan made by a creditor in the United States that is secured by a lien on a one- to four-family residential dwelling. Certain loans, such as business purpose loans, loans secured by vacant land, and temporary financing, such as a construction loan, with a term of less than two years that is not convertible to permanent financing, are exempt from coverage. See the exemptions at 12 C.F.R. § 1024.5(b).

§ 12.11:3 Consumer Disclosures

Generally, RESPA requires that loan originators provide written disclosures to loan applicants and borrowers at various stages of loan origination, settlement, and servicing of a federally related mortgage loan. The rules regulating the form, content, and timing of these required consumer disclosures and certain other key provisions are summarized below.

Loan Estimate: A loan originator, either the lender or the mortgage broker, of a federally related mortgage loan must provide a loan applicant a loan estimate (LE) within three business days after receiving an application (or information sufficient to complete an application). The lender or mortgage broker must provide the LE by hand delivery or by placing the LE in the
mail within the three-business-day period. The LE is an estimate of all fees and charges a borrower is likely to incur at loan closing that must be accurate within narrow permitted tolerances; the applicant can comparison shop estimated costs among competing lenders and brokers. “Application,” for this purpose, is defined in 12 C.F.R. § 1024.2(b). The form, content, and timing of a standardized LE disclosure must comply with the requirements of 12 C.F.R. § 1025.7 and appendix C, as amended.

Special Information Booklets: A mortgage lender or mortgage broker must provide loan applicants a preprinted special information booklet within three business days after receiving a loan application (unless the application is declined or withdrawn within that three-day period) consisting as applicable of either Your Home Loan Toolkit—A Step-by-Step Guide (as revised and effective August 2015 and accessible at http://files.consumerfinance.gov/f/201503_cfpb_your-home-loan-toolkit-web.pdf), in the case of closed-end credits to purchase a home, or When Your Home is On the Line: What You Should Know about Home Equity Lines of Credit (Consumer Financial Protection Bureau), in the case of open-end credit plans. See 12 C.F.R. §§ 1024.6, 1026.19(g).

Escrow Account Notices: When escrow accounts are established and maintained by the lender to reserve for property tax and insurance premium payments, the lender or loan servicer must provide the borrower an initial escrow account statement at loan settlement (or within forty-five days after settlement), and thereafter the servicer must provide the borrower an annual escrow account statement within thirty days after the end of each account computation year (which need not be a calendar year). The initial notice must itemize the amounts of the required initial deposit to the account to be collected from the borrower at loan settlement, the monthly deposits to be collected from the borrower during the twelve months thereafter, and the amounts and timing of payments from the account for that twelve-month computation year. RESPA, section 10, substantively regulates the maximum amount, including any cushion, that a mortgage lender may require the borrower to reserve in an escrow account and the method of analyzing and accounting for escrow balances, including any surpluses, shortages, and deficiencies that may occur. See 12 C.F.R. § 1024.17. The form and content of the initial and annual escrow account statements must comply with the requirements of sections 1024.17(h) and 1024.17(i), respectively, and the Public Guidance Documents referenced therein.

Loan Servicing Transfer Notices: Mortgage lenders, mortgage brokers who anticipate using table funding (that is, closings in which the note is made payable to the mortgage broker and the loan proceeds are advanced by an investor on contemporaneous assignment of the note and security instrument), and dealers of manufactured homes who anticipate a first-lien dealer loan must provide loan applicants a servicing disclosure statement at the time of application or within three business days after submission of an application that indicates whether the servicing of the loan may be assigned, sold, or transferred at any time while the loan is outstanding. The form, content, and timing of the servicing disclosure statement must generally conform to the model format set out in appendix MS-1 to Regulation X, 12 C.F.R. pt. 1024. See 12 C.F.R. § 1024.33(b). The term servicing generally refers to such contract administration services as collecting scheduled monthly or other periodic payments from the borrower, remitting principal and interest payments to the holder of the loan, disbursing property tax and insurance premium payments from escrow accounts when due, maintaining accounting and business records of account activity, and providing notices and reports required by law or the terms of the mortgage contract. The term servicer generally refers to the entity or other person responsible for performing servicing. These terms are defined in 12 C.F.R. § 1024.2.

A written notice of transfer also must be provided to the borrower on the actual assignment, sale, or transfer of servicing by the transferor servicer at least fifteen days before the effective date of the transfer and by the transferee servicer not later than fifteen days after the effective date. A combined written notice of transfer by the transferor and transferee given at loan settlement also satisfies these timing requirements. The notice of transfer must include such information as the effective date of the
transfer of servicing; the date on which the transferor servicer will cease accepting payments on the loan and the date the
transferee servicer will begin to accept the payments; the names, addresses, and toll-free numbers of the transferor and trans-
feree servicers where inquiries regarding the servicing transfer may be directed; a statement of the borrower’s rights regarding
complaint resolution; and other content as set out in appendix MS-2 to Regulation X, 12 C.F.R. pt. 1024. A late fee may not be
charged for any misdirected payments by a borrower during the sixty-day period beginning on the effective date of the trans-
ferral, and misdirected payments may not be treated as late for credit reporting or other purposes. See 12 C.F.R. § 1024.33(c).

**Affiliated Business Arrangement Disclosure Statement:** Any mortgage lender, mortgage broker, real estate broker, or
other person or entity in a position to refer settlement service business that refers a borrower or other person to an affiliated
business to perform a settlement service must provide the borrower or other person to whom the referral is made a written
affiliated business arrangement disclosure statement. The disclosure statement must generally be in the format of appendix D
to Regulation X, 12 C.F.R. pt. 1024. The statement must describe the nature of the relationship between the person making the
referral and the referred settlement service provider, set out the estimated charge or range of charges by the provider for the
settlement services, and disclose that the borrower or other person is not required to use the referred service provider and is
free to “shop around” for the best services and rates that may be available from other service providers. An affiliated business
arrangement exists when a person or entity in a position to refer settlement service business, or an associate of such a person,
has an affiliate relationship with, or a direct or beneficial interest of more than 1 percent in, a provider of settlement services
and directly or indirectly refers such settlement service business to that provider (or affirmatively influences the selection of
that affiliated provider). The disclosure statement must be on a sheet of paper separate from other disclosures and be provided
at the time the referral is made. If a lender makes the referral to a borrower, the disclosure may be provided at the time the
good-faith estimate disclosure is provided to the borrower. See 12 C.F.R. § 1024.15.

§ 12.11:4 Prohibition against Kickbacks and Unearned Fees

RESPA, section 8, prohibits kickbacks, referral fees, and unearned fees in connection with federally related mortgage loans.
12 U.S.C. § 2607. Specifically, section 8, as interpreted by Regulation X, provides that “[n]o person shall give and no person
shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that busi-
ness incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person.” 12
C.F.R. § 1024.14(b) (emphasis added). Payment of a fee or other thing of value in consideration of a referral of a settlement
service or an agreement to split or pay a portion of a fee charged for the performance of a settlement service with a person
referring the business, other than for the reasonable value of services actually performed by the person accepting the payment,
is a violation of section 8. A violation implicates both the party giving and the party receiving the unlawful kickback, referral
fee, or other thing of value. Moreover, against the weight of judicial authority, the CFPB construes section 8 to prohibit
unearned fees even when the fee is not split between two parties, including a charge by any person for which no or nominal
services are performed or for which duplicative fees are charged. Section 8 violations are rife with enforcement actions by the
CFPB and civil litigation under private rights of action, including class action.

Practitioners are cautioned that section 8 violations are most often inferred from specific facts, and careful analysis of all rele-
vant facts is often required to determine if a violation has occurred. Key elements of the offense are broadly construed. A
“referral,” for example, includes any oral or written action directed to the borrower or other person that has the effect of affir-
matively influencing the person’s selection of a particular provider of a settlement service for which the person will be
charged. 12 C.F.R. § 1024.14(f). An “understanding” need not be written or oral, but may be inferred from a practice, pattern,
or course of conduct. 12 C.F.R. § 1024.14(e). Moreover, a “thing of value” does not require a transfer of money and may be
any of a number of seemingly unrelated benefits to the party making a referral: discounts, credits, equity adjustments, deferred rents, debt reduction or forgiveness, free promotions and advertising, assumption of business expenses, expense-paid travel and vacations, and any other imaginable benefit. 12 C.F.R. § 1024.14(d).

Section 8, however, expressly permits payment to attorneys, title agents, or other settlement service providers for goods or facilities actually furnished or services actually performed; fee splits between real estate agents and real estate brokers pursuant to cooperative brokerage agreements; and compensation by an employer to its own employees for referrals either to the employer or to an affiliated business. See 12 C.F.R. § 1024.14(g)(1).

Referrals of borrowers or other persons to affiliates to perform settlement services are permitted under strict guidelines for affiliated business arrangements set out in 12 C.F.R. § 1024.15, which requires that written disclosure of the business arrangement is timely made in the form of an affiliated business arrangement disclosure statement described above, that the borrower or other person is not required to use any particular provider of the service, and that the only thing of value that is received from the arrangement is a bona fide return on the ownership interest the referring party may have in the affiliate or a franchise relationship. A prohibited “required use” for this purpose is defined in 12 C.F.R. § 1024.2. Caution: HUD published an “Advanced Notice of Proposed Rulemaking” in the Federal Register on June 3, 2010, at 75 Fed. Reg. 31,334 to strengthen and clarify the RESPA, section 8, prohibition against the “required use” of affiliated settlement service providers, examining in particular the practice of homebuilders’ conditioning construction discounts or discounted upgrades on the use of the homebuilder’s affiliated mortgage lender.

HUD’s Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 (June 7, 1996), provides guidance on the affiliated business arrangement exemption to section 8 prohibitions against referral fees. According to the policy statement, Congress did not intend this exemption to promote disguised referral fee payments through sham arrangements or shell entities for which there is no bona fide business purpose. By definition, for this exemption to apply, the person or entity receiving the referral must be a bona fide provider of settlement services. If the person or entity is not, considering particular factors enumerated in the policy statement, the arrangement would not qualify for the exemption even if the three safe harbor conditions of 12 C.F.R. § 1024.15 are otherwise met.

HUD’s Statement of Policy 1996-3, Rental of Office Space, Lock-outs, and Retaliation, 61 Fed. Reg. 29,264 (June 7, 1996), also addresses the application of section 8 to the practice of settlement service providers (such as mortgage lenders) leasing desks or office space at real estate brokerage offices in anticipation of loan referrals. This practice is permitted only if the general market value of the desk rental or other arrangement is paid by the settlement service provider. The “general market value” for this purpose, which also may include an appropriate portion of the cost for related office services actually provided under the arrangement (such as secretarial service, utilities, telephone, and other office equipment), means the rental amount that a non–settlement service provider (that is, one who would not be renting in anticipation of referrals) would pay for the same amount of space and services in the same or a comparable building.

HUD’s interpretive rule published June 25, 2010, in the Federal Register at 75 Fed. Reg. 36,271 addressed the application of section 8 to payments by home warranty companies to real estate brokers and agents for services performed in connection with home sales transactions in which a home warranty is sold to the purchaser. HUD concluded that a broker or agent may not be compensated by a home warranty company for marketing services directed to particular homebuyers or sellers and deemed any payments by a home warranty company to a broker or agent to be lawful only if services are actually performed by the broker or agent, are not nominal and are necessary and distinct from the primary services performed by the real estate broker or agent in the same transaction, and are services for which there is no duplicative charge. For example, conducting
actual inspections of items to be covered by the home warranty to identify preexisting conditions, recording serial numbers of
the items, documenting the condition of the items by taking photographs, and preparing a report to the home warranty com-
pany of findings may be compensable services. Any payment for compensable services nevertheless must reasonably relate in
amount to the value of services actually performed.

Persons violating section 8, on conviction, may be fined not more than $10,000, imprisoned for not more than one year, or
both. Any person violating section 8 provisions also is jointly and severally liable to the person or persons charged for the set-
tlement service involved in the violation in an amount equal to three times the amount of any charge paid for the service. In
any private action brought under section 8, the court may award court costs and reasonable attorney’s fees to the prevailing
party. See 12 U.S.C. § 2607(d); 12 C.F.R. § 1024.14(a). Violations may also be grounds for disbarment, suspension, or inelig-
bility of lenders participating in federally insured or guaranteed loan programs or for enforcement actions by federal or state
agencies having supervisory authority over lenders. 12 C.F.R. § 1024.14.

§ 12.11:5 Prohibition against Required Use of Particular Title Company

RESPA, section 9, provides that no seller of property that will be purchased with the assistance of a federally related mortgage
loan may require that, as a condition of selling the property, title insurance covering the property must be purchased by the
buyer from any particular title company. 12 U.S.C. § 2608. This provision is thought by some practitioners to be inapplicable
to Texas practice, in which the seller customarily purchases and pays the premium for the owner’s title insurance policy. An
offer of a discounted package or of discounts or rebates for the purchase of multiple settlement services as an inducement to
the buyer to use a particular title company may be permitted without violating this prohibition against a required use. See the
definition of “required use” at 12 C.F.R. § 1024.2. Any seller who violates section 9 is liable to the buyer in an amount equal

§ 12.11:6 Prohibition against Charging for Preparation of Regulatory Disclosures

RESPA, section 12, provides that no fee or charge may be imposed or charged by a lender of a federally related mortgage loan,
or by the servicer of the loan, for the preparation and distribution to the borrower or other person of a HUD-1 or HUD-1A set-
tlement statement; escrow account notices and statements required by RESPA, section 10; or statements required by the Truth

§ 12.11:7 Prohibition against Collecting Excessive Escrow Deposits

RESPA, section 10, substantively limits the amounts that a lender of a federally related mortgage loan may require the bor-
rower to deposit in any escrow account established by the lender to ensure timely payment of property taxes, insurance premi-
ums, or other property charges. 12 U.S.C. § 2609. When establishing the account, typically at loan closing, the lender may
require an initial deposit equal to the proportion of total annual costs reasonably anticipated to be paid from the account for the
period beginning with the date on which the costs were last paid (or the date on which each of the costs would have been paid
under the normal lending practices of the lender and local custom) and ending on the due date of the first installment payment
under the mortgage loan plus an additional reserve (for unanticipated disbursements) of no more than one-sixth of the total of
all such costs to be paid from the escrow account over the ensuing twelve-month period (that is, a two-month cushion). There-
after, a lender may not require the borrower to deposit in any such escrow account in any month a sum greater than one-
twelfth of the total of the estimated taxes, insurance premiums, and other charges that are reasonably anticipated to be paid
from the account during the ensuing twelve months plus a cushion of no more than one-sixth of the monthly amount. If a
lender conducts an account analysis, however, and determines there is or will be a deficiency in the escrow account, the lender may require the borrower to make additional monthly deposits to the account to avoid or eliminate the deficiency, subject to substantive and procedural rules set out in Regulation X, 12 C.F.R. § 1024.17(f). Violations of section 10 of RESPA are subject to civil penalties set out in 12 U.S.C. § 2609(d).

§ 12.12 Upcharges Prohibited

The amount stated on the HUD-1 or HUD-1A settlement statement for any itemized settlement service must not exceed the amount actually received by the settlement service provider for that service (unless the charge is an average charge in accordance with 12 C.F.R. § 1024.8(b)(2)). Third-party fees disclosed on the good-faith estimate (GFE) may not exceed the estimated amounts to be paid the third-party settlement service providers, and such fees reported on the HUD-1 may not exceed the amounts actually paid to such third parties. Thus, even earned markups that were permitted based on the value of actual services performed by the lender or mortgage broker in connection with services principally performed by third parties now appear to be prohibited.
Additional Resources


Truth-in-Lending Notice of Right of Rescission [General]

[Identification of transaction]

Your Right to Cancel

You are entering into a transaction that will result in a [mortgage on/lien on/security interest in] your home. You have a legal right under federal law to cancel this transaction, without cost, within three business days from whichever of the following events occurs last:

1. the date of the transaction, which is [date]; or

2. the date you received your Truth-in-Lending disclosures; or

3. the date you received this notice of your right to cancel.

If you cancel the transaction, the [mortgage/lien/security interest] is also canceled. Within twenty calendar days after we receive your notice, we must take the steps necessary to reflect the fact that the [mortgage on/lien on/security interest in] your home has been canceled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to
the address below. If we do not take possession of the money or property within twenty calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel this transaction, you may do so by notifying us in writing, at [creditor’s name and business address].

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by signing and dating the notice of cancellation below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice not later than midnight of [date] (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel in some other way, it must be delivered to the above address no later than that time.

In this agreement “you” and “your” refer to the consumer, and “we” and “us” refer to the creditor.

Consumer acknowledges receipt of the completed Truth-in-Lending Notice of Right of Rescission.

__________________________________________________________
Consumer’s signature
Date:
Notice of Cancellation

I WISH TO CANCEL.

__________________________________________________________
Consumer’s signature
Date:

__________________________________________________________
Truth-in-Lending Notice of Right of Rescission [Refinancing]

[Identification of transaction]

Your Right to Cancel

You are entering into a new transaction to increase the amount of credit previously provided to you. Your home is the security for this new transaction. You have a legal right under federal law to cancel this new transaction, without cost, within three business days from whichever of the following events occurs last:

1. the date of this new transaction, which is [date]; or

2. the date you received your new Truth-in-Lending disclosures; or

3. the date you received this notice of your right to cancel.

If you cancel this new transaction, it will not affect any amount that you presently owe. Your home is the security for that amount. Within twenty calendar days after we receive your notice of cancellation of this new transaction, we must take the steps necessary to reflect the fact that your home does not secure the increase of credit. We must also return any money you have given to us or anyone else in connection with this new transaction.

You may keep any money we have given you in this new transaction until we have done the things mentioned above, but you must then offer to return the money at the address below.
If we do not take possession of the money within twenty calendar days of your offer, you may keep it without further obligation.

**How to Cancel**

If you decide to cancel this new transaction, you may do so by notifying us in writing, at [creditor’s name and business address].

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by signing and dating the notice of cancellation below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of [date] (or midnight of the third business day following the latest of the three events listed above).

If you send or deliver your written notice to cancel in some other way, it must be delivered to the above address no later than that time.

In this agreement “you” and “your” refer to the consumer, and “we” and “us” refer to the creditor.

Consumer acknowledges receipt of the completed Truth-in-Lending Notice of Right of Rescission.

Consumer’s signature
Date:
Notice of Cancellation

I WISH TO CANCEL.

Consumer’s signature
Date:
The Real Estate Forms Committee has removed the chapter on residential contracts for deed. These transactions are heavily regulated, and in the majority of circumstances the risks and consequences of failure of compliance outweigh the usefulness of the transaction in light of the fact that the same result can be accomplished by a note, deed, and deed of trust. See, e.g., Morton v. Nguyen, 369 S.W.3d 659 (Tex. App.—Houston [14th Dist.] 2012, pet. filed).

Contracts for deed, sometimes referred to as “installment land contracts” or “rent-to-own” financing arrangements, are legal and have been used and litigated in Texas for seller-financed property sales for more than a hundred years. See Taber v. Dallas Co., 106 S.W. 332 (Tex. 1908). Contracts for deed are now, however, characterized by Texas Property Code section 5.062 as “executory contracts,” transactions that are incomplete or unfinished in a material respect, namely, the delivery of the deed.

The restrictions of the statute do not apply to a contract that provides for the seller to deliver a deed within 180 days, to commercial transactions, or to transactions in which the buyer is not going to use the property as his principal residence. See Tex. Prop. Code § 5.062.

The Code was amended in 1995, 2001, and 2005 to remedy what were perceived as seller abuses of contracts for deed, for example, collecting a large down payment and then, if the buyer fell behind, using the eviction process to repossess the property as if the buyer were no more than a tenant.

Because of this history, burdensome consumer protection rules and restrictions now apply, including the following: These contracts must now be recorded. A thorough financial disclosure and detailed calculations must be given to the buyer at closing. The seller must provide the buyer with a current survey and copies of documents from the chain of title. Many precontract and preclosing disclosures are required for which there are no standard forms. Certain statutory language must be included in the contract, or it can be canceled and rescinded by the buyer at any time, and the buyer will be entitled to a full refund of all sums paid to the seller. The seller must provide the buyer with tax and insurance information and copies of policies. Buyers also have a right to convert to a deed, note, and deed of trust. And the seller must provide a detailed accounting statement every January. See Tex. Prop. Code §§ 5.063–.085.

Failing to comply with the statutory requirements may constitute a deceptive trade practice and result in treble damages. Additionally, the seller can be assessed penalties of $250 per day for each day after January 31st that the annual accounting statement is not delivered. There are restrictions and prohibitions against selling under an executory contract if there is a mortgage on the property. See Tex. Prop. Code §§ 5.069, 5.070, 5.072, 5.077, 5.078, 5.085.

Accordingly, contracts for deed have fallen into disuse, which was exactly the legislature’s intent.

Note that even if a seller is willing to endure the various restrictions, risks, and potential liability involved in selling the property under a contract for deed, the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 licensing requirements may still apply. See the sections titled “Dodd-Frank Wall Street Reform and Consumer Protection Act” and “Mortgage Loan Originators” in chapter 2 of this manual.
The 2005 amendment to the Code expanded the definition of “executory contract” to include lease-option agreements. See Tex. Prop. Code § 5.0621. Clever draftsmanship will not avoid section 5.061. The courts look to substance over form in interpreting these transactions.

For these reasons, before advising a client to sell property under an executory contract, all circumstances and alternatives should be thoroughly evaluated.
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Foreclosure Documents

The Real Estate Forms Committee would like to acknowledge the contribution of G. Tommy Bastian and his work on the new rules for home equity foreclosures. Please see G. Tommy Bastian, Expedited Foreclosure Home Equity, Home Equity Line of Credit, Reverse Mortgage, and Tax Lien Transfer and Property Tax Loan Forms for the New Supreme Court Rules, in State Bar of Tex. Prof. Dev. Program, Advanced Real Estate Drafting Course ch. 15, 16–20, 27–30 (2012).

§ 14.1 General Considerations

This chapter summarizes the nonjudicial foreclosure process for real and personal property. The forms in this chapter are drafted specifically for the loan documents in this manual. Foreclosure by a mortgage servicer on behalf of a mortgagee requires a special notice of sale. See form 14-13 in this chapter. The attorney is cautioned that these letters and documents are provided as examples only and should not be used as standard forms. As each foreclosure is unique and requires careful consideration, the attorney must tailor the forms to fit the facts of the case. A complete analysis of Texas foreclosure law is beyond the scope of this manual.

For a thorough discussion of Texas foreclosure law, with additional forms and examples, see William H. Locke, Jr., Ralph Martin Novak, Jr. & G. Tommy Bastian, eds., Texas Foreclosure Manual, State Bar of Texas (3rd ed. 2014 & Supp. 2018). See also “Additional Resources” at the end of these practice notes for related bibliographical material.

§ 14.2 Real Estate Foreclosures

§ 14.2:1 General

A real property foreclosure must be conducted by a trustee or substitute trustee in strict compliance with Tex. Prop. Code §§ 51.0001, 51.002, 51.0021, 51.0025, 51.0074, 51.0075, 51.009, 51.015 and with any requirements set out in the deed of trust. A trustee or substitute trustee foreclosing on residential real estate should also satisfy any applicable requirements of chapter 22 of the Texas Business and Commerce Code.

The attorney must carefully review all loan documents to determine if additional notices, postings, or procedures apply to the foreclosure. For example, the prior version of the foreclosure statute required posting the foreclosure notice in three public places. That language was incorporated into many old deed-of-trust forms. Even though the law no longer requires these postings, if the deed of trust includes the language, the postings must be made. Harwath v. Hudson, 654 S.W.2d 851, 854 (Tex. App.—Dallas 1983, writ ref’d n.r.e.).

Many deed-of-trust forms have a foreclosure section that essentially tracks the language of section 51.002 of the Property Code. Sections 51.0001, 51.0021, 51.0025, 51.0075, and 51.009 regulate foreclosures by mortgage servicers. Section 51.0075(f) allows the foreclosure purchaser and the trustee or substitute trustee to agree on a reasonable time after acceptance of the bid within which to deliver the purchase price; otherwise, the purchase price is payable without delay after acceptance of the bid. The deed of trust and security agreement forms in this manual do not repeat the statutory language but instead require the mortgagee or mortgage servicer to foreclose in accordance with the law then in effect.
§ 14.2:2 Statutory Requirements

In Texas, a nonjudicial foreclosure sale must be conducted by a trustee or substitute trustee on the first Tuesday of a month or, if the first Tuesday of the month occurs on January 1 or July 4, on the first Wednesday of the month, in the county in which part or all of the real estate is located. Tex. Prop. Code § 51.002. The sale must take place at the county courthouse in the county in which the property is located unless the commissioner’s court designates another public place within a reasonable proximity to the county courthouse. Tex. Prop. Code § 51.002(h). The commissioner’s court designation of sales location must be recorded in the real property records of that county, but will not be effective before the ninetieth day after the designation is recorded. Tex. Prop. Code § 51.002(h). A designation by a commissioner’s court is not a ground for challenging or invalidating any sale. Tex. Prop. Code § 51.002(h). If the first Tuesday falls on a courthouse holiday in any month other than January or July, the sale may still be conducted. Koehler v. Pioneer American Insurance Co., 425 S.W.2d 889, 891 (Tex. Civ. App.—Fort Worth 1968, no writ). The holding in Koehler is not applicable to the months of January and July. Tex. Prop. Code § 51.002(a–1). Because deed of trust terms are strictly construed, the holding in Harwath v. Hudson, 654 S.W.2d 851 (Tex. App.—Dallas 1983, writ ref’d n.r.e.), should be considered when a deed of trust includes language restricting a foreclosure sale to the first Tuesday of the month if a trustee or substitute trustee intends to conduct a first Wednesday foreclosure sale. If the deed of trust covers property that lies in two or more counties, the notice should provide where the sale is to take place. The notice must be posted in all counties in which the real property is located. Tex. Prop. Code § 51.002(b). If the deed of trust covers multiple properties located in different counties, all properties can be foreclosed in one sale, even if the tracts are not contiguous. Bateman v. Carter-Jones Drilling Co., 290 S.W.2d 366, 370 (Tex. Civ. App.—Texarkana 1956, writ ref’d n.r.e.); Dall v. Lindsey, 237 S.W.2d 1006, 1009–10 (Tex. Civ. App.—Amarillo 1951, writ ref’d n.r.e.); see also Lewis v. Dainwood, 130 S.W.2d 456, 457 (Tex. Civ. App.—San Antonio 1939, writ ref’d).

Section 51.0001 of the Texas Property Code recognizes the effects of the national Mortgage Electronic Registration System and the securitization of mortgages. This section added definitions of “book entry system,” “debtor’s last known address,” “mortgage servicer,” “mortgagee,” “mortgagor,” “security instrument,” “substitute trustee,” and “trustee.”

Section 51.002(b) of the Property Code has three requirements for a foreclosure sale: (1) the mortgage servicer must give written notice of the sale to all debtors obligated to pay the debt, (2) the notice of the sale must be posted at the county courthouse of each county in which the property is located designating the county in which the property will be sold, and (3) a notice of the sale must be filed with the county clerk of each county in which the property is located. These steps must be completed at least twenty-one days before the sale date. Tex. Prop. Code § 51.002(b). However, if the courthouse or county clerk’s office is closed because of inclement weather, natural disaster, or other act of God, the notices required by section 51.002(b) may be posted or filed up to forty-eight hours after the courthouse or county clerk’s office reopens for business. Tex. Prop. Code § 51.002(b–1).

Additionally, the Property Code requires the mortgage servicer to give at least twenty days’ notice of default before posting the property for foreclosure if the property is the debtor’s residence. Tex. Prop. Code § 51.002(d).

Property Code section 51.002 requires the mortgage servicer to serve written notice of the sale on “each debtor who, according to the records of the mortgage servicer of the debt, is obligated to pay the debt.” See Tex. Prop. Code § 51.002(b)(3). Although a guarantor has been held not to be such a debtor, many attorneys elect to send a notice of the foreclosure sale to a guarantor in the same manner as sent to the debtor. See Long v. NCNB—Texas National Bank, 882 S.W.2d 861, 866 (Tex. App.—Corpus Christi 1994, no writ; Bishop v. National Loan Investors, L.P., 915 S.W.2d 241, 245 (Tex. App.—Fort Worth 1995, writ denied).
The notice must designate the county in which the property will be sold. Tex. Prop. Code § 51.002(b)(1). If no area has been designated for foreclosure sales by the county commissioner’s court, the notice of sale must designate the area where the sale is to take place. Tex. Prop. Code § 51.002(a). The notice of sale also must state the earliest time at which the sale will begin and the names and street addresses for the trustees or substitute trustees. Tex. Prop. Code §§ 51.002(b), 51.0075(e). The notice must also include conspicuous language regarding the rights of members of the armed forces. Tex. Prop. Code § 51.002(i). Beyond these requirements (and the disclosure required if a mortgage servicer is administering the foreclosure sale on behalf of the mortgagee that is discussed below in this section) there is little statutory or judicial guidance concerning the content of the notice.

The sale must take place between the hours of 10:00 A.M. and 4:00 P.M. on the first Tuesday of a month or, if the first Tuesday of the month occurs on January 1 or July 4, on the first Wednesday of the month. The sale must begin at the time stated in the notice of sale or not later than three hours after the time listed in the notice of sale. Tex. Prop. Code § 51.002(a), (c); Tex. Civ. Prac. & Rem. Code § 34.041.

The sale must be a public auction with the trustee announcing the property to those gathered at the courthouse and offering the property for sale to the highest bidder for cash. Often the mortgagee is the only bidder. Section 51.0075(f) of the Property Code allows the foreclosure purchaser and the trustee or substitute trustee to agree on a reasonable time after acceptance of the bid within which to deliver the purchase price; otherwise, the purchase price is payable without delay after acceptance of the bid. Most trustees will accept, and some may prefer, the cash bid in the form of a cashier’s check or a certified check.

A mortgage servicer may administer a foreclosure for a mortgagee if two requirements are met. First, there must be an agreement between the mortgagee and mortgage servicer granting the mortgage servicer the right to service the mortgage. Second, the notice of sale must disclose that the mortgage servicer is representing the mortgagee servicing agreement, the name of the mortgagee, and the address of the mortgagee or the mortgage servicer authorized to service the mortgage. Tex. Prop. Code § 51.0025. Trustees or substitute trustees can set reasonable conditions for conducting the public sale if the conditions are announced before the bidding is opened for the first sale of the day. Tex. Prop. Code § 51.0075(a). A purchaser at the foreclosure sale acquires the property “AS IS” without any express or implied warranties except warranties of title from the mortgagor, but the foreclosing lender does not. Sandel v. Burney, 714 S.W.2d 40 (Tex. App.—San Antonio 1986, no writ). The purchase is made at the purchaser’s own risk. Tex. Prop. Code § 51.009(1). A purchaser at foreclosure is not a consumer. Tex. Prop. Code § 51.009(2).

§ 14.2:3 Suit for Deficiency—Real Property

A person liable on the debt, including a guarantor, may introduce evidence of the fair market value of the property as of the date of the foreclosure sale. Tex. Prop. Code §§ 51.003, 51.005. The attorney should discuss these rights with the mortgagee-client before foreclosure to decide if a deficiency is likely and if so whether it would be prudent to obtain an appraisal to document fair market value and if a judicial foreclosure is a better alternative.

The rights granted to an obligor, including a guarantor, in sections 51.003 and 51.005 may be waived. See LaSalle Bank N.A. v. Sleuel, 289 F.3d 837, 841–42 (5th Cir. 2002); Segal v. Emmes Capital, L.L.C., 155 S.W.3d 267, 279–80 (Tex. App.—Houston [1st Dist.] 2004, pet. dismissed).
§ 14.2:4 Residential Property

If the property is used as the borrower’s residence, the mortgagee or mortgage servicer must allow the borrower at least twenty days to cure the default before accelerating the maturity of the debt and giving the twenty-one-day foreclosure notice. Tex. Prop. Code § 51.002(d). The delinquent payment of ad valorem taxes may not be considered a default under a deed of trust or other contract lien if the owner of the residence has entered into an installment agreement for the payment of such taxes under section 33.02 of the Texas Tax Code. Tex. Prop. Code § 51.0011.

A trustee or substitute trustee conducting a residential real property foreclosure may contract with an attorney to advise the trustee or substitute trustee and to administer or perform any of the trustee’s or substitute trustee’s functions or responsibilities under the deed of trust and chapter 51 of the Texas Property Code. Tex. Bus. & Com. Code § 22.003. The trustee or substitute trustee may also contract with an auction company to arrange, manage, sponsor, or advertise a residential real property foreclosure sale. Tex. Bus. & Com. Code § 22.003.

For residential real property foreclosures, a trustee or substitute trustee must also satisfy any applicable requirements of sections 22.004, 22.005, and 22.006 of the Texas Business and Commerce Code. If the successful bidder is not the mortgagee or the mortgage servicer, the trustee or substitute trustee must obtain the name, address, and other required information on certain parties submitting the highest and best bid. Tex. Bus. & Com. Code § 22.004. The trustee or substitute trustee must also provide the winning bidder a receipt for the sale proceeds tendered, deliver or record the deed, and account for and distribute the sale proceeds, including maintaining the sale proceeds in a separate account, and maintaining a written record of all deposits and disbursements from the account. Tex. Bus. & Com. Code §§ 22.005, 22.006.

A trustee or substitute trustee conducting a residential real property foreclosure may recover (1) the trustee’s or substitute trustee’s reasonable actual costs, (2) reasonable attorney’s fees incurred by the trustee or substitute trustee, (3) reasonable trustee’s or substitute trustee’s fees, and (4) the trustee’s or substitute trustee’s reasonable attorney’s fees in a suit based on a claim related to the sale if the suit is found to be groundless, in each instance payable from the sale proceeds in excess of the amount owed on the indebtedness secured by the residential real property. Tex. Bus. & Com. Code § 22.006. Certain trustee’s or substitute trustee’s fees and expenses in a residential real property foreclosure are presumed to be reasonable if they do not exceed the amounts provided by law. Tex. Bus. & Com. Code § 22.006.

§ 14.2:5 Federal Interests

If the federal government has a property interest that would be extinguished through foreclosure, including a security interest, lien, or mortgage, the government’s consent may be required to eliminate that interest; the government has a one-year right of redemption for certain liens eliminated by foreclosure of a superior lien without its consent. 12 U.S.C. § 1825(b)(2); 28 U.S.C. § 2410(c).

Before foreclosure, the federal tax lien records of the county in which the real property is located should be examined. If personal property secures the loan, the federal tax lien records of the secretary of state’s office or other appropriate office should also be examined. See 26 U.S.C. § 6323(f)(1)(A). If the property is encumbered by an inferior federal tax lien filed more than thirty days before the scheduled foreclosure sale, the mortgagee or mortgage servicer must give a special notice to the Internal Revenue Service at least twenty-five days in advance of the sale. See 26 U.S.C. § 7425(b), (c). The Internal Revenue Code provides that unless a proper notice is given, a foreclosure sale will not affect the subordinate tax lien. In the case of real property, the IRS has a 120-day right of redemption following the sale, provided a proper notice was given. 26 U.S.C. § 7425(d).
§ 14.2:6 Beachfront Property


§ 14.2:7 Personal Property Included in Deed of Trust

If the deed of trust includes a security agreement for personal property, the real property foreclosure sale can include the personal property in which a security interest is granted in the deed of trust as part of the foreclosure. See Tex. Bus. & Com. Code § 9.604(a). If personal property is sold in connection with the foreclosure sale of real property, the commercially reasonable standard of the Texas Business and Commerce Code does not govern the sale. Huddleston v. TCB-Dallas, 756 S.W.2d 343 (Tex. App.—Dallas 1988, writ denied).

§ 14.2:8 Deed in Lieu of Foreclosure

The Supreme Court of Texas has ruled that there is no such thing as a “deed in lieu of foreclosure.” Flag-Redfern Oil Co. v. Humble Exploration Co., 744 S.W.2d 6, 8 (Tex. 1987). The supreme court held that a deed in lieu of foreclosure is merely a conveyance by the borrower as a payment for the debt and that, because the deed does not have the effect of a lien foreclosure, the deed does not extinguish any subordinate liens. Deeds in lieu of foreclosure are, however, recognized by statute in Texas. Tex. Prop. Code § 51.006. A creditor who accepts a deed in lieu of foreclosure may void that deed within four years of accepting it if the debtor fails to disclose a lien before executing the deed and the creditor has no personal knowledge of the undisclosed lien. Tex. Prop. Code § 51.006(b). Some borrowers prefer to execute a deed in lieu of foreclosure to avoid the publicity associated with a public foreclosure. Before advising a client about a deed-in-lieu transaction, the attorney should review the law on this subject. See the articles listed as “Additional Resources” at the end of these practice notes. For an example of a deed in lieu of foreclosure, see form 5-13 in this manual.

§ 14.2:9 Home Equity Loan Lien Foreclosure

Tex. Const. art. XVI, § 50(a)(6), authorizes a voluntary lien on a Texas homestead for a home equity loan. (See chapter 11 in this manual for a discussion of home equity loans.) A lien on a Texas homestead securing the payment of a home equity loan may be foreclosed only by court order. Tex. Const. art. XVI, § 50(a)(6)(D). Article XVI, section 50(r), directs the Texas Supreme Court to promulgate rules of civil procedure for an expedited court order, and, acting pursuant to that authority, the Texas Supreme Court adopted rules 735 and 736 of the Texas Rules of Civil Procedure. The court approved forms for expedited foreclosure proceedings on February 10, 2014 (Misc. Docket No. 14-9047, Feb. 10, 2014). The forms may be found at www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf. Although rules 735 and 736 do require a judicial order before proceeding with the foreclosure of a home equity loan lien, those rules do not otherwise change existing Texas real property foreclosure law. See Tex. R. Civ. P. 735.2. The right of a lender to foreclose a home equity loan lien therefore remains conditioned on an underlying default on the home equity loan. (See forms 14-30 and 14-31 in this chapter for a notice of default and notice of acceleration letters on a home equity loan.)

Rules 735 and 736 were substantially amended effective January 1, 2012.
Rule 736 provides the procedure for obtaining a court order to allow foreclosure of a lien containing a power of sale in a security instrument securing a home equity loan. Tex. R. Civ. P. 735.1. Forms 14-32 through 14-37 are some of the forms promulgated by the supreme court. In addition, the practitioner should review section 14.4:5 below for additional information on consumer debt collection activities.

Rule 736 establishes an expedited judicial procedure for obtaining a court order that allows a lender to proceed with the foreclosure of a home equity loan lien. Under the rule, a lender files an application (see form 14-32) in any court with appropriate jurisdiction in any county where all or any part of the real property is located, including probate courts. Tex. R. Civ. P. 736.1(a). The required contents of the application were changed when the rule was amended and are set out in detail in Tex. R. Civ. P. 736.1(d).

The process for service of a rule 736 application changed effective January 1, 2012. Under the previous rule, the applicant or applicant’s attorney mailed the application to the obligor and obligor’s attorney. The new rule requires the clerk of the court to prepare and serve a citation by both certified and regular mail for each respondent named in the application. A citation addressed to “the occupant of the property” must also be issued. Tex. R. Civ. P. 736.3(a), (b). Other requirements for service by the clerk of the court may be found in Tex. R. Civ. P. 736.3.

A response to an application for a court order permitting the lender to proceed with the foreclosure of a home equity loan lien is due on the first Monday following the expiration of thirty-eight days from the date the citation was placed in the custody of the United States Postal Service. Tex. R. Civ. P. 736.5(b).

The response must be signed in accordance with rule 57 and may be in the form of a general denial under rule 92, except that the respondent must affirmatively plead the defenses relied on as set out in rule 736.5(c)(1)–(5). Tex. R. Civ. P. 736.5(c). The response may not state an independent claim for relief, and the court is required to strike any such claim without a hearing. Tex. R. Civ. P. 736.5(d).

The court must not conduct a hearing unless a response is filed. Tex. R. Civ. P. 736.6.

No discovery is permitted in a proceeding governed by rule 736, and the only issue to be determined is whether a party may obtain an order to proceed with foreclosure under applicable law and the terms of the loan agreement, contract, or lien sought to be foreclosed. Tex. R. Civ. P. 735.2, 736.4.

An order under rule 736 is without prejudice and has no res judicata, collateral estoppel, estoppel by judgment, or other effect in any other judicial proceeding. Tex. R. Civ. P. 736.9.

If no response to the application is filed by the due date, the petitioner may file a motion and proposed order to obtain a default order. A default order must be granted by the court no later than thirty days after a motion is filed and served in accordance with the rules. The return of service must be on file with the clerk of the court for at least ten days before the court may grant the application. Tex. R. Civ. P. 736.7. The granting or denial of the application is not an appealable order. Tex. R. Civ. P. 736.8(c).

An order (see form 14-37) granting an application that allows a lender to proceed with foreclosure of a home equity loan lien must describe—

1. the material facts establishing the basis for foreclosure,
2. the property to be foreclosed by commonly known mailing address and legal description,

3. the name and last known address of each respondent subject to the order, and

4. the recording or indexing information of each lien to be foreclosed.

Tex. R. Civ. P. 736.8(b).

A proceeding under rule 736 is automatically stayed if a respondent files a separate, original proceeding in a court of competent jurisdiction that puts in issue any matter relating to the foreclosure before 5:00 P.M. on the Monday before the scheduled foreclosure sale. Tex. R. Civ. P. 736.11(a). A stayed proceeding is to be dismissed if no order has been granted. If an order has been signed, the court must vacate the rule 736 order. Tex. R. Civ. P. 736.11(c).

§ 14.2:10 Property Owned by Military Servicemember

Property Code section 51.015 (1) prohibits any nonjudicial foreclosure of a dwelling owned by military personnel on active duty or within nine months after their active duty concludes; (2) provides that a court may, during the same active duty period and the nine months subsequent, either (a) stay a proceeding to judicially foreclose or enforce a mortgage lien or (b) modify the terms of any such mortgage, as necessary to preserve the interests of the parties; (3) authorizes the court to also issue similar orders of stay or take other actions to protect dependents of active duty personnel and third-party guarantors of the loan obligation; and (4) imposes a criminal penalty (class A misdemeanor) on any person who knowingly causes a foreclosure or seizure of property protected as set forth above. A borrower or guarantor may voluntarily waive these protections by written agreement contained in an instrument separate from the loan obligation. Tex. Prop. Code § 51.015. Property Code section 51.015 includes many of the same protections for military servicemembers as does the federal Servicemember’s Civil Relief Act.

§ 14.3 Personal Property Foreclosures

The foreclosure rules for personal property secured transactions are found at Tex. Bus. & Com. Code §§ 9.601–.628. There are four ways to foreclose a security interest in personal property collateral: as part of a real property foreclosure; by public disposition; by private disposition; and through strict foreclosure, accepting the property with or without a claim for a deficiency. Without foreclosing, a secured party may also collect amounts owed on collateral and enforce obligations of persons obligated on collateral.

A detailed discussion of the rules of personal property foreclosure is beyond the scope of this manual. Attorneys are encouraged to review the relevant provisions of chapter 9 of the Texas Business and Commerce Code and applicable case law before foreclosing a security interest in personal property.

A disposition of personal property collateral must be commercially reasonable, whether the disposition is public or private. Tex. Bus. & Com. Code § 9.610(b). This requirement cannot be waived or varied. Tex. Bus. & Com. Code § 9.602(7). The term commercially reasonable is a term of art, the meaning of which has been heavily litigated. The attorney should review the relevant case law on the particular type of personal property being disposed of to properly advise the client. Section 9.627 of the Code also gives guidelines for determining if conduct was commercially reasonable. Tex. Bus. & Com. Code § 9.627.
§ 14.3:1  Real Estate Foreclosure

If the security agreement covers both real and personal property, the secured party may elect to foreclose both under the real property laws. In that event, chapter 9 rules do not apply. Tex. Bus. & Com. Code § 9.604(a). For a discussion of the real property foreclosure rules, see section 14.2 above.

§ 14.3:2  Public Disposition vs. Private Disposition

The law of public and private foreclosure disposition of personal property collateral is found at Tex. Bus. & Com. Code §§ 9.610–.619, 9.623–.628. A disposition includes a sale, lease, or license of personal property collateral. A public disposition is not defined in the Texas Uniform Commercial Code. The official comment to section 9.610 states that although “public disposition” is not defined, it is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. In other words, a “public disposition” is a disposition at an auction open to the public. “Meaningful opportunity” is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale or disposition. Tex. Bus. & Com. Code § 9.610 cmt. 7.

Conversely, although a private disposition also is not defined in the Texas UCC, some commentators believe that a “private disposition” is any disposition that is not a “public disposition.”

A public-sale foreclosure or other public disposition of personal property collateral is more difficult for the secured party because every aspect of the disposition must be commercially reasonable. Tex. Bus. & Com. Code § 9.610(b). Unlike a real estate foreclosure, for which a courthouse public auction is authorized, a public auction disposition of personal property collateral is appropriate only if that method of disposition is commercially reasonable for the collateral involved. With the existence of Internet auction sites, many types of personal property are sold at an Internet public auction. However, there may be some types of personal property for which a public auction disposition is not commercially reasonable. The manner of disposition must be commercially reasonable. A public auction disposition must be conducted fairly. Adequate advertising should precede the disposition to solicit potential bidders. Merely advertising in a local newspaper may not be “commercially reasonable,” particularly if a potential buyer for the property would ordinarily look elsewhere for advertisements offering that type of property for sale. The time and place of the public auction must be commercially reasonable. If there is a usual place or market for a public auction disposition of property of the type involved that is reasonably available, the collateral should be disposed of there. Tex. Bus. & Com. Code § 2.706(d)(2). “[I]f such ‘usual’ place or market is not reasonably available, a duly advertised public [disposition] may be held at another place if it is one which prospective bidders may reasonably be expected to attend, as distinguished from a place where there is no demand whatsoever for [property] of the kind.” Tex. Bus. & Com. Code § 2.706 cmt. 9. The collateral should be available for reasonable inspection by prospective bidders, either at the public auction disposition or at another place made known to the bidders. Tex. Bus. & Com. Code § 2.706(d)(3). In a transaction, other than a consumer transaction, if a secured party’s compliance with the provisions of chapter 9 is placed in issue, the secured party has the burden of establishing that its collection, enforcement, or disposition of the collateral complied with the statutory requirements. Tex. Bus. & Com. Code § 9.626(a)(2). A secured party should consider how it will establish that all aspects of its public auction disposition of collateral meet the commercially reasonable requirement before deciding to proceed in that manner. A secured party may elect to conduct a private disposition. A private disposition may offer lower transaction costs to the secured party. A private disposition must be an arm’s-length transaction.

There are two primary distinctions between a public disposition and a private disposition of personal property collateral. First, the secured party may purchase the collateral at a public disposition but generally may not do so at a private disposition.
Bus. & Com. Code § 9.610(c). Second, the debtor is entitled to notification of “the time and place” of a public disposition but is merely entitled to notification of “the time after which” a private disposition is to be made. Tex. Bus. & Com. Code § 9.613(1)(E).

§ 14.3:3 Rules for Foreclosure


Except as described below, the secured party must send a proper notification of disposition of collateral to the debtor and to any secondary obligor. Additionally, if the collateral is other than consumer goods, notice must be sent to any other person from whom the secured party has received, before the notification date, notification of a claim of an interest in the collateral and to any other secured party that has filed a financing statement that meets the requirements set out in section 9.611(c)(3)(B) or that has complied with certificate of title or other title registration laws. Tex. Bus. & Com. Code § 9.611(c). Thus, for a disposition of collateral other than consumer goods, the foreclosing secured party has the duty of conducting a Uniform Commercial Code financing statement search to discover other potential secured parties and to notify any that are discovered. The attorney advising the secured party should carefully review section 9.611 and its comments to determine the filing offices to search and the period within which the search should be conducted. In a transaction other than a consumer transaction, a proper notification sent after default and ten or more days before the earliest time of disposition is deemed to be reasonable. Tex. Bus. & Com. Code § 9.612(b). The secured party need not give notice of disposition of the collateral if the property is perishable, threatens to decline speedily in value, or sells on a recognized market (such as a publicly listed stock). Tex. Bus. & Com. Code § 9.611(d). The debtor or a secondary obligor may waive its rights, but not the rights of other parties, to receive a notice of disposition of collateral by written waiver signed after default. Tex. Bus. & Com. Code § 9.624.

The contents of a proper notice of disposition of collateral are set forth in section 9.613 for collateral other than consumer goods and in section 9.614 for consumer goods collateral. Those sections also include model forms, which when completed are deemed to provide sufficient information concerning the disposition. The debtor may not waive, or agree that the secured party may vary from, the notification requirements of those sections. See Tex. Bus. & Com. Code § 9.602(7). Notices to consumers must also comply with the federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692–1692p) and the Texas Debt Collection Act (Tex. Fin. Code §§ 392.001–.404).

The secured party may buy personal property collateral at a public disposition. Tex. Bus. & Com. Code § 9.610(c)(1). The secured party may buy personal property collateral at a private disposition only if the property is of a kind that is customarily sold on a recognized market or is the subject of widely distributed standard price quotations. Tex. Bus. & Com. Code § 9.610(c)(2).

If a foreclosing secured party does not comply with section 9.601 et seq., a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions. Tex. Bus. & Com. Code § 9.625(a). This section also sets out the damages for which a secured party may be liable, including minimum penalties in consumer transactions and non-consumer transactions. See Tex. Bus. & Com. Code § 9.625(b)–(g).
A contract for sale, lease, license, or other disposition of personal property as a result of a foreclosure includes the warranties relating to title, possession, quiet enjoyment, and the like that by operation of law accompany a voluntary disposition of like-kind property. Tex. Bus. & Com. Code § 9.610(d). These warranties may be disclaimed or modified. The manner and the approved language for disclaiming or modifying warranties are set out in Tex. Bus. & Com. Code § 9.610(e), (f).

§ 14.3:4 Strict Foreclosure


A secured party that wants to accept personal property collateral in full or partial satisfaction of a secured obligation in a non-consumer transaction must obtain the debtor’s consent. The secured party must send its proposal to do so to any person from whom the secured party has received, before the debtor consented to the acceptance, a notice of a claim of interest in the collateral and to any other secured party or lienholder that has a perfected security interest in the collateral either because of a filed financing statement that meets the requirements of section 9.621(a)(2) or because of compliance with certificate of title or other title registration laws. Tex. Bus. & Com. Code § 9.621(a). If the secured party proposes to accept the collateral in partial satisfaction of the secured obligation, the secured party must also notify any secondary obligor. Tex. Bus. & Com. Code § 9.621(b). A secured party that proposes to accept personal property collateral in full or partial satisfaction of a secured obligation thus has a duty to conduct a UCC financing statement search to discover other potential secured parties and to notify those that have filed a proper financing statement of the secured party’s proposal. Moreover, a secured party that accepts personal property collateral is liable to another secured party that should have been notified, but was not, for any loss resulting from the failure of the enforcing secured party to notify the other secured party. Tex. Bus. & Com. Code § 9.625(b). The debtor may consent to the acceptance of collateral in partial satisfaction of the secured obligation only by a record authenticated after default. The debtor may consent to acceptance of collateral in full satisfaction of the secured obligation by authenticating a record (for example, signing a writing) after default or by failing to object to a properly sent proposal within twenty days after the proposal is sent. Tex. Bus. & Com. Code § 9.620(c)(2).

The secured party may not use strict foreclosure if—


2. the secured party timely receives objection in writing from a party entitled to notice of the proposed strict foreclosure (Tex. Bus. & Com. Code § 9.620(a)(2));

3. the secured party is foreclosing a security interest in consumer goods and the debtor is in possession of the goods (Tex. Bus. & Com. Code § 9.620(a)(3));

4. the secured party is foreclosing a security interest in consumer goods and the debtor has paid more than 60 percent of the principal amount of the obligation (Tex. Bus. & Com. Code § 9.620(e)); or

5. in a consumer transaction, the secured party does not propose to satisfy the secured obligation in full (Tex. Bus. & Com. Code § 9.620(g)).

§ 14.3:5 Suit for Deficiency—Personal Property


In a consumer goods transaction in which either the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency, the secured party must send a written explanation of the surplus or deficiency. If a surplus exists, the secured party must send an explanation of the surplus before or when the secured party accounts to the debtor and pays any surplus or within fourteen days of the debtor’s request for an explanation, whichever comes first. If a deficiency exists, the secured party must send an explanation of the deficiency when the secured party first makes written demand for the deficiency or within fourteen days of the debtor’s request for an explanation, whichever comes first. Tex. Bus. & Com. Code § 9.616(b). A debtor or consumer obligor is entitled without charge to one response to a request for an explanation of the surplus or deficiency during any six-month period in which the secured party does not send one. The secured party may require payment of a charge not exceeding $25 for each additional response. Tex. Bus. & Com. Code § 9.616(e).

The rules for an action to collect a deficiency other than in a consumer transaction are set forth in section 9.626. This section provides for the determination of the deficiency when the secured party fails to comply with the procedures set forth in section 9.601 et seq. Under this section, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney’s fees exceeds the greater of the proceeds the secured party realized or the amount the proceeds would have been if the secured party had proceeded in compliance with those provisions. Tex. Bus. & Com. Code § 9.626(a). A court may not infer from section 9.626 the nature of the proper rule in consumer transactions and may continue to apply existing principles. Tex. Bus. & Com. Code § 9.626(b). See Greathouse v. Charter National Bank—Southwest, 851 S.W.2d 173 (Tex. 1992); Tanenbaum v. Economics Laboratory, Inc., 628 S.W.2d 769 (Tex. 1982).

§ 14.3:6 Cautions

The lender’s rights are governed by subchapter F of article 9 of the Uniform Commercial Code (Tex. Bus. & Com. Code §§ 9.601–.628) and the security agreement. Certain provisions, noted in Tex. Bus. & Com. Code § 9.602, cannot be altered by the parties. Before exercising any contractual right under the security agreement, the attorney should review these subchapters.

§ 14.3:7 Secured Party’s Collection Rights—Accounts, Intangibles, and Instruments

After default, or earlier if agreed, the secured party may notify an account debtor or other person obligated on collateral, such as the maker of a Business and Commerce Code chapter 3 negotiable instrument, to make payment or otherwise render performance directly to the secured party. Tex. Bus. & Com. Code § 9.607(a). This remedy may enhance the secured party’s recovery because payments on the collateral would otherwise be paid to the debtor. This procedure requires no prior notice to the debtor. Cullen Frost Bank v. Dallas Sportswear Co., 730 S.W.2d 668, 669–70 (Tex. 1987). If a debtor or secondary obligor will be liable for a deficiency, a secured party must proceed in a commercially reasonable manner in collecting or enforcing the obligation of an account debtor or other person obligated on collateral. Tex. Bus. & Com. Code § 9.607(c).
§ 14.3:8  Right of Possession

After default, unless otherwise agreed, the secured party may take possession of tangible personal property collateral. Tex. Bus. & Com. Code § 9.609. The repossession must not breach the peace. This nonjudicial self-help remedy is useful in allowing the secured party to obtain possession without delay.

§ 14.3:9  Right of Redemption

A debtor, any secondary obligor, or any junior secured party or lienholder may redeem the collateral from the secured party at any time before (1) the secured party has collected the collateral under section 9.607, (2) the secured party has disposed of the collateral or entered into a contract to dispose of the collateral under section 9.610; or (3) the secured party has accepted the collateral in full or partial satisfaction of the obligation under section 9.622. See Tex. Bus. & Com. Code §§ 9.607, 9.610, 9.622. To redeem the collateral, a person must fulfill all obligations secured by the collateral and pay certain expenses and attorney’s fees. Tex. Bus. & Com. Code § 9.623(b).

§ 14.3:10  Secured Party’s Liability


Chapter 9 requires the secured party’s collection and enforcement rights to be exercised in a commercially reasonable manner. Evidence that a better price could have been obtained under a different foreclosure proceeding does not of itself establish that the sale was commercially unreasonable. A sale under judicial approval is deemed to be commercially reasonable, but the UCC does not require a secured party to seek such approval. See Tex. Bus. & Com. Code § 9.627.

§ 14.4  Foreclosure Documents

§ 14.4:1  Foreclosure Documents Applicable to Real Property and Personal Property

The appropriate forms to use in any foreclosure depend on the facts of the specific situation. The forms in this chapter are examples of foreclosure documents to be used with the forms in this manual, without modification of their principal terms. Use of modified State Bar forms or other forms could significantly change the foreclosure document requirements.

Sections 14.4:2 through 14.10 below provide a chronological analysis of the foreclosure process and references to forms for compliance.

§ 14.4:2  Document Review

The attorney should review with the client all the loan documents for the transaction. In transactions that cover long time periods, there may be modification agreements that would affect the foreclosure process. For example, a subordinate creditor may...
have obtained an agreement from the first secured creditor to receive a special notice of default or foreclosure. The attorney should verify with the client that no such agreements exist.

§ 14.4:3 Statute of Limitations

The attorney should confirm that the statute of limitations has not barred any right to relief. A sale of real property under a power of sale contained in a deed of trust must be made not later than four years after the day the cause of action accrues. Tex. Civ. Prac. & Rem. Code § 16.035(b). However, a mortgage servicer may foreclose a security interest in personal property collateral notwithstanding that there is a limitations defense to the debt. Miller, Hiersche, Martens & Hayward, P.C. v. Bent Tree National Bank, 894 S.W.2d 828, 830 (Tex. App.—Dallas 1995, no writ).

§ 14.4:4 Current Title, Abstract, and Tax Searches

The attorney should verify current information about the collateral and its ownership. Because tax liens are accorded priority over most other claims, the client must know the amounts of any delinquent taxes to be able to decide if the foreclosure is economically feasible. See Tex. Tax Code § 32.05.

The attorney should advise the client that title insurance coverage may be available. The limited preforeclosure policy (form T-98) is issued in connection with a mortgage in default to the named mortgagee or its assignee, a loan servicer, a trustee, or an attorney and insures as to matters recorded since the mortgage, including involuntary liens such as federal tax liens. See Procedural Rule P-43, Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas, available at www.tdi.texas.gov/title/titlem4g.html#P-43.

§ 14.4:5 Consumer Transactions

Fair Debt Collection Practices Act Notice: The forms in this chapter are drafted for use in nonconsumer transactions, to which federal and state fair-debt collection acts do not apply. The Texas Property Code provides that a trustee or a substitute trustee is not a debt collector under Texas law. Tex. Prop. Code § 51.0075(b). If, however, the attorney wishes to try to adapt these forms for a consumer transaction, the notice contained in clause 14-7-1 in this chapter should be incorporated in the first correspondence the attorney has with the consumer. Additional modifications to the forms also may be required. Case law is unclear, and there is no Fifth Circuit authority on what additional collection efforts, if any, may be made during the thirty-day period during which the consumer may request debt verification. Nothing may be included with the notice that negates the notice or would lead an unsophisticated person to misunderstand the right to contest the debt. Chauncey v. JDR Recovery Corp., 118 F.3d 516, 519 (7th Cir. 1997) (demand that payment be received within thirty days or “a decision to pursue other avenues to collect the amount due will be made” found to contradict notice); Terran v. Kaplan, 109 F.3d 1428, 1434 (9th Cir. 1997) (statement that “[u]nless an immediate telephone call is made . . . we may find it necessary to recommend to our client that they proceed with legal action” held not a demand for payment and thus not contradictory or overshadowing). The safest course of action would be to send only the notice found in clause 14-7-1 and wait thirty days before making any other collection efforts. The attorney, as a debt collector under the federal and state acts, can be personally liable to the consumer for failure to comply with the acts and should review this area of the law with care. See the section titled “Fair Debt Collection Practices” in chapter 2 of this manual and the materials in “Additional Resources” at the end of these practice notes.

Fair Credit Reporting Act: Any financial institution that extends credit to an individual and regularly and in the ordinary course of business reports negative information to a credit bureau must give its individual customers a clear and conspicuous
written notice about reporting negative information. A financial institution complies with the notice requirement if the institution uses a model notice promulgated by the Board of Governors of the Federal Reserve System. There are two model notices, one that may be used before reporting negative information to a credit bureau and one that may be used after reporting negative information to a credit bureau. If the financial institution did not include the notice in its initial loan documentation or related communication, the notice should be given with the first correspondence concerning the foreclosure. 15 U.S.C. § 1681s–2(a)(7); 12 C.F.R. pt. 222. The model forms of notice are found in clauses 14-7-2 and 14-7-3. See the section titled “Fair Credit Reporting Act” in chapter 2.

§ 14.5 Notices

All foreclosure notices must be sent by certified mail and should be sent return receipt requested. For real estate foreclosures, the notice must be addressed to the debtor at the debtor’s last known address. Tex. Prop. Code § 51.002(e). For personal property foreclosures, the notice should be sent to the address specified in the security agreement or other agreement or, if none, to any address reasonable under the circumstances. Tex. Bus. & Com. Code § 1.201(b)(36). For foreclosure of a debt secured by a debtor’s residence there is a presumption that the residential address is to be used for notice unless the debtor notifies the mortgage servicer otherwise. Tex. Prop. Code § 51.0001(2)(A). For all other debts the notices are sent to the last known address of the debtor as shown by the records of the mortgage servicer. Tex. Prop. Code § 51.0001(2)(B). If there is doubt about the proper address, it is good practice to send the notice to each address in the file. If two borrowers reside at the same address, the attorney may wish to send the letter separately to each person at the address. Some attorneys also send a copy of the letter to each party by first-class mail to attempt actual delivery if the certified mail is not accepted by the borrower. That attempt should be noted on the letter.

The mortgage servicer must give at least twenty days’ notice of default before posting the property for foreclosure if the property is the debtor’s residence. Tex. Prop. Code § 51.002(d). See the notice of default and intent to accelerate, form 14-4 in this chapter.

A debtor is required to inform the mortgage servicer of any change of address of the debtor. Tex. Prop. Code § 51.0021. Form 14-2 is a “Notice of Change of Debtor’s Address” to comply with this requirement.


If the mortgagee has not insisted on strict performance of the loan documents in the past, the mortgagee should advise the borrower of its decision to strictly enforce the agreements in the future. Dhanani Investments, Inc. v. Second Master Bilt Homes, Inc., 650 S.W.2d 220, 222 (Tex. App.—Fort Worth 1983, no writ). See form 14-1 in this chapter.

§ 14.5:2 Notice of Maturity and Demand for Payment

If the note has matured by its own terms, the mortgagee or mortgage servicer should demand payment. See form 14-3 in this chapter.

§ 14.5:3 Notice of Default and Intent to Accelerate

The notices of default and of intent to accelerate are waived in the promissory note form (see form 6-1 in this manual). However, Texas courts deem acceleration a harsh remedy. Shumway v. Horizon Credit Corp., 801 S.W.2d 890, 892–93 (Tex. 1991).
Even if notices of default and of intent to accelerate have been expressly waived, many attorneys elect to send this notice, viewing the waiver more as a safeguard to protect the mortgagee from the complications of minor technicalities than as a license to foreclose on borrowers without notice or demand. See form 14-4 in this chapter.

§ 14.5:4 Notice of Acceleration

The notice of acceleration is used if the mortgagee or mortgage servicer gives notice of intent to accelerate and the borrower fails to cure the default. See form 14-5 in this chapter.

§ 14.5:5 Reinstatement Agreement

Sometimes the mortgagee and the borrower will agree to continue the payment terms of the note after acceleration. However, once the maturity of a note is accelerated, limitations on the entire debt will begin to run. A reinstatement agreement should rescind the acceleration and reinstate the payment provisions in the note. See form 14-6 in this chapter.

§ 14.5:6 Affidavit of Posting and Filing

The affidavit of posting and filing is not required by law, but it serves to document where and when the notice was distributed and will normally be required by title companies. See form 14-8 in this chapter. If a newspaper or other public advertisement is used, the company publishing the notice should provide an affidavit of the publication, and the attorney should provide a copy of the page for the client’s file. Some attorneys prefer to use a certificate form instead of an affidavit.

§ 14.5:7 Affidavit of Mailing

The affidavit of mailing is not required by law, but it serves to document legal notice mailing compliance and will normally be required by title companies. See form 14-9 in this chapter. Such an affidavit, completed and signed by a person knowledgeable of the facts, is prima facie evidence of service. Tex. Prop. Code § 51.002(e). Some attorneys prefer to use a certificate form instead of an affidavit.

§ 14.6 Foreclosure Documents Unique to Real Property

§ 14.6:1 Appointment of Substitute Trustee

Forms 14-10 and 14-11 in this chapter may be used if the mortgagee or mortgage servicer wishes for someone other than the trustee named in the deed of trust to act. The appointment may also be made in the notice of trustee’s sale. See section 14.6:2 below. If required by the deed of trust, the appointment of substitute trustee must be recorded in the real property records before posting the notice of foreclosure.

§ 14.6:2 Notice of Trustee’s Sale

Form 14-12 in this chapter has been adapted to include personal property that may be covered by the deed of trust and that the mortgagee may wish to foreclose on with the foreclosure of the real property. See section 14.2:7 above. Note that, once appointed, the substitute trustee is the trustee under the deed of trust and is referred to as such rather than as the substitute trustee.
The appointment or authorization of a trustee or substitute trustee made in a notice of sale is effective as of the date of the notice if the notice—

1. complies with sections 51.002 and 51.0075(e) of the Texas Property Code;
2. is signed by an attorney or agent of the mortgagee or mortgage servicer; and
3. contains a statement in all capital letters, bold-faced type, to read as follows:

   **THIS INSTRUMENT APPOINTS THE SUBSTITUTE TRUSTEE(S) IDENTIFIED TO SELL THE PROPERTY DESCRIBED IN THE SECURITY INSTRUMENT IDENTIFIED IN THIS NOTICE OF SALE. THE PERSON SIGNING THIS NOTICE IS THE ATTORNEY OR AUTHORIZED AGENT OF THE MORTGAGEE OR MORTGAGE SERVICER.**


§ 14.6:3 Agenda of Public Sale

Forms 14-14 and 14-15 in this chapter, although not required by law, serve to document the sale.

§ 14.6:4 Trustee’s Deed

Form 14-16 in this chapter has been adapted to include personal property that may be covered by the deed of trust and that the mortgagee may wish to foreclose on with the foreclosure of the real property. See section 14.2:7 above. Note that, once appointed, the substitute trustee is the trustee under the deed of trust and is referred to as such rather than as the substitute trustee.

Deeds transferring an interest to or from an individual, including a trustee, must contain the confidentiality notice required by Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 14.6:5 Foreclosure Affidavit

Form 14-17 in this chapter, although not required by law, serves to document the legal requirements of the sale. Title companies will normally require an affidavit from the trustee attesting to these matters. This form may be used as a stand-alone document or may be attached to the trustee’s deed. It may also be used in conjunction with the affidavit of posting and filing (form 14-8) and the affidavit of mailing (form 14-9) with the appropriate modifications.

§ 14.6:6 Notice and Affidavit of Advancement

If the mortgagee advances funds to cure a default under the deed of trust to secure assumption or a similar form used to secure performance, the mortgagee should use the notice of advancement (form 14-18 in this chapter) and the affidavit of advancement (form 14-19) to protect its rights and put parties on notice of the payment.

§ 14.6:7 IRS Notice Letter

If the property is subject to an Internal Revenue Service lien, the notification letter at form 14-20 in this chapter may be used. See section 14.2:5 above for information about the IRS lien.
§ 14.6:8 Rescission of Nonjudicial Foreclosure Sale

Texas Property Code section 51.016 provides a nonexclusive method for rescission of a nonjudicial foreclosure sale of residential real property, as defined in section 51.016(a). See Tex. Prop. Code § 51.016. Not later than the fifteenth day after the date of a foreclosure sale, a mortgagee, trustee, or substitute trustee may rescind the sale if one or more of these statutory reasons listed in section 51.016(b) exists:

1. the statutory requirements for the sale were not satisfied;
2. the default leading to the sale was cured before the sale;
3. a receivership or dependent probate administration involving the property was pending at the time of sale;
4. a condition specified in the conditions of sale prescribed by the trustee or substitute trustee before the sale and made available in writing to prospective bidders at the sale was not met;
5. the mortgagee or mortgage servicer and the debtor agreed before the sale to cancel the sale based on an enforceable written agreement by the debtor to cure the default; or
6. at the time of the sale, a court-ordered or automatic stay of the sale imposed in a bankruptcy case filed by a person with an interest in the property was in effect.


The party rescinding the sale must serve written notice of rescission on the purchaser and each debtor obligated to pay the debt that describes the reason for the rescission and includes recording information for any affected trustee’s deed. Tex. Prop. Code § 51.016(c)(1). See form 14-40 in this chapter. This notice must be served by certified mail in the county where all or a part of the property is located. Tex. Prop. Code § 51.016(c)(2), (d). The rescinding mortgagee, trustee, or substitute trustee shall record in the real property records of the county in which the written notice of rescission is filed an affidavit stating the date the bid amount was returned together with the certified mail, electronic or wire transfer, or courier service delivery tracking information. Tex. Prop. Code § 51.016(f). See form 14-41. This affidavit is prima facie evidence of the return of the bid amount. Tex. Prop. Code § 51.016(g). A completed rescission restores the mortgagee and debtor to their respective title, rights, and obligations under the instrument relating to the foreclosed property that existed immediately prior to the sale. Tex. Prop. Code § 51.016(h). No action challenging the effectiveness of a rescission under this section may be commenced, unless filed on or before the thirtieth calendar day after the notices of rescission are filed for recording. Tex. Prop. Code § 51.016(j). A rescission under this section is not effective as to a creditor or subsequent good-faith purchaser for value. Tex. Prop. Code § 51.016(i). Damages in a suit challenging the effectiveness of the rescission or resulting from the rescission are substantially limited to the amount of the bid price. See Tex. Prop. Code § 51.016(k), (l). Specific performance is not available. Tex. Prop. Code § 51.016(k).

§ 14.7 Foreclosure Documents for Public Disposition of Personal Property

§ 14.7:1 Waiver of Right to Notice after Default

A debtor or secondary obligor may waive its rights (but not the rights of other parties) to notice of a public disposition of personal property collateral, but the waiver must be signed after the default has occurred. Tex. Bus. & Com. Code § 9.624(a). See form 14-21 in this chapter for a waiver.
§ 14.7:2 Notice of Public Disposition

The posted notice of public sale can be used for public posting and advertisement of the sale. The attorney should consider advising the client about the requirements of a commercially reasonable sale and the risks associated with it. See form 14-23 in this chapter for a notice of public sale.


§ 14.7:3 Agenda of Public Sale

The agenda of public sale is not required by the Uniform Commercial Code, but it serves to document that the sale was completed. See form 14-24 in this chapter.

§ 14.7:4 Bill of Sale

The bill of sale evidences the transfer of ownership of the personal property to the successful bidder. See form 14-25 in this chapter. If applicable, a disclaimer of warranties should be included. To disclaim warranties, the attorney must use language similar to that provided in Tex. Bus. & Com. Code § 9.610(f).

§ 14.8 Strict Foreclosure of Personal Property

§ 14.8:1 Notice of Strict Foreclosure

The notice of strict foreclosure notifies the debtor and others required to be notified of the secured party’s proposal to accept personal property collateral in satisfaction of the debt. See Tex. Bus. & Com. Code §§ 9.620–.622. See form 14-26 in this chapter for a notice of strict foreclosure.

§ 14.8:2 Consent to Strict Foreclosure


§ 14.8:3 Objection to Strict Foreclosure

A letter of objection notifies the secured party of a person’s objection to the secured party’s proposal to accept the collateral in satisfaction of the debt. See form 14-27 in this chapter. The letter may be sent by any person to whom the secured party sent
its proposal to accept the collateral. To be effective, the objection letter must be received by the secured party within twenty days after the date the secured party sends its proposal. Tex. Bus. & Com. Code § 9.620(c)(2)(C), (d)(1), (d)(2)(A).

§ 14.9 Private Disposition of Personal Property

§ 14.9:1 Waiver of Notice after Default

A debtor or secondary obligor may waive its rights (but not the rights of other parties) to notice of a private disposition of personal property collateral, but the waiver must be signed after the default has occurred. Tex. Bus. & Com. Code § 9.624(a). See form 14-21 in this chapter for a waiver.

§ 14.9:2 Notice of Private Disposition

Texas Business and Commerce Code section 9.613 sets forth an approved form for notice of public or private disposition of personal property collateral other than consumer goods. See Tex. Bus. & Com. Code § 9.613. The approved form for notification of public or private disposition of personal property collateral that consists of consumer goods is set out in Tex. Bus. & Com. Code § 9.614. Notice must be sent to the debtor, any secondary obligor, and, if the collateral is other than consumer goods, any other person from whom the secured party has received, before the notification date, an authenticated claim of interest in the collateral, and any other secured party or lienholder described in section 9.611(c)(3)(B), (C). Tex. Bus. & Com. Code § 9.611(c). See form 14-28 in this chapter for a notice if the collateral is consumer goods and form 14-29 for a notice if the collateral is not consumer goods.

§ 14.9:3 Memorandum of Private Sale

The agenda of private sale is not required by the Uniform Commercial Code, but it serves to document that the sale was completed. See form 14-30 in this chapter.

§ 14.9:4 Bill of Sale

The bill of sale evidences the transfer of ownership of the personal property to the buyer at the private foreclosure sale. See form 14-25 in this chapter. If applicable, a disclaimer of warranties should be included. To disclaim warranties, the attorney must use language similar to that provided in Tex. Bus. & Com. Code § 9.610(f).

§ 14.10 Security Interest Included in Deed of Trust

If the deed of trust contains the security interest covering personal property, the lienholder may foreclose the personal property lien with the real property foreclosure. Tex. Bus. & Com. Code § 9.604(a).

§ 14.11 Collateral Transfer of Note and Lien Foreclosure

The collateral transfer of note and lien form creates a security interest in an instrument, the collateral promissory note. The foreclosure of the collateral note under a collateral transfer is governed by the Texas Business and Commerce Code rather than by the Texas Property Code. See Tex. Bus. & Com. Code §§ 9.601–.628. The secured party may select any procedure applicable to the situation: strict foreclosure, public disposition, or private disposition. Without foreclosing on the collateral
note, the secured party may collect and enforce the collateral note, including, if the collateral note is in default, accelerating the collateral note and exercising any foreclosure remedy contained in the underlying deed of trust. See the collateral transfer of note and lien, form 9-8 in this manual.
Additional Resources


Form 14-1

Letter to Reinstate Default Provisions

[Date]

[Name and address of borrower]

See section 14.5 in this chapter.

Re: [describe note and loan documents]

[Salutation]

In the past, you have been delinquent in your monthly payments, and the mortgagee has accepted the late payments without assessing a penalty. Please be advised, however, that all future payments must be received by the due date, or the mortgagee will exercise its rights under the loan documents.

Include clause 14-7-1 if this is the first correspondence from the attorney to a debtor who is a consumer. See section 14.4:5.

If you have any questions, please consult your legal counsel.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail
Notice of Change of Debtor’s Address

Date:

Debtor:

Debtor’s Old Mailing Address:

Debtor’s New Mailing Address:

Trustee:

Trustee’s Mailing Address:

Mortgagee:

Mortgagee’s Mailing Address:

Obligation

Note

Date:

Original principal amount:

Debtor:

Grantor: (if different)

Lender:

Maturity date:
Property (including any improvements):

This is notice to Lender and its mortgage servicers of the change in Debtor’s mailing address.

[Name of [grantor/debtor]]
Notice of Maturity and Demand for Payment

[Date]

[Name and address of borrower]

See section 14.5 in this chapter.

Re: [describe note and loan documents]

[Salutation]

The referenced note matured on [date] and remains unpaid.

Demand is made for the immediate payment of all unpaid principal and all accrued but unpaid interest. Please contact [name] for the current payoff information.

Select one of the following.

Or

Demand is made for the immediate payment of $[amount] principal and $[amount] accrued but unpaid interest through [date], together with additional interest at the rate of $[amount] per day until paid.

Continue with the following.

Please be advised that if the payment is not received by [date], the mortgagee will exercise its rights under the loan documents.

Include clause 14-7-1 if this is the first correspondence from the attorney to a debtor who is a consumer. See section 14.4.5.

If you have any questions, please consult your legal counsel.
Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail
Notice of Default and Intent to Accelerate

[Date]

[Name and address of borrower]

See section 14.5 in this chapter.

Re: [describe note and loan documents]

[Salutation]

This letter is to give you notice of default under the referenced loan documents. This default consists of [describe default].

Unless the default is cured by [date], the mortgagee intends to enforce its rights and remedies under the loan documents. Specifically, the mortgagee intends to accelerate the maturity of the note and demand payment for the full unpaid principal balance, together with accrued but unpaid interest and all fees and expenses, as allowed by law. If the amount due is not timely paid, the mortgagee intends to foreclose the lien under the loan documents. [Include if applicable: In addition, the mortgagee demands that you pay to the mortgagee the proceeds of all accrued but unpaid rent as of the date you receive this letter and all rent that accrues after you receive this letter. Payment of the proceeds should be made to [name of mortgagee and address for payments]. The tenant[s] will be instructed to pay all rents to the mortgagee until further notice, in accordance with [the deed of trust/[specify instrument]] and the Texas Property Code.]
You are notified that if the default is not cured within twenty days from the date of posting of this letter, the mortgagee intends to enforce its rights under the loan documents. Specifically, the mortgagee intends to accelerate the maturity of the note and demand payment for the full unpaid principal balance, together with accrued but unpaid interest and all fees and expenses, as allowed by law. If the amount due is not timely paid, the mortgagee intends to foreclose the lien under the loan documents.

If you have any questions, please consult your legal counsel.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail
Form 14-5

Notice of Acceleration

[Date]

[Name and address of borrower]

Re: [describe note and loan documents]

[Salutation]

Because of the failure to cure the default under the referenced loan documents, the mortgagee has accelerated the maturity of the note.

Select one of the following.

Demand is made for the payment of all unpaid principal and all accrued but unpaid interest. Please contact [name] for the current payoff information.

Or

Demand is made for the payment of $[amount] principal and $[amount] accrued but unpaid interest through [date], together with additional interest at the rate of $[amount] per day until paid.

Continue with the following.

If the amount due is not paid, the mortgagee intends to foreclose the lien under the loan documents in accordance with the enclosed notice of sale.

[Include if applicable: The mortgagee demands that you pay to the mortgagee the proceeds of all accrued but unpaid rent as of the date you receive this letter and all rent that accrues after you receive this letter in accordance with the loan documents and the Texas]
Property Code. Payment of the proceeds should be made to [name of mortgagee and address for payments]. The tenant[s] will be instructed to pay all rents to the mortgagee until further notice, in accordance with [the deed of trust/[specify instrument]] and the Texas Property Code.]

Include clause 14-7-1 if this is the first correspondence from the attorney to a debtor who is a consumer. See section 14.4:5.

If you have any questions, please consult your legal counsel.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail
Reinstatement Agreement

Date:

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property:

Note

Date:

Principal amount:

Mortgagee:

Borrower:

[Include if the owner is different from the borrower: Owner of Property:]

[Guarantor:]

Borrower has defaulted in payment of the Note, and Mortgagee has accelerated the maturity of the Note. At Borrower’s request and for valuable consideration, Mortgagee
rescinds the acceleration, and Mortgagee and Borrower reinstate the payment terms of the Note.

Borrower agrees to pay the Note according to its terms and to comply with all provisions of the Deed of Trust. This agreement does not replace the Note or the Deed of Trust. It only reinstates those documents as written.

Borrower and Mortgagee agree that the unpaid principal balance of the Note is $[amount] and the interest is paid through [date].

Guarantor consents to the reinstatement of the Note under the terms of this agreement.

And/Or

Owner of Property consents to the reinstatement of the Note under the terms of this agreement.

Mortgagee’s acceptance of this agreement and rescission of the acceleration will not prejudice Mortgagee’s rights regarding future defaults under the Note or the Deed of Trust.

As a material inducement to Mortgagee to execute this agreement, Borrower [include either or both if applicable: and Guarantor/and Owner of Property] acknowledge[s] that:

1. The current principal balance of the Note is $[amount], and the interest is paid through [date].

2. The liens and security interests of the Deed of Trust are valid and subsisting liens against the Property and are renewed to secure the payment of the Note and the obligations of the Deed of Trust.
3. There are no claims or offsets against or defenses or counterclaims to the Note and the obligations secured by the Deed of Trust.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of borrower]

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of mortgagee]

Include signature lines for the guarantor and the owner if applicable. Include acknowledgments.
Additional Clauses for Foreclosure Documents

**Fair Debt Collection Act Notice**

If this notice is sent in a letter as suggested in section 14.4:5 in this chapter, a sentence describing the debt should be included following the internal address.

**Clause 14-7-1**

In accordance with federal and Texas laws regarding fair debt collections, unless you, within thirty days after receipt of this notice, dispute the validity of the debt set forth above, or any portion thereof, the indebtedness will be assumed to be valid. If you notify the undersigned in writing within the thirty-day period that the indebtedness, or any portion thereof, is disputed, I will obtain a verification of the indebtedness and will mail that verification to you. On my receipt of your written request within the thirty-day period, I will forward to you the name and address of the original creditor, if different from the current creditor.

I am attempting to collect this indebtedness, and any information obtained will be used for that purpose. This letter is being sent to your attention in accordance with federal law.

**Fair Credit Reporting Act Notices**

**Clause 14-7-2**

We may report information about your account to credit bureaus. Late payments, missed payments, or other defaults on your account may be reflected in your credit report.
Clause 14-7-3

We have told a credit bureau about a late payment, missed payment, or other default on your account. This information may be reflected in your credit report.
Affidavit of Posting and Filing

Date:

Affiant:

If the affidavit is to be attached to the trustee’s deed and has been incorporated by reference, the following may be omitted.

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the foreclosure of the Deed of Trust that occurred on [date].

2. Attached to this affidavit is a copy of the Notice of Trustee’s Sale, file-stamped by the county clerk’s office.
3. Affiant posted a copy of the Notice of Trustee’s Sale on [date] at the place at [the/each] courthouse designated in the notice [include if applicable: ], being the area designated by the county commissioner’s court for foreclosure sales,] and filed the Notice of Trustee’s Sale in the office of the county clerk for [the/each] county in which the property is located.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on __________________ by [name of affiant].

Notary Public, State of Texas
Affidavit of Mailing

Date:

Affiant:

If the affidavit is to be attached to the trustee’s deed and has been incorporated by reference, the following may be omitted.

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: Insert property description and include the following if applicable, including all personal property secured by the security agreement included in the Deed of Trust.

Continue with the following.

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the foreclosure of the Deed of Trust that occurred on [date].

Select one of the following.
2. Attached to this affidavit is a copy of the letter sent to each debtor obligated to pay the debt at the address required by the Deed of Trust and the Texas Property Code.

Or

2. At least twenty-one days before the trustee’s sale, Affiant, either personally or by agent, served notice of the sale on [date] on each debtor, at the address for that debtor as shown by Mortgagee’s records, who [is/are]: [list name[s] and address[es]].

Continue with the following.

Each notice was served by certified mail, postage prepaid, properly addressed to each debtor listed above at the address[es] stated.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _________________ by [name of affiant].

_____________________________________________________

Notary Public, State of Texas
Form 14-10

Appointment of Substitute Trustee[s] [Mortgagee]

Date:

Borrower:

Borrower’s Address:

Mortgagee:

Mortgagee’s Address:

Mortgage Servicer:

Mortgage Servicer’s Address:

Substitute Trustee:

Substitute Trustee’s Address:

Repeat as necessary for multiple trustees.

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:
Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

The Deed of Trust and section 51.0075 of the Texas Property Code allow Mortgagee to remove the trustee[s] and appoint [a] substitute trustee[s]. Mortgagee removes the present trustee[s] and appoints Substitute Trustee[s] as the trustee[s] under the Deed of Trust. Mortgagee directs Substitute Trustee[s] to foreclose the lien of the Deed of Trust in accordance with its terms and the laws of the state of Texas.

[Name of mortgagee]

Include acknowledgment.
Appointment of Substitute Trustee[s] [Mortgage Servicer]  

Form 14-11

Appointment of Substitute Trustee[s]  
[Mortgage Servicer]

Date:

Borrower:

Borrower’s Address:

Mortgagee:

Mortgagee’s Address:

Mortgage Servicer:

Mortgage Servicer’s Address:

Substitute Trustee:

Substitute Trustee’s Address:

Repeat as necessary for multiple trustees.

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:
Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

Sections 51.0001(7) and 51.0075 of the Texas Property Code allow a mortgage servicer to remove the trustee[s] and appoint [a] substitute trustee[s]. Mortgage Servicer removes the present trustee[s] and appoints Substitute Trustee[s] as the trustee[s] under the Deed of Trust. Mortgage Servicer directs Substitute Trustee[s] to foreclose the lien of the Deed of Trust in accordance with its terms and the laws of the state of Texas.

[Name of mortgage servicer]

Include acknowledgment.
Notice of Trustee’s Sale

[Mortgagee]

Date:

[Trustee/Substitute Trustee]:

[Trustee/Substitute Trustee]’s Address:

Repeat as necessary for multiple trustees.

Mortgagee:

Note:

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

County:

Date of Sale (first Tuesday of month):

Time of Sale:
Place of Sale: [Designate county location where sale will take place (may be other than courthouse)]

ASSERT AND PROTECT YOUR RIGHTS AS A MEMBER OF THE ARMED FORCES OF THE UNITED STATES. IF YOU ARE OR YOUR SPOUSE IS SERVING ON ACTIVE MILITARY DUTY, INCLUDING ACTIVE MILITARY DUTY AS A MEMBER OF THE TEXAS NATIONAL GUARD OR THE NATIONAL GUARD OF ANOTHER STATE OR AS A MEMBER OF A RESERVE COMPONENT OF THE ARMED FORCES OF THE UNITED STATES, PLEASE SEND WRITTEN NOTICE OF THE ACTIVE DUTY MILITARY SERVICE TO THE SENDER OF THIS NOTICE IMMEDIATELY.

[[Name[s] of trustee[s]] [is/are] Trustee[s] under the Deed of Trust/Mortgagee has appointed [name[s] of trustee[s]] as Trustee[s] under the Deed of Trust]. Mortgagee has instructed Trustee[s] to offer the Property for sale toward the satisfaction of the Note.

THIS INSTRUMENT APPOINTS THE SUBSTITUTE TRUSTEE(S) IDENTIFIED TO SELL THE PROPERTY DESCRIBED IN THE SECURITY INSTRUMENT IDENTIFIED IN THIS NOTICE OF SALE. THE PERSON SIGNING THIS NOTICE IS THE ATTORNEY OR AUTHORIZED AGENT OF THE MORTGAGEE OR MORTGAGE SERVICER.

Notice is given that on the Date of Sale, Trustee[s] will offer the Property for sale at public auction at the Place of Sale, to the highest bidder for cash, “AS IS.” [Include if applicable: THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.] The sale will begin at the Time of Sale or not later than three hours thereafter. This sale will be conducted subject to the right of rescission contained in section 51.016 of the Texas Property Code.
Notice of Trustee's Sale [Mortgagee]

[Name of trustee]

Repeat signature line as necessary.
Notice of Trustee’s Sale

Date: 

[Trustee/Substitute Trustee]:

[Trustee/Substitute Trustee]’s Address:

Repeat as necessary for multiple trustees.

Mortgagee:

Mortgagee’s Address:

Mortgage Servicer:

Mortgage Servicer’s Address:

Note:

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: [Insert property description and include the following if applicable], including all personal property secured by the security agreement included in the Deed of Trust.]
County:

Date of Sale (first Tuesday of month):

Time of Sale:

Place of Sale: [Designate county location where sale will take place (may be other than courthouse)]

Assert and protect your rights as a member of the Armed Forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately.

[[Name[s] of trustee[s]] [is/are] Trustee[s] under the Deed of Trust/[Mortgagee/Mortgage Servicer] has appointed [name[s] of trustee[s]] as Trustee[s] under the Deed of Trust]. [Mortgagee/Mortgage Servicer] has instructed Trustee[s] to offer the Property for sale toward the satisfaction of the Note. This foreclosure is being administered by Mortgage Servicer. Mortgage Servicer is representing Mortgagee under a servicing agreement.

Include the following if appointing a substitute trustee in this notice.

This instrument appoints the substitute trustee(s) identified to sell the property described in the security instrument identified in this notice of sale. The person signing this notice is the attorney or authorized agent of the mortgagee or mortgage servicer.

Continue with the following.
Notice is given that on the Date of Sale, Trustee[s] will offer the Property for sale at public auction at the Place of Sale, to the highest bidder for cash, “AS IS.” [Include if applicable: THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.] The sale will begin at the Time of Sale or not later than three hours thereafter. This sale will be conducted subject to the right of rescission contained in section 51.016 of the Texas Property Code.

[Name of trustee]

Repeat signature line as necessary.
Form 14-14

Note: On the first sale of the day by a trustee or a substitute trustee an announcement of the reasonable conditions for conducting the public sale may be made pursuant to Tex. Prop. Code § 51.0075(a). Tex. Prop. Code § 51.0075(f) was amended in 2009 to allow the foreclosure purchaser and the trustee or substitute trustee to agree on a reasonable time after acceptance of the bid within which to deliver the purchase price; otherwise, the purchase price is payable without delay after acceptance of the bid.

---

Agenda of Public Foreclosure Sale
[county] County, Texas, [date]

I am [name of trustee], Trustee under the Deed of Trust recorded in [recording data] of the real property records of [county] County, Texas. [Name of mortgagee or mortgage servicer] has instructed me to sell, at public auction, the property described in the Deed of Trust, together with the personal property that is subject to the security interest granted in the Deed of Trust[]

Include one or both of the following.

but not including any property previously released from the Deed of Trust, including but not limited to the property described in Exhibit [exhibit letter/number] attached hereto.

And/Or

Continue with the following.

This is to be an “AS IS” sale. This sale will be conducted subject to the right of rescission contained in section 51.016 of the Texas Property Code.

The property is [read legal description or offer a copy for review. If appropriate, provide beachfront notice. See TREC form no. 33-2 at https://www.trec.texas.gov/forms/addendum-coastal-area-property].
[Include if applicable: THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

I now call for cash bids on the property. Each bidder will please state his or her name, for whom the bid is being made, and the amount of each bid made. [Include if applicable: All bidders must execute an acknowledgment of receipt of the beachfront notice in order to bid.]

Bids in the order made:

1. Name:

   Representing:

   Amount bid:

| Repeat above information as needed. |

Are there any further bids?

When there are no further bids, select one of the following.

If the bidder has requested, and the trustee agrees to grant the bidder, a reasonable time to obtain the amount of the bid, select the following.

Hearing no further bids, this sale is adjourned until ____________, at which time this sale will reconvene at this location if the bidder has not delivered cash to me, as Trustee, in the amount of the bidder’s bid; provided, however, that if the bidder delivers the cash bid, the property will be sold to the bidder without further notice, and this sale will be concluded.

The time for reconvening the sale must allow time to complete the sale by 4:00 P.M. and bidding on behalf of the beneficiary should commence at its minimum bid. If the sale is reconvened, this agenda should be reread in full.

If the bidder has not requested time to obtain the amount of the bid, select the following.
Hearing no further bids, the property is sold to ______________________, who made the highest and best bid.

This concludes the sale.

[Name of trustee]
Form 14-15

Note: On the first sale of the day by a trustee or a substitute trustee an announcement of the reasonable conditions for conducting the public sale may be made pursuant to Tex. Prop. Code § 51.0075(a). Tex. Prop. Code § 51.0075(f) was amended in 2009 to allow the foreclosure purchaser and the trustee or substitute trustee to agree on a reasonable time after acceptance of the bid within which to deliver the purchase price; otherwise, the purchase price is payable without delay after acceptance of the bid.

Agenda of Public Foreclosure Sale of Residential Real Property
[county] County, Texas, [date]

I am [name of trustee], Trustee under the Deed of Trust recorded in [recording data] of the real property records of [county] County, Texas. [Name of mortgagee or mortgage servicer] has instructed me to sell, at public auction, the property described in the Deed of Trust, together with the personal property that is subject to the security interest granted in the Deed of Trust[.]

Include one or both of the following.

And/Or

but not including any property previously released from the Deed of Trust, including but not limited to the property described in Exhibit [exhibit letter/number] attached hereto.

Continue with the following.

This is to be an “AS IS” sale. This sale will be conducted subject to the right of rescission contained in section 51.016 of the Texas Property Code.

The property is [read legal description or offer a copy for review. If appropriate, provide beachfront notice. See TREC form no. 33-2 at https://www.trec.texas.gov/forms/addendum-coastal-area-property].
[Include if applicable: THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

I now call for cash bids on the property. Each bidder will please state his or her name, for whom the bid is being made, and the amount of each bid made. [Include if applicable: All bidders must execute an acknowledgment of receipt of the beachfront notice in order to bid.]

Bids in the order made:

1. Name:

   Representing:

   Amount bid:

   Repeat above information as needed.

Are there any further bids?

Include the following information, as required by Tex. Bus. & Com. Code § 22.004, for the winning bidder other than the mortgagee or mortgage servicer.

Bidder submitting the highest and best bid:

   Name:

   Address:

   Telephone number:

   E-mail address:

   Taxpayer identification number:

Bidder’s principal (if bidder is acting as an agent):
Name of individual or organization:

Name of organization’s contact person:

Address:

Telephone number:

E-mail address:

Grantee in deed:

Name:

Address:

Party tendering payment of highest and best bid:

Name:

Address:

Telephone number:

E-mail address:

Government-issued photo identification: [attach copy]

Select one of the following.

If the bidder has requested, and the trustee agrees to grant the bidder, a reasonable time to obtain the amount of the bid, select the following.

Hearing no further bids, this sale is adjourned until ____________, at which time this sale will reconvene at this location if the bidder has not delivered cash to me, as Trustee, in the
amount of the bidder’s bid; provided, however, that if the bidder delivers the cash bid, the property will be sold to the bidder without further notice, and this sale will be concluded.

The time for reconvening the sale must allow time to complete the sale by 4:00 p.m. and bidding on behalf of the beneficiary should commence at its minimum bid. If the sale is reconvened, this agenda should be reread in full.

If the bidder has not requested time to obtain the amount of the bid, select the following.

Hearing no further bids, the property is sold to ______________________, who made the highest and best bid.

This concludes the sale.

Continue with the following.

[Name of trustee]
Trustee’s Deed [with Bill of Sale]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Trustee:

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

Note

Date:

Principal amount:

Borrower:

Mortgagee:
Date of Sale (first Tuesday of month):

Time of Sale:

Place of Sale:

Buyer:

Buyer’s Mailing Address:

[Amount of Sale:]

A default existed under the Deed of Trust and Mortgagee or its agent directed Trustee to enforce the trust.

Notices stating the time, place, and terms of sale of the Property were posted and filed and [include if applicable: as shown by the affidavit attached to this deed and incorporated in it by this reference] Mortgagee either personally or by agent served notice of the sale to each debtor, as required by section 51.002 of the Texas Property Code. In accordance with that statute and the Deed of Trust, Trustee sold the Property to Buyer, who was the highest bidder at the public auction [include if the amount of sale is completed: , for the Amount of Sale]. The sale was made on the Date of Sale, began at the Time of Sale or not later than three hours thereafter, and was concluded by 4:00 p.m.

Trustee, subject to any prior liens, the right of rescission contained in section 51.016 of the Texas Property Code, and other exceptions to conveyance and warranty in the Deed of Trust and for the [bid price/Amount of Sale] paid by Buyer as consideration, grants, sells, and conveys the Property to Buyer, “AS IS,” together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Buyer and Buyer’s heirs, successors, and assigns forever. Trustee binds Grantor and Grantor’s heirs and successors to warrant and forever defend all and singular the Property to Buyer and Buyer’s heirs, succes-
sors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the prior liens and other exceptions to conveyance and warranty in the Deed of Trust.

Include the following if applicable.

TRUSTEE HAS NOT MADE, AND DOES NOT MAKE, ANY REPRESENTATION, EXPRESS OR IMPLIED, WITH RESPECT TO THE PERSONAL PROPERTY, AND THE PERSONAL PROPERTY IS SOLD TO BUYER “AS IS, WHERE IS, AND WITH ALL FAULTS.” THERE IS NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE IN THIS DISPOSITION OF PERSONAL PROPERTY.

Continue with the following.

[Name of trustee]

Include acknowledgment.
Form 14-17

Foreclosure Affidavit

Date:

Affiant:

If the affidavit is to be attached to the trustee’s deed and has been incorporated by reference, the following may be omitted.

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the foreclosure of the Deed of Trust that occurred on [date].

2. Attached to this affidavit is a copy of the Notice of Trustee’s Sale, file-stamped by the county clerk’s office.
3. The trustee’s sale took place on [date] at approximately [time] at the place at the courthouse designated in the notice [include if applicable: , being the area designated by the county commissioner’s court for foreclosure sales].

4. Attached to this affidavit is a copy of the letter sent to each debtor obligated to pay the debt at the address required under the Texas Property Code.

4. At least twenty-one days before the trustee’s sale, Affiant, either personally or by agent, served notice of the sale on each debtor, at the address for that debtor as shown by Mortgagee’s records, who [is/are]: [list name[s] and address[es]].

5. To the best of Affiant’s knowledge, the debtor[s] [was/were] alive on the date of the trustee’s sale.

6. [Name of grantor] is a servicemember in military service, as those terms are defined in 50 U.S.C. § 3911; however, the obligation described in the mortgage originated after [name] began military service on [date].

6. [Name of grantor] is a servicemember in military service, as those terms are defined in 50 U.S.C. § 3911, and the obligation described in the mortgage originated before [name] began military service on [date]. However, [name], during [his/her] military service,
executed and delivered a written waiver of rights and protections provided by 50 U.S.C. §§ 3901–4043, and a copy of the waiver is attached to this affidavit.

6. [Name of grantor] was not a servicemember in military service, as those terms are defined in 50 U.S.C. § 3911, or at any time within ninety days preceding the date of the trustee’s sale.

7. Attached to this affidavit is a copy of the notice sent to the Internal Revenue Service regarding the tax liens described therein.

SUBSCRIBED AND SWORN TO before me on __________________ by [name of affiant].

Notary Public, State of Texas
Notice of Advancement and Demand for Payment

[Date]

[Name and address of borrower]

Re: [describe note and loan documents]

[Salutation]

This letter is to give you notice of default under the referenced loan documents. This default consists of your failure to pay the loan that you assumed and agreed to pay. The mortgagee has paid $[amount] to [name of mortgage company].

Demand is made for the immediate payment of $[amount], with interest as allowed by the deed of trust. Unless the default is cured by [date], the mortgagee intends to foreclose its lien under the loan documents.

If you have any questions, please consult your legal counsel.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail
Affidavit of Advancement

Date:

Affiant:

Deed of Trust to Secure Assumption

Date:

Grantor:

Grantor’s address:

Mortgagee:

Mortgagee’s address:

Trustee:

Trustee’s address:

Recording information:

Property:

Amount Advanced:

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

Affiant is Mortgagee in the Deed of Trust to Secure Assumption. Grantor has defaulted in the performance of the loan assumed, and Affiant has advanced the Amount Advanced to
cure the default. Affiant has given notice of the advancement to Grantor and has demanded to be reimbursed.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on ________________ by [name of affiant].

_______________________________
Notary Public, State of Texas
Form 14-20

IRS Notice Letter

[Date]

District Director
Internal Revenue Service

[Address]
Attention: Technical Support Group Manager

Re: Notice of nonjudicial foreclosure sale on property
Taxpayer:

[Salutation]

This letter is notice as required under section 7425 of the Internal Revenue Code and Treasury Regulations section 301.7425–3(a) that property encumbered by a deed-of-trust lien granted by [name of borrower] is being nonjudicially foreclosed pursuant to the authority granted in the deed of trust. [Name of mortgagee], holder of the deed-of-trust lien, gives notice of the proposed nonjudicial sale of the property.

1. **Name and Address of Creditor.** The name and address of the person for whom this notice is submitted is [name of mortgagee]. This creditor is the current owner and holder of the deed of trust and the promissory note[s] secured by it, which are described as follows: [describe deed of trust and promissory note[s]].

2. **Tax Lien Descriptions.** A copy of each of the following notices of federal tax lien potentially affecting the property to be sold is enclosed:

   Place filed: [county] County, Texas

   Date filed:

   Recording data:
Tax amount:

Taxpayer:

3. Description and Location of Property. A detailed description, including location of the property affected by this notice, is [include property description and any other relevant data].

The street address of the property is [address].

4. Date, Time, and Place of Foreclosure Sale. The date, time, place, and terms of the proposed sale are as follows:

Date:

Time: Between the hours of 10:00 A.M. and 4:00 P.M. and to begin no earlier than [time] and no later than three hours thereafter.

Place:

Terms: To the highest bidder for cash.

5. Debt. The approximate amount of the principal obligation, including interest, secured by the lien sought to be enforced and a description of the other expenses (such as legal expenses and selling costs) that may be charged against the sale proceeds are as follows:

Principal balance:

Interest through [date]:

Daily accrual:

Legal and sale expenses: Estimated range of expenses is from $[amount] to $[amount].
6. **Property within District.** The property within your district is referred to in the mortgagee title policy held by [name of mortgagee], which covers the tract and related improvements and which has been included if available.

7. **Acknowledgment of Notice Requested.** Please acknowledge receipt of this notice by returning a file-stamped copy of this letter in the enclosed envelope. If you have any questions, please do not hesitate to call.

Sincerely yours,

________________________________________________________________________________________________________________________

[Name of attorney]

c: [name of client]
Form 14-21

Waiver of Rights after Default

Date:

Security Agreement

Date:

Lender (Secured Party):

Debtor:

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

[Secondary Obligor:] [Debtor/Secondary Obligor] acknowledges that a default exists under the Note and the Security Agreement. [Debtor/Secondary Obligor] waives all further notices of disposition of the collateral, pursuant to section 9.624(a) of the Texas Business and Commerce Code.

Include the following if a waiver of disposition of consumer goods collateral is desired. See section 14.3:4 in this chapter for requirements for using a waiver.
Further, [Debtor/Secondary Obligor] waives the right to require Secured Party to dispose of the collateral within ninety days pursuant to section 9.620(e) of the Texas Business and Commerce Code.

Include the following if a waiver of the right to redeem the collateral is desired. Note: This waiver may not be used in a consumer goods transaction.

[Debtor/Secondary Obligor] acknowledges that the collateral is not consumer goods and waives its right to redeem the collateral.

Continue with the following.

[Name of debtor or secondary obligor]
Debtor’s Consent to Acceptance of Collateral

Date:

Security Agreement

Date:

Lender (Secured Party):

Debtor:

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

[Secondary Obligor:]

[Debtor/Secondary Obligor] acknowledges receipt of a proposal from Lender to accept the collateral in [full/partial] satisfaction of the obligation. [Debtor/Secondary Obligor] consents to the acceptance of the collateral as proposed by Lender.

[Debtor/Secondary Obligor] acknowledges that a default has occurred under the Note and the Security Agreement [./and/] [include if the collateral is consumer goods: that Debtor is not in possession of the collateral at this time[./, and]] [include if applicable: that 60 percent of the cash price has not been paid in a consumer purchase-money transaction or 60 percent of
the principal amount of the obligation has not been paid in a consumer non-purchase-money transaction. [If 60 percent of the cash price has been paid in a consumer purchase-money transaction or 60 percent of the principal amount of the obligation has been paid in a consumer non-purchase-money transaction, include: Further, [Debtor/Secondary Obligor] waives its right to require disposition of the collateral within ninety days pursuant to section 9.620(e) of the Texas Business and Commerce Code.]

[Name of debtor or secondary obligor]

[72x757]Form 14-22  Debtor’s Consent to Acceptance of Collateral

[456x38]© STATE BAR OF TEXAS14-22-2
Form 14-23

[Posted] Notice of Public Sale

Date:

Security Agreement

Date:

Debtor:

Lender (Secured Party):

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

Lender (Secured Party):

[Secondary Obligor:]  

Date of Sale:

Place of Sale:

Time of Sale:
A default exists under the Security Agreement. Secured Party will sell the Collateral at public auction to the highest bidder for cash at the Place of Sale on the Date of Sale to satisfy the debt secured by the Security Agreement. The sale will begin at the Time of Sale.

[Include if applicable: THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

__________________________________________________________________________________________________________________________ ...
__________________________________________________________________________________________________________________________

[Name of lender]
Form 14-24

Agenda of Public Foreclosure Sale
Held on [date]
[Personal Property]

I am [name], [title]. [Name of debtor] signed a security agreement in favor of [name of lender], the lender, granting a security interest in [describe collateral], the property in this sale. The lender has authorized me to sell the property at public auction. The property is [read itemized list of property or offer a copy for review]. [Include if applicable: THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

I now call for cash bids on the property. Each bidder will please state his or her name, for whom the bid is being made, and the amount of each bid made.

Bids in the order made:

1. Name:

    Representing:

    Amount bid:

    Repeat above information as needed.

Are there any further bids?

If the successful bidder is not the lender, continue with the following.

Does the bidder require time to obtain cash in the amount of its bid?

If the answer is "yes," continue with the following.
Hearing no further bids, this sale is adjourned until ____________, at which time this sale will reconvene at this location if the bidder has not delivered cash to me in the amount of the bidder’s bid; provided, however, that if the bidder delivers the cash bid, the property will be sold to the bidder without further notice, and this sale will be concluded.

If the sale is reconvened, this agenda should be reread in full.

If the answer is “no” or if the successful bidder is the lender, continue with the following.

Hearing no further bids, the property is sold to ______________________, who made the highest and best bid.

This concludes the sale.

Continue with the following.

______________________________
[Name of trustee]
Bill of Sale

Date:

Security Agreement

Date:

Debtor:

Lender (Secured Party):

Property:

Note

Date:

Amount:

Borrower (Obligor):

Lender (Secured Party):

Date of Sale:

Place of Sale:

Time of Sale:

Buyer:
A default occurred under the Security Agreement. Notices stating the time, place, and terms of sale of the property were sent to Debtor, any secondary obligor, and other persons to whom Lender is required to send such notice by the laws of the state of Texas. At the foreclosure sale for the Property, Lender accepted Buyer’s bid, which was the highest bid.

Lender, subject to the prior liens and other exceptions to conveyance and warranty in the Security Agreement and for the amount of sale paid by Buyer as consideration, sells and conveys the Property to Buyer.

LENDER HAS NOT MADE, AND DOES NOT MAKE, ANY REPRESENTATION, EXPRESS OR IMPLIED, WITH RESPECT TO THE PROPERTY, AND THE PROPERTY IS SOLD TO BUYER “AS IS, WHERE IS, AND WITH ALL FAULTS.” [Include if applicable: THERE IS NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE IN THIS DISPOSITION OF PERSONAL PROPERTY.]

[Name of lender]
Notice of Strict Foreclosure

[Date]

[Name and address of borrower]

Re: [describe property, note, and loan documents]

[Salutation]

This letter is to give you notice that [name of lender], the lender, proposes to accept the Property described above in [full/partial] satisfaction of the obligations under the note and security agreement, as provided in sections 9.620 through 9.622 of the Texas Business and Commerce Code. This proposal is [unconditional/subject only to the condition that any property not in the possession of the lender be preserved and maintained].

If the lender receives within twenty-one days from the date of this letter your written objection to this proposal, the lender will dispose of the Property at either a public or a private disposition or will undertake to collect from or enforce an obligation of any person obligated on the Property, as allowed by law.

Include the following if applicable.

A copy of this letter has been sent to the secured party[ies], lienholder[s], or other persons below, as required by law.

Continue with the following.

If you have any questions, please consult your legal counsel.
Sincerely yours,

__________________________________________________________________________________________________________________________ ...
__________________________________________________________________________________________________________________________

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail
Form 14-27

Objection to Proposal to Accept Collateral in [Full/Partial] Satisfaction of Obligation

[Date]

[Name and address of lender]

Security Agreement

Date:

Debtor:

Lender (Secured Party):

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

[Secondary Obligor:]

Lender (Secured Party):

[Salutation]

This letter is to notify you of an objection to your proposal to accept the collateral dated

[date of lender's proposal].
Form 14-27  Objection to Proposal to Accept Collateral in [Full/Partial] Satisfaction of Obligation

[Name of debtor or person objecting]
Form 14-28

This form is for use in consumer goods transactions.

Notice of Our Plan to Sell Property

[Date]

[Name and address of borrower]
[Name and address of any obligor who is also a debtor]

Re: [describe property, note, and loan documents]

[Salutation]

We have your [describe collateral] because you broke promises in our agreement.

Select one of the following. Include the first paragraph for a public disposition. Include the second paragraph for a private disposition.

We will sell [describe collateral] at public sale. A sale could include a lease or license. The sale will be held on [date] at [time] at [place]. You may attend the sale and bring bidders if you want.

Or

We will sell [describe collateral] at private sale sometime after [date]. A sale could include a lease or license.

Continue with the following.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will/will not] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.
You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past-due payments), including our expenses. To learn the exact amount you must pay, call us at [telephone number]. If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number] [include if applicable: or write us at [address of secured party]] and request a written explanation. [Include if applicable: We will charge you $[amount] for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]

If you need more information about the sale, call us at [telephone number] or write us at [address of secured party].

[Include if applicable: We are sending this notice to the following people who have an interest in [describe collateral] or who owe money under your agreement: [list names of all other debtors and obligors, if any].]

[Name of lender]
Form 14-29

This form is for use in transactions other than those for consumer goods.

---

Notification of Disposition of Collateral

[Date]

[Name and address of debtor, obligor, or other person to whom the notice is sent]

[Include only if debtor is not an addressee: Name[s] of Debtor[s]: [name[s]]]

Select one of the following. Include the first paragraph for a public disposition. Include the second paragraph for a private disposition.

We will [sell/lease/license] the [describe collateral] [include if applicable: to the highest qualified bidder] in public on [date] at [time] at [place].

Or

We will [sell/lease/license] the [describe collateral] privately sometime after [date].

Continue with the following.

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to [sell/lease/license] [include if applicable: for a charge of $[amount]]. You may request an account by calling us at [telephone number].

[Name of lender]

Certified Mail No. [number]
Return Receipt Requested
c: [name of debtor], by first-class mail
Memorandum of Private Foreclosure Sale

Held on [date]

I am [name], [title]. [Name of debtor] signed a security agreement in favor of [name of lender], the lender, granting a security interest in [describe collateral], the property in this sale. The lender has given notice to Debtor and any secondary obligor that after [date] the property would be sold at a private sale. The property is [read itemized list of property or offer a copy for review]. [Include if applicable: THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

I now call for cash bids on the property. Each bidder will please state his or her name, for whom the bid is being made, and the amount of each bid made.

1. Name:
   Representing:
   Amount bid:

   Repeat above information as needed.

Are there any further bids?

   If the successful bidder is not the lender, continue with the following.

Does the bidder require time to obtain cash in the amount of its bid?

   If the answer is “yes,” continue with the following.

Hearing no further bids, this sale is adjourned until ____________, at which time this sale will reconvene at this location if the bidder has not delivered cash to me in the amount of
the bidder’s bid; provided, however, that if the bidder delivers the cash bid, the property will be sold to the bidder without further notice, and this sale will be concluded.

If the sale is reconvened, this agenda should be reread in full.

If the answer is “no” or if the successful bidder is the lender, continue with the following.

Hearing no further bids, the property is sold to ______________________, who made the highest and best bid.

This concludes the sale.

Continue with the following.

[Name of person conducting sale]
Form 14-31

Notice of Default
[Home Equity Loan]

[Date]

[Name and address of borrower]

Re: [describe note and loan documents]

[Salutation]

This letter is to give you notice of default under the referenced loan documents on your Texas Constitution article XVI, section 50(a)(6), home equity loan. This default consists of [describe default; if the default is monetary, include the amount in default and the name of the mortgagee.]. I am attempting to collect this indebtedness, and any information obtained will be used for that purpose. This letter is being sent to your attention in accordance with state and federal law.

You are notified that if the default is not cured within twenty days from the date of posting of this letter, the mortgagee will enforce its rights under the loan documents. Specifically, the mortgagee will accelerate the maturity of your home equity note and declare due and payable the unpaid principal balance, together with accrued but unpaid interest and fees and expenses allowed by law. If the amount due is not timely paid, the mortgagee will seek a court order allowing the mortgagee to foreclose the lien you granted on your homestead under the loan documents in accordance with Texas Constitution article XVI, section 50(a)(6), and rules 735 and 736 of the Texas Rules of Civil Procedure.

In accordance with federal laws regarding fair debt collections, unless you, within thirty days after receipt of this notice, dispute the validity of the debt set forth above, or any portion thereof, the indebtedness will be assumed to be valid. If you notify the undersigned in writing...
within the thirty-day period that the indebtedness, or any portion thereof, is disputed, I will obtain a verification of the indebtedness, and I will mail you that verification. If within the same thirty-day period you request in writing the name and address of the original mortgagee, and if the original mortgagee is different from the current lender, I will furnish you with that information. Federal laws do not require that I wait until the end of the thirty-day period before taking action to collect the debt. If, however, you have requested verification of the debt or the name and address of the original mortgagee within the thirty-day period, I will cease collection activities until the requested information has been mailed to you.

If you have any questions, please consult your legal counsel.

Sincerely yours,

__________________________________________________________________________________________________________________________ ...

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail
Notice of Acceleration

[Home Equity Loan]

[Date]

[Name and address of borrower]

Re: [describe note and loan documents]

[Salutation]

By letter dated [date of letter], I notified you of a default under the referenced loan documents on your Texas Constitution article XVI, section 50(a)(6), home equity loan. I am attempting to collect this indebtedness, and any information obtained will be used for that purpose.

Because the default on your home equity note has not been cured, the mortgagee has accelerated the maturity of your note, declaring all unpaid principal, together with accrued but unpaid interest and fees and expenses allowed by law, immediately due and payable. The mortgagee will now seek a court order allowing the mortgagee to foreclose the lien you granted on your homestead under the loan documents in accordance with Texas Constitution article XVI, section 50(a)(6), and rules 735 and 736 of the Texas Rules of Civil Procedure.

If you have any questions, please consult your legal counsel.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail
Form 14-33

The Texas Supreme Court approved forms for expedited foreclosure proceedings on February 10, 2014. The forms may be found on the court’s website, www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf. The form below is a reproduction of the form in the order.

Cause No.: ______________

In Re: Order for Foreclosure Concerning ________________ Under Tex. R. Civ. P. 736

Petitioner: ________________ County, Texas

Respondent(s): ________________

Application for an Expedited Order Under Rule 736 on a Home Equity, Reverse Mortgage, or Home Equity Line of Credit Loan

1. Petitioner is ________, whose last known address is ________________________.

2. Respondent is ________, whose last known address is ________________________.

3. The property encumbered by the ________ [loan agreement, contract, or lien] sought to be foreclosed is commonly known as ________________ with the following legal description:

   [legal description of the property]

4. Petitioner alleges:
A. The type of lien sought to be foreclosed is a ____________ [see liens described in Texas Rule of Civil Procedure 735.1(a)] under _________ [state the statutory or constitutional authority for the lien]. The lien is indexed at __________________ [volume/page, instrument number, or clerk’s file number] and recorded in the real property records of ________ County, Texas.

B. Petitioner has authority to seek foreclosure of the lien because ________________.

C. The name of each Respondent obligated to pay the underlying debt or obligation evidenced by the __________ [loan agreement, contract, or lien] encumbering the property sought to be foreclosed is ____________________.

D. The name of each Respondent who is a mortgagor of the lien instrument sought to be foreclosed, but who is not a maker or assumer of the underlying debt, is __________________________________________.

E. As of _________ [a date that is no more than sixty days prior to the date that the application is filed]:

   (i) [If the default is monetary:] ______ [number and frequency of payments (e.g., monthly)] have not been paid. The amount required to cure the default is _______. According to Petitioner’s records, all lawful offsets, payments, and credits have been applied to the account in default.
Application for an Expedited Order on a Home Equity, Reverse Mortgage, or HELOC

(ii) [If the lien secures a reverse mortgage or the default is nonmonetary.] The facts creating the default and Petitioner’s authority to enforce the lien are __________.

(iii) The total amount to pay off the __________ [loan agreement, contract, or lien] is __________.

F. Notice to cure the default has been sent by certified mail to each Respondent who is obligated to pay the underlying debt or obligation. The opportunity to cure has expired.

G. Before this application was filed, any other action required to initiate a foreclosure proceeding by Texas law or the ______ [loan agreement, contract, or lien] sought to be foreclosed was performed.

5. Legal action is not being sought against the occupant of the property unless the occupant is named as a Respondent in this application.

6. If Petitioner obtains a court order, Petitioner will proceed with foreclosure of the property in accordance with applicable law and the terms of the ______ [loan agreement, contract, or lien] sought to be foreclosed.

7. The following documents are attached to this application:

A. An affidavit or declaration of material facts describing the basis for foreclosure.

B. The _____ [note, original recorded lien, or other documentation] establishing the lien.
C. [If the lien has been assigned.] The current assignment of the lien recorded in the real property records of the county where the property is located.

D. A copy of each default notice required to be mailed to any Respondent under Texas law and the _________ [loan agreement, contract, or lien] sought to be foreclosed, and the _________ [USPS Tracking report, return receipt, or other proof] demonstrating that a notice was sent by certified mail before this application was filed.

8. Assert and protect your rights as a member of the armed forces of the United States.

If you or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to Petitioner or Petitioner’s attorney immediately.

9. Prayer for Relief: Petitioner seeks an expedited order under Rule 736 so that it may proceed with foreclosure in accordance with applicable law and terms of the _________ [loan agreement, contract, or lien] sought to be foreclosed.

_______________________
[Petitioner’s signature block]
Form 14-34

The Texas Supreme Court approved forms for expedited foreclosure proceedings on February 10, 2014. The forms may be found on the court’s website, [www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf](http://www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf). The form below is a reproduction of the form in the order.

Affidavit in Support of Petitioner’s Application for an Expedited Order Under Rule 736

State of Texas
County of _________

Before me, the undersigned notary, on this day personally appeared ___________ [name of affiant], and stated under oath:

1. My name is _________________ [first, middle, and last name]. I am an adult and of sound mind.

2. I am _________________ [job title or position] of _________________ [name of affiant’s employer], whose address is _________________ [street address, city, state, and zip code]. My affidavit concerns the account of ________________ [name of each person who is obligated for the underlying debt or lien sought to be foreclosed] (“Obligor”). ________________. [Explain the relationship between the affiant or the affiant’s employer and Petitioner (e.g., affiant’s employer is the agent for loan service...].

Cause No. ______________
administration for Petitioner) and the connection or role of the affiant or the affiant’s employer with respect to the servicing or foreclosure of Obligor’s account (e.g., mortgagee or mortgage servicer).]

3. I have read and understand the purpose of the application to which my affidavit is attached and adopt by reference the statements made in it. I am the authorized agent or representative of Petitioner with respect to Obligor’s account, and in that capacity, I am authorized to make this affidavit on Petitioner’s behalf. My testimony is based on my experience, my knowledge of the usual business practices of _______ [affiant’s employer] and the servicing industry in general, my job responsibilities, and the servicing records for Obligor’s account.

4. Through my job responsibilities, I have access to and have reviewed the servicing records and data for Obligor’s account, including electronic and computer generated records and data compilations. The records attached to the application are the original records or exact duplicates of the original records kept in the servicing file for Obligor’s account.

5. Based on the regular practices of _______ [affiant’s employer] and the servicing industry in general, these records:
   a. were made at or near the time of each act, event, or condition set forth in the records;
   b. were made by, or from information transmitted by, a person engaged in the servicing of Obligor’s account who had actual knowledge of the acts, events, or conditions recorded; and
   c. are the kind of records that are kept in the regular course of servicing loan agreements.

6. It is the regular practice of businesses engaged in the servicing of loan agreements or other contracts requiring the collection of money to keep accurate records on debits and credits to an account, an account’s balance, the collateral securing the right to the
Affidavit in Support of Petitioner’s Application for an Expedited Order

Form 14-34

lienholder’s right to repayment, and efforts to enforce the underlying debt if the Obligor has defaulted. These records are relied upon for accuracy by all persons engaged in the servicing and enforcement of a loan agreement. There is no indication that the servicing records for Obligor’s account are untrustworthy.

7. Based on the servicing records for Obligor’s account, ___________________. [State all facts demonstrating the basis for foreclosure, including, if applicable, the number of unpaid scheduled payments, the amounts required to cure the default and payoff the loan, and the credits and offsets that have been applied to Obligor’s account. Describe proof (e.g., USPS Tracking report, return receipt, or other proof) that Obligor was given notice of the default by certified mail.]

8. I sign this affidavit based on the personal knowledge that I have obtained by reviewing the servicing records for Obligor’s account. The statements made in the application and my affidavit are true and correct as of the date stated.

Signed this _____ day of ______________, 20__

[printed name and title of affiant]

[signature of affiant]

Signed under oath before me on ______________, 20__.

[notary’s seal]

__________________________________  
Notary Public in and for the State of Texas

My commission expires: _______.

© STATE BAR OF TEXAS

14-34-3

(4/18)
Declaration in Support of Petitioner’s Application for an Expedited Order

Form 14-35

The Texas Supreme Court approved forms for expedited foreclosure proceedings on February 10, 2014. The forms may be found on the court’s website, www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf. The form below is a reproduction of the form in the order.

Cause No. ______________

In Re: Order for Foreclosure Concerning [property address] Under Tex. R. Civ. P. 736

Petitioner: ___________________ County, Texas

Respondent(s): ___________________ [court designation]

Declaration in Support of Petitioner’s Application for an Expedited Order Under Rule 736

I, _______________ [name], declare:

1. My name is __________________________ [first, middle, and last name]. I am an adult and of sound mind.

2. I am __________________________ [job title or position] of __________________________ [name of declarant’s employer], whose address is __________________________ [street address, city, state, and zip code]. My declaration concerns the account of __________________________ [name of each person who is obligated for the underlying debt or lien sought to be foreclosed] (“Obligor”). __________________________. [Explain the relationship between the declarant or the declarant’s employer and Petitioner (e.g., declarant’s employer is the agent for loan service administration for Petitioner) and the connection or role of the declarant or the declarant’s employer with respect to the servicing or foreclosure of Obligor’s account (e.g., mortgagee or mortgage servicer).]
3. I have read and understand the purpose of the application to which my declaration is attached and adopt by reference the statements made in it. I am the authorized agent or representative of Petitioner with respect to Obligor’s account, and in that capacity, I am authorized to make this declaration on Petitioner’s behalf. My testimony is based on my experience, my knowledge of the usual business practices of [declarant’s employer] and the servicing industry in general, my job responsibilities, and the servicing records for Obligor’s account.

4. Through my job responsibilities, I have access to and have reviewed the servicing records and data for Obligor’s account, including electronic and computer generated records and data compilations. The records attached to the application are the original records or exact duplicates of the original records kept in the servicing file for Obligor’s account.

5. Based on the regular practices of [declarant’s employer] and the servicing industry in general, these records:
   a. were made at or near the time of each act, event, or condition set forth in the records;
   b. were made by, or from information transmitted by, a person engaged in the servicing of Obligor’s account who had actual knowledge of the acts, events, or conditions recorded; and
   c. are the kind of records that are kept in the regular course of servicing loan agreements.

6. It is the regular practice of businesses engaged in the servicing of loan agreements or other contracts requiring the collection of money to keep accurate records on debits and credits to an account, an account’s balance, the collateral securing the right to the lienholder’s right to repayment, and efforts to enforce the underlying debt if the Obligor has defaulted. These records are relied upon for accuracy by all persons engaged in the servicing and enforcement of a loan agreement. There is no indication that the servicing records for Obligor’s account are untrustworthy.
7. Based on the servicing records for Obligor’s account, _______________. [State all facts demonstrating the basis for foreclosure, including, if applicable, the number of unpaid scheduled payments, the amounts required to cure the default and payoff the loan, and the credits and offsets that have been applied to Obligor’s account. Describe proof (e.g., USPS Tracking report, return receipt, or other proof) that Obligor was given notice of the default by certified mail.]

8. I sign this declaration based on the personal knowledge that I have obtained by reviewing the servicing records for Obligor’s account. The statements made in the application and my declaration are true and correct as of the date stated.

**JURAT**

My name is ________________ [first, middle, and last], my date of birth is ________________, and my address is ________________ [street, city, state, zip code, and country]. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the ____ day of ______ [month], ______ [year].

[signature of declarant]
Form 14-36

The Texas Supreme Court approved forms for expedited foreclosure proceedings on February 10, 2014. The forms may be found on the court’s website, www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf. The form below is a reproduction of the form in the order.

Cause No. ______________

In Re: Order for Foreclosure
Concerning ______________
[property address] Under Tex. R. Civ. P. 736

Petitioner: ______________

__________ County, Texas

Respondent(s): ______________

_____ [court designation]

Military Status Affidavit

State of Texas
County of __________

Before me, the undersigned notary, on this day personally appeared ______________ [name of affiant], and stated under oath:

1. My name is ______________________ [first, middle, and last name]. I am an adult and of sound mind.

2. Respondent’s name is ____________________________.

3. I am _______ [job title or position] of ______________ [name of the affiant’s employer]. _____________. [Explain relationship between affiant’s employer and Petitioner.] I have personal knowledge of the facts set forth in this affidavit. These facts are true and correct.
4. [Choose one]
   a. I know that Respondent is not currently in the military because I asked the U.S. Department of Defense to check its Defense Manpower Data Center (DMDC) database. DMDC notified me that Respondent is not on active duty in any of the armed forces. I attach a true copy of the DMDC verification. [You can print a copy of the DMDC verification from this web address: https://www.dmdc.osd.mil/appj/scra/scraHome.do.]
   b. I know that Respondent is not currently in the military because __________________. [State facts that would render a person ineligible for military service, such as being in prison or having a serious disability.]
   c. I am unable to determine if Respondent is in military service.
   d. Respondent is in the military now.

5. [If Respondent was previously in the military.] Respondent’s period of military service ended more than ____ months before this proceeding was filed.

   [signature of affiant]

Signed under oath before me on _____________, 20__.

[notary’s seal]

__________________________________
Notary Public in and for the State of Texas

My commission expires: ________.
Form 14-37

The Texas Supreme Court approved forms for expedited foreclosure proceedings on February 10, 2014. The forms may be found on the court’s website, www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf. The form below is a reproduction of the form in the order.

Cause No. _____________

In Re: Order for Foreclosure
Concerning ________________
[property address] Under Tex. R. Civ. P. 736

Petitioner:

___________

_______ County, Texas

Respondent(s):

___________

_______ [court designation]

Military Status Declaration

I, _______________ [name], declare:

1. My name is _______________________ [first, middle, and last name]. I am an adult and of sound mind.

2. Respondent’s name is _______________________.

3. I am ________ [job title or position] of ______________ [name of the declarant’s employer]. ______________. [Explain relationship between declarant’s employer and Petitioner.] I have personal knowledge of the facts set forth in this affidavit. These facts are true and correct.

4. [Choose one]

   e. I know that Respondent is not currently in the military because I asked the U.S. Department of Defense to check its Defense Manpower Data Center (DMDC) database. DMDC notified me that Respondent is not on active duty in any of the
armed forces. I attach a true copy of the DMDC verification. [You can print a copy of the DMDC verification from this web address: https://www.dmdc.osd.mil/appj/scra/scraHome.do.]

f. I know that Respondent is not currently in the military because ______________. [State facts that would render a person ineligible for military service, such as being in prison or having a serious disability.]

g. I am unable to determine if Respondent is in military service.

h. Respondent is in the military now.

5. [If Respondent was previously in the military.] Respondent’s period of military service ended more than ____ months before this proceeding was filed.

JURAT

My name is ______________ [first, middle, and last], my date of birth is ______________, and my address is ______________ [street, city, state, zip code, and country]. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the ____ day of ______ [month], ______ [year].

[signature of declarant]
Default Order

Form 14-38

The Texas Supreme Court approved forms for expedited foreclosure proceedings on February 10, 2014. The forms may be found on the court’s website, [link]. The form below is a reproduction of the form in the order.

Cause No.: _____________

In Re: Order for Foreclosure
Concerning ________________________________
[property address] Under Tex. R. Civ. P. 736

[§]

Petitioner:

[§]

Respondent(s):

[§]

In the _______ [type of court, e.g., district, county, or probate] Court

[§]

_________ County, Texas

[§]

Default Order

1. On this day, the Court considered Petitioner’s motion for a default order granting its application for an expedited order under Rule 736. Petitioner’s application complies with the requirements of Texas Rule of Civil Procedure 736.1.

2. The name and last known address of each Respondent subject to this order is _______________. Each Respondent was properly served with the citation, but none filed a response within the time required by law. The return of service for each Respondent has been on file with the court for at least ten days.

3. The property that is the subject of this foreclosure proceeding is commonly known as _______________ [street address of the property] with the following legal description:
[legal description of the property]

4. The lien to be foreclosed is indexed or recorded at ________________ [volume/page, instrument number, or clerk's file number] and recorded in the real property records of ____________ County, Texas.

5. The material facts establishing Respondent's default are alleged in Petitioner’s application and the supporting ____________ [affidavit or declaration]. Those facts are adopted by the court and incorporated by reference in this order.

6. Based on the _______ [affidavit or declaration] of Petitioner, no Respondent subject to this order is protected from foreclosure by the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 et seq.

7. Therefore, the Court grants Petitioner’s motion for a default order under Texas Rules of Civil Procedure 736.7 and 736.8. Petitioner may proceed with foreclosure of the property described above in accordance with applicable law and the ____________ [loan agreement, contract, or lien] sought to be foreclosed.

8. This order is not subject to a motion for rehearing, a new trial, a bill of review, or an appeal. Any challenge to this order must be made in a separate, original proceeding filed in accordance with Texas Rule of Civil Procedure 736.11.

SIGNED this _____ day of __________, 20__. 

________________________
JUDGE PRESIDING
Demand to Pay Proceeds of Rent

[Date]

[Name and address of borrower]

Re: [describe note and loan documents]

[Salutation]

A default exists under the referenced loan documents.

Demand is made for the payment of the proceeds of all accrued but unpaid rent as of the date you receive this letter and all rent that accrues after you receive this letter in accordance with the Texas Property Code. Payment of the proceeds should be made to [name of mortgagee and address for payments]. The tenant[s] will be instructed to pay all rents to the mortgagee until further notice, in accordance with [the deed of trust/[specify instrument]] and the Texas Property Code.

Include clause 14-7-1 in this chapter if this is the first correspondence from the attorney to a debtor who is a consumer. See section 14.4:5.

If you have any questions, please consult your legal counsel.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail
Notice of Rescission of Trustee’s Sale

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

[Trustee/Substitute Trustee]:

[Trustee/Substitute Trustee]’s Address:

Repeat as necessary for multiple trustees.

Debtor[s]:

[Debtor’s/Debtors’] Address[es]:

Buyer[s]:

[Buyer’s/Buyers’] Address[es]:

Note

Date:

Principal amount:

Borrower:

Mortgagee:
Trustee’s Deed

Date:

Trustee:

Buyer:

Recording information:

Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

County:

Date of Sale (first Tuesday of month):

Time of Sale:

Place of Sale: [Designate county location where sale will take place (may be other than courthouse)]

Notice is given that on the Date of Sale, Trustee[s] offered the Property for sale at public auction at the Place of Sale, to the highest bidder for cash, “AS IS.” The sale was struck off at the Time of Sale to Buyer[s].

The foreclosure sale is rescinded by the Trustee[s] because one or more of the statutory reasons listed below exist:

1. the statutory requirements for the sale were not satisfied;

2. the default leading to the sale was cured before the sale;
3. a receivership or dependent probate administration involving the Property was pending at the Time of Sale;

4. a condition specified in the conditions of sale prescribed by the Trustee[s] or Substitute Trustee[s] before the sale and made available in writing to prospective bidders at the sale was not met;

5. the Mortgagee or mortgage servicer and the Debtor[s] agreed before the sale to cancel the sale based on an enforceable written agreement by the Debtor[s] to cure the default; or

6. at the Time of Sale, a court-ordered or automatic stay of the sale imposed in a bankruptcy case filed by a person with an interest in the Property was in effect.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of trustee]

[Name of trustee]

Repeat signature line as necessary.
Affidavit of Return of Bid Amount

Date:

Affiant:

Trustee’s Deed

Date:

Trustee:

Buyer:

Recording information:

Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

Tracking Information: [certified mail, electronic or wire transfer, or delivery service tracking information]

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the rescission of a foreclosure sale evidenced by the Trustee’s Deed.

2. On the date shown above, the bid amount for the Trustee’s Deed was returned to the Buyer by the method shown in the Tracking Information.
[Name of affiant]

SUBSCRIBED AND SWORN TO before me on ______________ by [name of affiant].

________________________________________
Notary Public, State of Texas
Chapter 16

Water Rights Conveyancing Documents

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I. Overview of Water Law

§ 16.1 Introduction

Texas real estate transactions increasingly involve issues of groundwater or surface water resources and supply. These issues affect the use and valuation of the land. In addition, transactions involving the purchase or lease of existing water rights (surface and groundwater), severed from the surface estate, are becoming increasingly common as a result of the limited availability of unappropriated surface water and of groundwater shortages in many parts of the state. This chapter provides an overview of Texas water law, including major statutory changes that have revised Texas’s systems for water resource planning, management, and development; it includes some basic forms for the sale, conveyance, and mortgage of surface water and groundwater rights.

Surface water and groundwater, while both interests in real property, are treated differently under Texas law. Surface water is generally the property of the state. See, e.g., Texas Water Rights Commission v. Wright, 464 S.W.2d 642 (Tex. 1971); South Texas Water Co. v. Bieri, 247 S.W.2d 268 (Tex. Civ. App.—Galveston 1952, writ ref’d n.r.e.) (state owns the corpus of the water, appropriator owns a usufructory right). Groundwater in place under the land is the property of the owner of the surface estate. Tex. Water Code § 36.002(a); see Edwards Aquifer Authority v. Day, 369 S.W.3d 814, 817, 831 (Tex. 2012); Edwards Aquifer Authority v. Bragg, 421 S.W.3d 118, 137–38 (Tex. App.—San Antonio 2013, pet. denied); City of Del Rio v. Clayton Sam Colt Hamilton Trust, 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied). Surface water is regulated through a statewide program administered by the Texas Commission on Environmental Quality (TCEQ). Tex. Water Code ch. 11; 30 Tex. Admin. Code chs. 295, 297. Groundwater is regulated by local groundwater conservation districts generally operating pursuant to chapter 36 of the Texas Water Code, and their respective enabling legislation, to provide some regulation of the withdrawal and use of groundwater within their jurisdictions. As of January 1, 2017, there were one hundred confirmed groundwater districts operating across Texas. Thus, parties to real estate transactions must carefully consider whether they are dealing with issues of surface water rights, groundwater rights, or both, and they must also consider which regulatory entities have jurisdiction over those rights.

The TCEQ and the Texas Water Development Board (TWDB) are the two state agencies principally involved in the implementation of Texas’s surface water laws and policies. The TWDB serves as the state’s financier for major water projects. The regulation of water and sewer utilities, including the responsibility for rate and other economic regulation, and the jurisdiction over certain water supply and sewer service corporations, is under the Public Utility Commission of Texas. The TCEQ’s jurisdiction includes water rights, water pollution and water quality, water rates, some groundwater district formation and supervision, dam safety, and the regulation of public sewer and drinking water systems. The TCEQ is the adjudicatory body for all contested surface water rights cases and has substantive and procedural rulemaking authority. The TWDB is the state agency with authority for the planning of and financial assistance for water development projects. The TWDB is responsible for the
development of the state water plan and coordination with the regional planning groups. The TWDB makes loan and grant programs available to qualifying local governments and utilities for water supply development projects and for water quality purposes.

§ 16.2  

Groundwater

§ 16.2:1  

Definition

Groundwater is water occurring under the surface of land. Groundwater may consist of percolating water or artesian water, but the underflow of a surface water river or stream or the underground flow of water in confined channels is not groundwater. Groundwater is presumed to be percolating unless it is proven to be otherwise. *Pecos County WCID No. 1 v. Williams*, 271 S.W.2d 503, 506 (Tex. Civ. App.—El Paso 1954, writ ref’d n.r.e.). The Texas Water Code defines “groundwater” as water percolating below the surface of the earth. See Tex. Water Code § 36.001(5).

Artesian water is groundwater confined under pressure by an impermeable geological layer, capable of flowing “above the first impervious stratum below the surface of the ground” when properly cased in a well. See Tex. Water Code § 11.201. The only significant difference between the legal treatment of percolating water and artesian water is that there are statutory provisions prohibiting the waste of artesian water and relating to artesian water produced from wells in the Edwards Aquifer. See Tex. Water Code § 11.202(d)–(e).

Underflow is that portion of a surface watercourse that flows through sand and gravel deposits beneath the surface of the bed of a stream. Underflow is surface water and is the property of the state. Tex. Water Code § 11.021(a). The laws governing the allocation and use of surface water apply to underflow. *Texas Co. v. Burkett*, 296 S.W. 273, 277 (Tex. 1927); see Tex. Water Code § 11.021.

Water “confined to underground streams with definite channels” means a subsurface watercourse that has all the characteristics of a surface watercourse, including a bed, banks that form a channel, and a current of water. *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235, 237 (Tex. App.—Austin 1989, writ denied). Ownership rights for this type of subsurface watercourse are the same as for surface water. Tex. Water Code § 11.021(a); see Edwards Aquifer Authority v. Day, 369 S.W.3d 814, 822 & n.28 (Tex. 2012). Whether subsurface water is the underground flow of water in a defined subterranean channel or percolating groundwater is a determination that must be made on a case-by-case basis. Denis, 771 S.W.2d at 237.

§ 16.2:2  


In 1904, the Texas Supreme Court applied the English common-law rule of capture to groundwater and held that the owner of land could pump unlimited quantities of water from under his land, regardless of whether his action drained water from under his neighbor’s land. *Houston & T.C. Railway Co. v. East*, 81 S.W. 279 (Tex. 1904). Under common law, a landowner could use groundwater at a location other than his land and sell groundwater that he captured below the surface of his land for off-site use by a third party. *Texas Co. v. Burkett*, 296 S.W. 273 (Tex. 1927). Texas courts subsequently upheld the right of a landowner to capture and use groundwater even when doing so affects surface water supplies. *Pecos County WCID No. 1 v. Williams*, 271 S.W.2d 503 (Tex. Civ. App.—El Paso 1954, writ ref’d n.r.e.). The supreme court has declined to overrule the holding of *East*, finding that the common-law rule of capture does not preclude ownership in place. *See Edwards Aquifer*
Authority v. Day, 369 S.W.3d 814 (Tex. 2012), in which the State of Texas and the Edwards Aquifer Authority challenged this well-established rule.

There are only two significant limitations at common law on the landowner’s right to capture and use groundwater: (1) the landowner cannot capture and use groundwater maliciously for the purpose of injuring a neighbor or in a manner that constitutes wanton and willful waste (City of Corpus Christi v. City of Pleasanton, 276 S.W.2d 798 (Tex. 1955)); and (2) the landowner may be liable for damages if he negligently pumps groundwater in a manner that causes subsidence of neighboring land (Friendswood Development Co. v. Smith-Southwest Industries, Inc., 576 S.W.2d 21 (Tex. 1978)). These limitations are recognized in section 36.002 of the Texas Water Code. Tex. Water Code § 36.002.

In recent years, Texas courts and the Texas legislature have had to address issues regarding the nature and extent of a landowner’s ownership interest in groundwater under his land. Specifically, the question has arisen whether a landowner owns groundwater in place under his land or whether the landowner’s property interest in the groundwater actually vests only when the landowner has captured the groundwater by producing it and putting it to a beneficial use. A related question that has arisen is whether the landowner’s interest in the groundwater is a vested right that would enable the landowner to challenge groundwater regulation by a governmental authority as an unconstitutional taking of the landowner’s ownership of groundwater.

In City of Del Rio v. Clayton Sam Colt Hamilton Trust, 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied), the trust, which was the owner of a large ranch, sold a fifteen-acre portion of the ranch to the city of Del Rio but reserved the rights to all groundwater under the land. The trust had never produced groundwater from the fifteen-acre tract. After the sale, the city drilled a well on the land for the production of groundwater for its municipal water supply. The trust sued the city on the grounds that the trust was the owner of the groundwater due to its reservation. The city, using an interpretation of the “rule of capture” as a theory of ownership, rather than a defense to liability for the pumping and use of groundwater in place, argued that the landowner’s interest in the groundwater under his land is not a vested right but vests only when the landowner has “captured” the groundwater by pumping it and using it. Under this argument, because the trust had never produced groundwater from the fifteen-acre tract, the trust did not have an ownership interest in the groundwater that could be reserved in the deed, and therefore the city owned the groundwater under the fifteen acres. The court rejected the city’s argument, holding instead that “under the absolute ownership theory, the Trust was entitled to sever the groundwater from the surface estate by reservation.” City of Del Rio, 269 S.W.3d at 617. The Texas Supreme Court denied the city’s petition for review.

In Edwards Aquifer Authority v. Day, the landowners sued the Edwards Aquifer Authority (EAA) on the grounds that the EAA’s denial of the landowners’ permit applications constituted a regulatory taking of the landowners’ vested rights in the groundwater. The Texas Supreme Court affirmed many aspects of the EAA’s final order regarding the permit applications at issue but remanded the case to the trial court for further proceedings on the taking claim. The supreme court affirmed the court of appeals’ key holding, stating that “land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation.” Day, 369 S.W.3d at 817. The court ruled that prior decisions neither recognized nor precluded ownership in place. The court noted that it had held oil and gas in place to be owned by the landowner long ago, and concluded “we find no reason to treat groundwater differently.” Day, 369 S.W.3d at 823. In a subsequent case, Edwards Aquifer Authority v. Bragg, 421 S.W.3d 118, 137–38 (Tex. App.—San Antonio 2013, pet. denied), the court relied on the supreme court’s ruling in Day that groundwater rights in place are vested rights, constitutionally protected from a government taking, including a regulatory taking resulting from the permitting decisions of groundwater conservation districts (GCDs), without just compensation.
The Texas legislature in 2011 amended section 36.002 of the Water Code to address the issue of ownership of groundwater in place and the authority of GCDs to regulate the pumping and use of groundwater. To some extent this section, as amended, codifies the existing case law. Section 36.002(a) states that the “legislature recognizes that a landowner owns the groundwater below the surface of the landowner’s land as real property.” Section 36.002(b) provides that this ownership interest entitles the landowner to drill for and produce the groundwater “subject to” the authority of GCDs to limit or prohibit drilling and to regulate production as described in section 36.002(d). While the term vested right is never used in this statute, section 36.002(c) expressly states that nothing in the Water Code “shall be construed as granting the authority to deprive or divest a landowner . . . of the groundwater ownership and rights described by this section.” Section 36.002(b) was further amended in 2015 to extend the scope of rights to include “any other right recognized under common law.” Section 36.002(b–1)(1) states, however, that the “groundwater ownership and rights described by this section [does not] entitle a landowner . . . to the right to capture a specific amount of groundwater below the surface of the landowner’s land.”

The common-law rule of capture in Texas, as adopted by the court in the East case referenced above, is being eroded. GCDs, where they exist, have the authority to adopt regulations that require permits for drilling wells and pumping groundwater and that impose limitations on a landowner’s ability to produce groundwater and to export it outside the district. Tex. Water Code §§ 36.001(1), 36.101, 36.116. Restrictive covenants that prohibit a landowner’s drilling of water wells have been held to be enforceable against the right of a landowner to access its groundwater. See Dyegard Land Partnership v. Hoover, 39 S.W.3d 300 (Tex. App.—Fort Worth 2001, no pet.). Municipal ordinances prohibiting or limiting the drilling of wells may be found to be enforceable.

§ 16.2:3    Groundwater Conservation Districts and Groundwater Management

The state has the power to impose reasonable regulations on real property, including groundwater, to protect the public health and welfare, as part of its police powers. In addition, the Conservation Amendment (article XVI, section 59, of the Texas Constitution) declares the right and duty of the state to conserve and develop its natural resources and gives the legislature authority and duty to pass all laws appropriate to these conservation goals. See Tex. Const. art. XVI, § 59; City of Corpus Christi v. City of Pleasanton, 276 S.W.2d 798, 803 (Tex. 1955). The legislature has emphasized that groundwater conservation districts (GCDs) are the state’s preferred method of groundwater management. Tex. Water Code § 36.0015; see Sipriano v. Great Spring Waters of America, Inc., 1 S.W.3d 75, 79 & n.33 (Tex. 1999).

GCDs may be created by special legislation or by the TCEQ on petition of landowners within the proposed district. See Tex. Water Code §§ 36.013–.021. Chapter 36 of the Texas Water Code sets out the main regulatory powers of general-law GCDs. However, most GCDs have been legislatively created and thus may have powers and authority that differ from those of general-law districts. To the extent of any conflict between an individual GCD’s enabling legislation and the provisions of chapter 36, the provisions of the individual GCD’s special legislation controls. Tex. Water Code § 36.052(a). Although the legislation creating most districts follows closely the provisions of chapter 36, the enabling legislation of a legislatively created district must be reviewed to determine the scope of its jurisdiction and authority. A notable example of such a special-law groundwater district is the Edwards Aquifer Authority in central Texas. Similarly, the Harris-Galveston Subsidence District and the Fort Bend Subsidence District, which were originally established as special-law GCDs, were created to address the specific issue of subsidence. In 2003, the legislature clarified that these two districts had the particularized purpose of regulating groundwater to prevent subsidence. Tex. Spec. Dist. Code §§ 8801.003, 8834.003. These districts were created for very specific purposes that go beyond regulating a water supply. The regulatory requirements for transferring groundwater rights within the EAA and these subsidence districts are unique, making it important for attorneys to understand the substantive and procedural
rules of each district. Generally, most GCDs have the authority to incur debt, levy taxes, charge for services, obtain easements, and condemn property. See Tex. Water Code §§ 36.101–.124. Districts may impose fees to cover administrative acts of the district and production fees on pumping authorized in the district. Tex. Water Code § 36.205. A GCD may impose additional fees for exporting water out of the district but may not impose more restrictive permit conditions on transporters than the GCD imposes on existing in-district users. See Tex. Water Code § 36.122. A seller of residential real property must disclose whether the seller is aware (actual knowledge, without any duty of investigation) of any portion of the property being located within a GCD or subsidence district. See Tex. Prop. Code § 5.008(b)(6).

Each GCD has the power to implement its statutory authority through rulemaking and permitting. See Tex. Water Code §§ 36.101, 36.113, 36.1131, 36.117. District rules may include well spacing and regulation of groundwater production by well production limits, limits based on acreage or tract size, rate of production limits, or “managed depletion” (an approach that aims to control the amount and rate of depletion districtwide over the long term). See Tex. Water Code § 36.116. Within certain constraints, a GCD may also regulate groundwater production in a manner designed to preserve “historic or existing use.” Tex. Water Code § 36.116(b). All wells are required to be permitted unless they are exempted by statute or the GCD’s rules. Tex. Water Code §§ 36.113, 36.117. Small wells used solely for domestic and livestock purposes, wells used for oil and gas production or surface mining activities, and wells existing at the time of the creation of the district are generally exempt from the permitting process but still may be required to be registered with the district. See Tex. Water Code § 36.117. Consequently, if land is within a GCD or a subsidence district, it is important to review the regulations of the district to determine any requirements and limitations on the landowner’s ability to access and produce groundwater.

Information and maps of groundwater conservation districts are available on the TWDB website at www.twdb.texas.gov. Copies of district rules and district management plans generally must be obtained from the individual conservation district. Contact information for GCDs may be available on the Texas Alliance of Groundwater Districts website at www.texasgroundwater.org.

Landowners also should be aware of the tools for groundwater management implemented by the Texas legislature, as these processes and their results can affect the regulation of groundwater in a specific area of the state. Each GCD is required to develop a comprehensive management plan that addresses various management goals, includes specific performance standards, details actions and procedures to carry out the plan, and includes estimates of various aspects of the groundwater resources within the district. See Tex. Water Code § 36.1071(e). However, GCDs do not follow aquifer boundaries, and more than one district may have jurisdiction over a single aquifer. The TWDB must designate “groundwater management areas” for aquifers across the state to promote coordination among GCDs. See Tex. Water Code § 35.004. GCDs within a groundwater management area sharing jurisdiction over the same aquifer are required to engage in a joint planning process to determine “desired future conditions” (as adopted by the district under Water Code section 36.108) for the aquifer. Tex. Water Code § 36.1071(a)(8).

The TCEQ has statutory authority to designate a “priority groundwater management area” if the area is currently experiencing, or is anticipated to experience within the next twenty-five years, critical groundwater problems, such as shortages, contamination of groundwater supplies, or land subsidence through the withdrawal of groundwater. Tex. Water Code § 35.007(a). Once an area is designated a priority groundwater management area, the landowners within the area may either (1) create one or more general-law GCDs, (2) have the area annexed to an adjoining GCD, or (3) create one or more GCDs through the legislative process. Tex. Water Code § 35.012(a).
§ 16.3 Practical Considerations for Conveying Groundwater Rights

§ 16.3:1 Severability and Marketing of Groundwater Rights

In *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012), the Texas Supreme Court determined that groundwater rights may be severed from the surface estate and leased or sold to a party other than the owner of the surface estate. The supreme court held in *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 64 (Tex. 2016), that general groundwater rights were the “dominant estate” to be treated similarly to severed mineral rights. Groundwater currently is the favored source of water for water marketers, but the purchase or lease of groundwater rights presents its own challenges, not the least of which is navigating the various regulatory regimes used by different groundwater conservation districts (GCDs). If the real estate or groundwater rights being considered are located within a designated priority groundwater management area, due consideration should be given to the potential for creation of a groundwater conservation district in the future.

§ 16.3:2 GCD Permitting

When evaluating a prospective lease or purchase of groundwater rights from property within a groundwater conservation district (GCD), the permitting implications of the transaction, which are determined by the district’s rules and management plan, must be carefully considered. For example:

- Does the transaction involve the purchase or lease of the groundwater rights in place, of only production rights of the groundwater, or of existing permitted rights also?
- What permits, or permit amendments, will the buyer need for his intended use of the groundwater, if any, and what are the district’s applicable permitting requirements?
- Are there any existing permits, such as production or drilling permits, that can be transferred to the purchaser? If so, do the terms or other limitations of those permits need to be amended to meet the purchaser’s needs?
- How and when in the closing process should the transfer of any existing permits or the rights being sold be completed?
- Do the district’s permitting requirements allow for adequate production, including export of groundwater if desired by the purchaser, for a sufficient term?
- Are the district’s fees (for example, for water use or export) prohibitive?
- Are there any aspects of the district’s rules that affect the relative advantage of well-field design or amount of contiguous acreage included in the permit?

It has become increasingly important, in conducting due diligence on groundwater rights, to determine whether there is likely to be opposition to the buyer’s intended use of the groundwater by landowners sharing the same aquifer, other permit holders, or interested organizations, and whether past permitting decisions of the GCD indicate that there may be difficulty in obtaining the required permits. This is particularly important in areas in which there has been an increase—either in scope or frequency—of the acquisition of groundwater rights for development, transportation for use outside of the GCD, or water marketing, where such opposition may lead to contested hearings or litigation. In one recent case, a GCD refused to grant in full the requested operating and transport permits, even though the application was uncontested and the GCD staff recommended approval. *See Forestar (USA) Real Estate Group, Inc. v. Lost Pines Groundwater Conservation District*, No. 15369, 335th Dist. Ct., Lee County, Tex., filed March 14, 2014; *but see Tex. Water Code § 36.4051(d)* allowing an applicant to seek a contested case hearing following such a decision). In another instance, a water marketer’s plan to produce and transport groundwater from land not subject to a GCD, and thus not subject to production limits, was opposed by neighboring landowners, who feared that the magnitude of the production would cause their wells to fail. As a result, the Texas legislature in 2015

§ 16.3:3 Other Due Diligence

Among the other issues that the purchaser or lessee of groundwater rights should consider are the following:

- What types of legal or technical (for example, hydrological or well-field design) advice are necessary before closing on the transaction, and how should the closing be conditioned on the results of such analysis?
- What method of pricing the groundwater rights is most appropriate for the transaction? For example, should pricing be based on amount of production, a flat price per acre, the volume of permitted production, or hydrological analysis estimating the saturated thickness of groundwater under the surface?
- To what extent, if any, will groundwater rights, or the right to use some portion of the conveyed groundwater, be reserved to the owner of the surface estate?
- What types of easement rights will be required to make use of the groundwater rights?
- What existing uses are being made of the surface (for example, agricultural or oil and gas production) that might affect the purchaser’s development of the groundwater rights?
- Can the water be transported to its place of use or need?
- What is the native quality of the groundwater?
- What is the condition of any infrastructure or groundwater production, treatment, or storage facilities to be conveyed?
- What are the terms and conditions in any existing permits authorizing production or export of groundwater?

§ 16.4 Surface Water

Although in most cases surface water in Texas is owned by the state, transactions for the purchase of rights to use surface water are quite common. Individuals and entities enter into water supply contracts to meet their needs for municipal, industrial, agricultural, or other water uses. Because most stream segments in Texas are already fully appropriated or even overappropriated, the market relating to existing water rights is necessarily dynamic. This section of the chapter addresses the nature of surface water rights under Texas law, the requirements for obtaining a new or amended surface water right from the TCEQ, and some practical considerations in surface water rights transactions, including requirements related to changes in ownership of appropriated surface water rights.

Generally, surface water is owned by the state and is available for use pursuant to the statutory appropriation process. Section 11.021(a) of the Texas Water Code reads as follows:

The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.


Navigable streams, defined as streams retaining an average width of thirty feet from the mouth, measured from cut bank to cut bank, generally are considered watercourses and thus are subject to appropriation. Tex. Nat. Res. Code § 21.001(3). The state holds the waters of navigable streams in trust for the public, and therefore such streams are subject to appropriation. In re

Under some circumstances, the landowner may have more or different rights to surface water.

**Domestic and Livestock Exemption:** The use of water for domestic and livestock purposes is generally exempt from state water rights administration. Without obtaining a permit, a person may construct a dam or reservoir up to two hundred acre-feet in capacity for domestic and livestock purposes on his own property. Tex. Water Code § 11.142.

**Diffused Surface Water:** Diffused surface water is water on the surface of the land, such as rainfall runoff, that has not yet entered a watercourse. A watercourse is a channel, with a well-defined bed and banks, in which water flows as a stream and has a permanent source of supply. Hoefs v. Short, 273 S.W. 785 (Tex. 1925). Diffused surface water is the property of the owner of the soil until it enters a watercourse, at which point diffused surface water is transformed legally to public property (state water or riparian water). Turner v. Big Lake Oil Co., 96 S.W.2d 221 (Tex. 1936); Motl v. Boyd, 286 S.W. 458 (Tex. 1926).

Developed Water: “Developed water” refers to water augmenting the natural streamflow that has been made available through artificial means, such as an imported surface water supply or groundwater pumped to the surface. Generally water that is legally reduced to possession and still under the physical control of the owner of an artificial conveyance system is subject to sale or further use by the owner of the system, as long as the water does not escape his control and rejoin a watercourse. See Guelker v. Hidalgo County WCID No. 6, 269 S.W.2d 551 (Tex. Civ. App.—San Antonio 1954, writ ref’d n.r.e.).

§ 16.5 General Types of Surface Water Rights

§ 16.5:1 Appropriative Water Rights

In Texas, the appropriation doctrine has developed over more than a century of legislation. The water right, documented in the form of a permit, certificate of adjudication, or certified filing, is a right of use and is precisely defined, with the state authorizing the use of water in a specific amount, by diversion from a watercourse at a definite location, for a particular purpose, and for use on a particular tract of land. It is unlawful to willfully take, divert, or appropriate any state water for any purpose without first complying with all applicable requirements of chapter 11 of the Water Code. Tex. Water Code § 11.081. Violators are also subject to civil and administrative penalties. See Tex. Water Code §§ 11.082, 11.0842–.0843.

Under the doctrine of seniority, or “first in time, first in right,” each water right is assigned a specific priority date. During times of shortage, this system determines the allocation of water among appropriators by use of relative priority dates. Tex. Water Code § 11.027. Senior rights holders are entitled to fully exercise their rights before those holding junior rights receive any water. Two exceptions should be noted, however. First, the TCEQ in 2012 promulgated rules that allow it to deviate from the prior appropriation system by exempting junior water rights from suspension or adjustment “based on public health, safety, and welfare concerns.” See 30 Tex. Admin. Code § 36.5(c). These rules are currently under judicial review. Second, the seniority system does not apply to water in the Rio Grande below Lake Amistad. See Tex. Water Code § 11.3271. There, the type of water right (for example, municipal, industrial, Class A irrigation, Class B irrigation) governs who is entitled to water during times of shortage. Beneficial use is another principle concept in the appropriation doctrine. A permit authorizing use of
state water under the appropriative system is a license. To the extent the appropriator actually puts the water to beneficial use, the appropriation is perfected and becomes a vested property right. See Tex. Water Code §§ 11.025–.026.

Even within the framework of appropriative rights, there are various limitations on a landowner’s rights to use surface water, including the following.

**Damage to Other Property:** No person may divert or impound the natural flow of surface water in the state in a manner that damages the property of another because of the overflow of the diverted or impounded water. Tex. Water Code § 11.086(a). If property is injured by such a diversion or impoundment, the owner of the injured property may recover damages from the liable party. Tex. Water Code § 11.086(b).

**Eminent Domain for Municipal Use:** Section 11.033 of the Texas Water Code provides that municipalities and other governmental agencies can exercise the power of eminent domain to acquire water or property devoted to uses other than municipal and domestic purposes. Although this eminent domain provision has not been repealed or amended, the Texas Property Code imposes various additional requirements on condemnation of water rights by municipalities and provides for separate valuation of groundwater rights in excess of the market value of the fee simple estate. See Tex. Prop. Code §§ 21.0121, 21.0421.

**Cancellation of Water Rights:** Although a perfected water right is considered a vested property right, with notice and hearing the TCEQ may cancel a water right in whole or in part based on ten years of nonuse immediately before the cancellation proceeding. See Tex. Water Code §§ 11.172, 11.173(a); Texas Water Rights Commission v. Wright, 464 S.W.2d 642 (Tex. 1971). There are now certain statutory exemptions from cancellation, including exemptions for water rights dedicated to certain conservation programs, and the TCEQ may find “justified nonuse” in cases in which the water right is being made available for private marketing or reserved for environmental use. See Tex. Water Code §§ 11.173(b), 11.177(b).

### § 16.5:2 Riparian Rights

A riparian water right is a right recognized at common law that entitles the owner of property adjacent to a watercourse to make “reasonable” use of the normal flow of the stream. This right is not quantified. A riparian property owner may impound and use any amount of water that is reasonably necessary for any reasonable purpose; however, the owner may not unreasonably interfere with the use of water by others. A riparian landowner may sell the water for use off-site of the riparian property, provided that the off-site use does not prejudice other riparian water users. Riparian rights holders may separate, by express conveyance, their riparian water rights from the riparian land. See Watkins Land Co. v. Clements, 86 S.W. 733 (Tex. 1905). On rivers for which the state has completed the water rights adjudication process, the distinction between riparian rights and appropriative rights has been removed, and riparian rights have been converted into appropriative rights for all practical purposes.

### § 16.5:3 Civil-Law Water Rights

Before the Republic of Texas adopted the common law, land grants from the sovereign were governed by civil law—either of Mexico or of Spain. These laws therefore determine the water rights relating to property originally granted under civil law. If a civil-law grant expressly includes a grant of water with the land, there is a legally recognizable water right. If the water right was not expressly granted, it is presumed that the sovereign retained the water rights when it made the land grant, and thus those water rights ultimately pass to the state of Texas. See State v. Valmont Plantations, 346 S.W.2d 853 (Tex. Civ. App.—
San Antonio 1961), opinion adopted, 355 S.W.2d 502 (Tex. 1962). Like riparian rights, civil-law water rights are subject to the water rights adjudication process and thus have been quantified and merged with appropriative rights through that process.

§ 16.6 Water Rights Adjudication and Administration

The Texas Water Rights Adjudication Act provides the mechanism for the state to quantify and compile the various sorts of water rights, such as civil-law water rights, riparian water rights, certified filings, and permits. See Tex. Water Code §§ 11.301–.341. The final decree in each water rights adjudication is final and conclusive as to all existing and prior rights and claims to the water rights in the adjudicated stream or segment and is binding on all claimants to water rights outside that stream or segment. Tex. Water Code § 11.322(d). This statute is the exclusive means by which water rights may be recognized in Texas, and thus courts cannot recognize equitable water rights based on good-faith prior use. In re Adjudication of Water Rights of Brazos III Segment of Brazos River Basin, 746 S.W.2d 207 (Tex. 1988). Nearly all of the general stream adjudications for Texas have been completed.

For river basins in which a watermaster program has been established, the TCEQ administers adjudicated water rights through a watermaster and a watermaster advisory committee appointed for each water division. See Tex. Water Code §§ 11.326, 11.3261. Watermaster programs are intended to ensure compliance with water rights by monitoring stream flows, reservoir levels, and water use. The watermaster divides the water of the streams (or other sources of supply) in the division based on the adjudicated water rights. Tex. Water Code § 11.327(a). The watermaster also regulates controlling works and diversion works in times of shortage to protect existing water rights, prevent waste, and prevent practices in excess of adjudicated rights. Tex. Water Code § 11.327(b). Currently, there are watermaster programs only for South Texas, the Rio Grande, the Concho River, and the Brazos River. More information on watermaster programs, including a map of the locations, can be found on the TCEQ website at https://www.tceq.texas.gov.

An attorney representing a purchaser or lender acquiring an interest in water rights that are subject to a watermaster program should become familiar with the applicable statutory and program provisions at Tex. Water Code §§ 11.325–.3291, 30 Tex. Admin. Code §§ 304.1–.63 (Watermaster Operations), and the TCEQ website. Water rights in the Rio Grande below Lake Amistad are allocated on an account basis based on the use of the water, such as municipal and irrigation, instead of on a seniority basis, with priority being given to municipal use. If, in any given month, surplus water is identified over the water needed for municipal use, the water is allocated to the other accounts, such as irrigation. In purchasing water rights, the buyer should determine whether an allocation has been made to the seller, and if so the purchase contract should address how the water allocation will be divided between the parties at closing. The cost of administration of water rights by watermasters is allocated among the adjudicated water rights holders, and assessments are made by the TCEQ. In general, no water may be diverted, taken, or stored by or delivered to a person while he is delinquent in the payment of his assessed costs. See Tex. Water Code §§ 11.329, 11.455. Purchasers should determine the amount of assessments that have been made against a seller and the payment status as part of their due diligence. The purchase contract should address the manner in which these assessments will be allocated at closing, if appropriate.

Attorneys dealing with water rights within the Rio Grande should be aware of recording requirements applicable to the Rio Grande watermaster. There are two subsections (j) to section 11.3271 of the Texas Water Code adopted by the legislature in 2003 that have never been reconciled. See Tex. Water Code § 11.3271. Under one subsection (j), the watermaster with jurisdiction over the Rio Grande is made the official recorder for all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens that the TCEQ authorizes or requires to be filed in connection with a water right relating to water in the lower, middle, or upper basin of the Rio Grande and that are subject to a permit, certified filing, or certificate of
adjudication, and the filing will have the same legal effect as filing under other law for the same type of instrument. Under the other subsection (j), the watermaster is required to maintain a central repository that includes certified copies of all instruments, including deeds, deeds of trust, and liens that the TCEQ requires to be filed in connection with the same type of water rights as are described in the first-referenced subsection (j), and it is expressly stated that on and after September 1, 2003, a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster and all requirements under other law are met. It would be prudent when conveying rights or interests in water rights in the Rio Grande to record a duplicate set of original documents with the Texas watermaster, as well as in the real property records of the county or counties in which the documents are otherwise authorized to be recorded, and to also file a certified copy of the documents recorded in the county real property records (at least with regard to liens) with the watermaster.

§ 16.7 Obtaining Surface Water Rights

A person desiring to appropriate surface water must obtain a permit from the TCEQ. See Tex. Water Code §§ 11.022, 11.121. The permit or amendment may be granted only if—after the proper application is filed, the required fees are paid, and notice and hearing are held—the applicant shows that (1) unappropriated water is available in the source of supply; (2) the proposed appropriation is intended for a beneficial use, does not impair existing water rights or vested riparian rights, is not detrimental to the public welfare, considers various environmental and water quality assessments required by statute, and addresses a water supply need in a manner consistent with the state water plan and the relevant approved regional plan or plans; and (3) reasonable diligence will be used to avoid waste and achieve water conservation. Tex. Water Code § 11.134(b). Each of these requirements is discussed briefly below. (The TCEQ also issues several types of more restrictive permits, such as seasonal permits, temporary permits, and emergency permits, authorized by other provisions of the Texas Water Code.)

§ 16.7:1 Availability of Unappropriated Water

“Unappropriated water” must be available in the source of supply, which the Texas Supreme Court has held to mean the amount of water remaining after taking into account complete satisfaction of all existing uncanceled permits and filings valued at their recorded levels. Lower Colorado River Authority v. Texas Department of Water Resources, 689 S.W.2d 873 (Tex. 1984). The TCEQ’s water availability models, sometimes referred to as “WAMs,” for each river basin in the state and the TCEQ’s regulatory criteria determine how frequently water must be available to support a finding that unappropriated water is available for appropriation.

§ 16.7:2 Beneficial Use

The Texas Water Code recognizes various purposes for which state water may be appropriated, stored, or diverted and ranks those uses by preference for permit issuance: domestic and municipal, agricultural and industrial, mining, hydroelectric power, navigation, recreation, public parks, game preserves, and “any other beneficial use.” Tex. Water Code §§ 11.023(a), (b), 11.024. The TCEQ may grant a water right application only if the proposed appropriation “is intended for a beneficial use.” Tex. Water Code § 11.134(b)(3)(A).

§ 16.7:3 Nonimpairment of Existing Water Rights

The TCEQ may grant a water right (or amendment) application only if the proposed appropriation does not impair existing water rights or vested riparian rights. Tex. Water Code § 11.134(b)(3)(B). To the extent the proposed appropriation would
impair water availability for existing downstream rights, the commission may include restrictions, such as minimum stream-flow restrictions, on the diversion and use of water in the new permit.

§ 16.7:4 Public Welfare

The TCEQ may grant a water right only if it finds that it would not be “detrimental to the public welfare.” Tex. Water Code § 11.134(b)(3)(C). Under the commission’s rules, this very broad requirement includes consideration of environmental, social, and economic impacts of the proposed appropriation. See 30 Tex. Admin. Code ch. 297.

§ 16.7:5 Conservation and Drought Contingency Requirements

The TCEQ may grant a water right application only if the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve “water conservation,” as that term is defined by Tex. Water Code § 11.002(8)(B). Tex. Water Code § 11.134(b)(4). With few types of exceptions, such as applications for emergency use, temporary use, or to impound water solely for in-place use, an applicant for new or amended water rights must submit a water conservation plan and adopt reasonable conservation measures, with varying criteria for such plans depending on the water use. See Tex. Water Code § 11.1271. In addition to developing conservation plans, wholesale and retail public water suppliers and irrigation districts must develop and submit drought contingency plans, relating to their water rights, to be implemented during periods of water shortages and drought. Tex. Water Code § 11.1272(a).

§ 16.7:6 Other Requirements

The TCEQ may grant an application for a water right or amendment only if the proposed appropriation addresses a water supply need in a manner consistent with the state water plan and any relevant approved regional water plan, unless the commission waives this consistency requirement. Tex. Water Code §§ 11.134(b)(3)(E), 11.1501. Information regarding each of the sixteen regional water plans can be found on the “Planning” page of the TWDB’s website, www.twdb.texas.gov.

Various other statutory provisions require the TCEQ to consider the environmental and conservation impact of water rights applications, including the effects, if any, of the issuance of the permit on groundwater or groundwater recharge (Tex. Water Code § 11.151); the effects, if any, on the bays and estuaries of Texas (Tex. Water Code § 11.147(b)); and permit conditions necessary to maintain existing instream uses, the water quality of the river or stream to which the permit would apply (Tex. Water Code §§ 11.147(d), 11.150), and fish and wildlife habitats (Tex. Water Code §§ 11.147(e), 11.152).

The Texas Parks and Wildlife Department also has significant authority relating to certain environmental aspects of water rights applications. The TCEQ must send a copy of every water rights permit application to the department, which is entitled to participate in hearings on such applications. Information and evidence presented by the department must be considered by the TCEQ in making a final decision on a water rights application. Tex. Water Code § 11.147(f).

A prospective buyer or seller of water rights as part of a real estate transaction must take special note if the water is intended to be taken or diverted from one watershed or river basin to another, because special TCEQ authorization must be obtained before any such “interbasin transfers.” See Tex. Water Code § 11.085. There are criminal penalties for taking or diverting water in violation of this statute. See Tex. Water Code § 11.085(q), (r). The legislature has sought to balance the interests of the basin of origin and the receiving basin. See Tex. Water Code § 11.085(k)–(l); San Antonio v. Texas Water Commission, 407 S.W.2d 752 (Tex. 1966). Because newly authorized interbasin transfers have junior priority to all other water rights granted
before the filing of a transfer application, the feasibility of an interbasin transfer from existing water rights can be severely limited. See Tex. Water Code § 11.085(s).

§ 16.8 Practical Considerations for Conveying Surface Water Rights

§ 16.8:1 Severability and Marketing of Surface Water Rights

Water rights may or may not be appurtenant to a specific tract of land. State-owned surface water rights, arising from either permit or certificate of adjudication, may be transferred as an easement that passes with title to the land or may be transferred separately from the land. Tex. Water Code § 11.040(a); Strayhorn v. Jones, 300 S.W.2d 623, 634 (Tex. 1957). In general, title to private water rights will pass automatically with title to the land unless the water rights have been previously sold or conveyed to some third party or are specifically reserved by the grantor. See Graham v. Kuzmich, 876 S.W.2d 446 (Tex. App.—Corpus Christi 1994, no writ); Fleming Foundation v. Texaco, Inc., 337 S.W.2d 846, 850 (Tex. Civ. App.—Amarillo 1960, writ ref’d n.r.e.). See the discussion at sections 16.5:1 and 16.5:2 above distinguishing private water rights from state water.

For marketing of surface water rights in Texas, there are significant restrictions on interbasin transfers, as discussed at section 16.7:6 above. Within a river basin, water transfers and marketing by regional suppliers such as river authorities are relatively straightforward. Difficulties may arise, however, when these transactions require amendment of an existing water rights permit, particularly if there are potential issues of impairment of existing senior water rights or environmental impacts. Nonetheless, there is an active market for surface water rights in some parts of Texas, particularly in the Rio Grande Valley. It should be noted that the transfer of water rights in the Rio Grande Valley is governed by TCEQ rules that are unique to the Rio Grande basin. Practitioners should fully understand those rules before beginning negotiations for the sale or purchase of surface water rights in that area.

§ 16.8:2 TCEQ Permitting

In cases in which an applicant is seeking a new or amended water right, the requirements outlined generally at sections 16.7 through 16.7:6 above will govern the substantive and procedural aspects of the TCEQ’s consideration of the application. Even in cases of transactions to sell or lease existing water rights, however, there may be commission requirements that must be satisfied, which could include the following:

- Do the TCEQ rules require actual amendments of the water right as a result of the transaction (for example, diversion point, place, or purpose of use)?
- If so, will notice and hearing be required? If so, is there any potential for opposition from other interests within the basin?
- Must the contract or the deed for the transaction be submitted to the TCEQ for its records?
- Do any special rules or procedures apply (for example, for transactions within the jurisdiction of a watermaster program)?

§ 16.8:3 Other Due Diligence

Among the other issues that the purchaser or lessee of surface water rights should consider are the following:

- What types of legal or technical advice are necessary before closing on the transaction, and how should the closing be conditioned on the results of such analysis?
- How much water is needed for the proposed project, in terms of firm yield requirements over the relevant time period?
• Are the existing rights valid and properly perfected?
• Can the relative priority of the water right be determined through examination of county deed records and the TCEQ’s records?
• What do the TCEQ’s records of existing water rights in the stream segment or basin reveal that might impact the desirability of the transaction?
• What types of easement rights will be required to make use of the surface water rights?
• Can the water be transported to its place of use or need?

§ 16.8:4 Transfer and Recording of Permits

Transfers of ownership of surface water rights must be reported to the TCEQ. See Tex. Water Code § 11.122. The change of ownership form, TCEQ Form 10204, may be downloaded from the commission’s website, https://www.tceq.texas.gov. This form initiates the transfer process at the TCEQ, which is not complete until an approval letter, amended certificate of adjudication, or amended permit is issued to the new owner.

The permit or amended permit must be recorded with the county clerk of the county or counties in which the appropriation will be made. Tex. Water Code § 11.136. This would include at least the county or counties in which the point of diversion is located. In most cases, a certificate of adjudication or amendment must be similarly recorded in each applicable county. See Tex. Water Code § 11.324. For more discussion on recordation, see part IV. in this chapter.

[Sections 16.9 and 16.10 are reserved for expansion.]

II. Groundwater Transaction Guide for Sale of Groundwater Rights for On-Site Production

§ 16.11 Sale of Groundwater Rights in Place for On-Site Production

The rights to explore for, drill for, produce, and transport groundwater can be sold under a contract of sale and conveyed by deed and easement agreement. These rights can also be leased under a groundwater lease. (But see section 16.1 above for a discussion of ownership of groundwater rights.) This part of this chapter applies to the sale and conveyance of groundwater rights for on-site production, that is, to a transaction in which the groundwater is intended to be produced from wells located on the seller’s land. It does not cover the sale or conveyance of permitted groundwater for off-site production, which is addressed in part III. in this chapter, nor does it apply to the sale of surface water rights, which are addressed in part IV. Financing documents for use in transactions in which the groundwater rights, easement rights, and permit, if any, constitute the collateral, are discussed in part V.

The forms discussed in this part of the chapter are for general use. Users should be aware that modifications may be required for specific transactions. For all groundwater sales, it is imperative that the attorneys involved in the transaction identify the regulatory agencies with jurisdiction over the groundwater rights (referred to collectively in this transaction guide as the “groundwater authority”) and obtain copies of all rules and regulations pertaining to groundwater as early in the transaction as possible. The rules may contain requirements that have an important bearing on the transaction, such as minimum acreage requirements for production, limitations on production, and requirements for the issuance and transfer of permits. It may be necessary for the practitioner to make modifications to the forms based on the rules of the groundwater authority. Forms 16-1,
16-2, and 16-3 in this chapter, as described in this part of the chapter, are not generally used in the sale of groundwater rights subject to the rules of the Edwards Aquifer Authority.

§ 16.12 Groundwater Rights Sales Contract, Deed, Easement, and Related Forms; Place for Recordation

If the seller is the owner of both the surface and groundwater estates in the land and is selling the groundwater and the right to use the surface estate for drilling, production, and transportation of groundwater on-site, the groundwater sales contract, form 16-1 in this chapter, should be used in the transaction. If the seller owns only groundwater rights that have already been severed from the land, together with easement rights to use the surface of the land for drilling, production, and transportation, the groundwater sales contract may be used if appropriately modified. At closing, the deed would describe both the groundwater rights and the easement rights. If the seller acquired the easement rights through a separate easement agreement, the deed would reference the recorded easement agreement. Alternatively, a separate assignment of easement rights could be used.

If the groundwater is subject to regulation by a groundwater authority, the attorney should determine whether the seller has obtained a groundwater permit. If so, the information regarding the permit should be set out in the contract, and the seller should request a transfer of the permit from the groundwater authority as part of the sale transaction. See section 16.17:5 below regarding permits.

All recordable documents should be recorded in the county or counties in which the land from which the groundwater and easement rights are obtained is located. If the real property identified in forms 16-2 and 16-3 is located in Brazos County, Texas, for example, the deed and easement would be recorded in that county. In many groundwater districts, the permits issued in connection with groundwater rights for on-site production are not recorded in the real property records. If a groundwater permit is issued to the buyer in a form that may be recorded, the permit should be recorded in the real property records in the same county or counties as the deed is recorded. It has generally not been the practice to record production permits in the real property records except for those issued by the Edwards Aquifer Authority. See part III. in this chapter.

The contract anticipates that a memorandum of contract will be recorded in the real property records when the contract is signed. The memorandum will put the public on notice of the buyer’s contract rights in the event there is a significant period of time between signing the contract and closing. See form 16-16.

The basic sales documents include the following:

4. Permit Transfer Request (form 16-12) or a transfer form promulgated or approved by the groundwater authority if a permit has been issued to the seller or another form promulgated by the groundwater authority, if it has a particular form for transfer.
5. Partial Release of Lien (On-Site) (form 16-8) if the seller has an existing lien on the land and only the groundwater rights are being released from the lien at closing.
6. Release of Lien (form 10-2 in this manual) if the seller’s entire lien will be released at closing.
7. Lienholder Consent and Subordination to Easement Agreement (form 16-7) if the seller has an existing lien on both the surface estate and groundwater, which will not be released as to the surface estate at closing.

8. Bill of Sale (form 5-16 in this manual) if personal property will be conveyed at closing and a more detailed description is required than the description in the deed.

9. Form UCC3 (form 9-14 in this manual), a form promulgated by the Texas secretary of state, if there is a security interest that covers or that could be construed to cover the groundwater rights, the permit, or personal property to be conveyed at closing.

10. Assignment and Assumption of Lease (form 16-14) if there is an existing lease of the groundwater.

11. Lessee Estoppel Certificate (form 16-15) used to assure the buyer that the groundwater lease is valid and is not in default and that the lessee understands the lease is being assigned.

12. Affidavit of Debts and Liens [and Indemnity] (form 16-13) (if this form is not being provided by a title company) used to provide additional protection to the buyer, especially in instances in which no title insurance will be obtained or title insurance is not available.

13. Loan documents required by the lender.

The groundwater deed, easement, and other recordable documents should be recorded in the real property records of the county or counties in which the land is located. If the buyer has applied for a new or amended production permit from a groundwater conservation district, the permit, when issued, may not be in recordable form. It has generally not been the practice to record these types of production permits in the real property records.

§ 16.13 General Considerations

The groundwater rights sales contract for on-site production, form 16-1 in this chapter, is drafted as a neutral form of contract, intending to favor neither the buyer nor the seller. For each contract, the basic elements of the transaction are, in general, stated in the sections to be completed at the beginning of the form. Some provisions, however, are required to be completed throughout the contract. The general terms that follow in the form may be used for many transactions. However, the sale of groundwater rights is an emerging area of law, and there are no well-established terms of sale. Contracts for the purchase and sale of groundwater rights are diverse, and additional drafting may be necessary to tailor the forms to the transaction.

§ 16.14 Special Surface Use Considerations

In the sale of groundwater rights in which the groundwater will be produced using the surface estate, it is possible for the deed to convey not only an interest in the groundwater but also easement rights in the surface of the land for exploration, drilling, production, and transportation of groundwater. However, it is advisable to use a separate easement agreement to describe in detail the easement rights that the owner of the groundwater estate will have in the surface estate. The parties may also want to provide for payment terms and use restrictions that are too detailed to include in the deed. Although form 16-1 in this chapter and the groundwater warranty deed, form 16-2, provide for the sale and conveyance of groundwater rights, which include surface use rights, these provisions are intended as safeguards to ensure that surface use rights are included in the sale and conveyance. It is recommended that the optional provision for the execution of a separate easement agreement at closing be used.
§ 16.15  Groundwater Rights Sales Contract

The following sections describe the provisions and terms of form 16-1 in this chapter and include considerations for the attorney in drafting or reviewing a contract, assisting the client during investigation of the groundwater rights, and closing the transaction. This commentary is organized in the same order as the sections of the contract.

§ 16.16  Introductory Paragraph: Offer and Acceptance

The introductory paragraph of the contract states what the parties must do to form the contract of purchase and sale. If the buyer’s earnest money cannot be collected, the buyer will be in default.

§ 16.17  Defined Terms

§ 16.17:1  Seller and Buyer

There are sections for the names of and other information concerning the seller, the buyer, and their respective attorneys. Proper identification of the parties is important, and the seller and the buyer should be identified as fully as possible. Capacity and authority should be considered, especially if a party is not an individual acting on his or her own behalf. See chapter 3 in this manual for a discussion of party designations.

§ 16.17:2  Title Company/Escrow Agent

Title insurance to insure title to severed groundwater rights in Texas is not generally offered by title insurance underwriters in Texas, although currently there is at least one insurer that offers title insurance for water rights. The contract designates a title company or escrow agent to act as the escrow and closing agent to address the situation in which the property will close through a title insurance company and the situation when it will not. The title company or escrow agent will be responsible for closing the transaction and receiving and disbursing funds under the terms of the contract.

It is advisable to have a written escrow agreement between the title company or escrow agent, the buyer, and the seller that defines the rights and duties of the title company or escrow agent. Form 4-2 in this manual is an escrow agent receipt and escrow agreement. It can be modified for use with an escrow agent other than a title company. The escrow agent should be responsible for getting signed at closing the affidavit of debts and liens (form 16-13), the settlement statement, and similar documents typically provided by a title company.

§ 16.17:3  Surveyor

This section of the contract should be completed if a surveyor has been designated for the transaction. See section 16.21:3 below regarding survey requirements.

§ 16.17:4  Groundwater Authority

If the real property is located within a groundwater conservation district or other groundwater authority, the authority should be identified. It is imperative that the buyer’s attorney consult the rules of the groundwater authority to determine all restrictions on the use and production of groundwater, requirements for sale of groundwater, and rules regarding the issuance or
transfer of a permit. Generally, copies of the rules can be obtained only from the groundwater authority. The buyer’s attorney should also obtain, and personally review, copies of all documents maintained by the groundwater authority pertaining to the groundwater being sold. The attorney should note all relevant information from the file, such as yearly allocations, if applicable, and should determine the feasibility of meeting all conditions of the groundwater authority’s approval of the sale within the buyer’s required time frame.

§ 16.17:5 Seller’s Permit

It is important for the buyer to determine whether the seller has a production or other permit issued by a groundwater authority in connection with the groundwater, whether the permit will allow the use of the groundwater contemplated by the buyer, and what requirements the groundwater authority imposes for the transfer, amendment, or issuance of a permit. If the seller has been issued a permit, the permit information should be set out in the contract and a copy of the permit and all amendments provided to the buyer as part of the seller’s records. If there is an existing permit, the buyer generally will want to obtain a transfer of the seller’s permit, and the seller should be required to submit a request for transfer of the permit in connection with the sale transaction. If the buyer needs a modification to the permit, such as a change in the type of groundwater use permitted, the buyer can file the appropriate documentation for a request with the groundwater authority, with any transfer of the permit and change in permit terms taking effect after closing. Because the rules and procedures for groundwater authorities vary, the attorney should contact the groundwater authority to obtain information on the forms and procedures required by the specific groundwater authority.

Paragraph G.5. of form 16-1 addresses the buyer’s right to evaluate the seller’s permit during the inspection period and contains an optional paragraph if the purchase of the groundwater is contingent on the buyer’s ability to obtain required permits.

§ 16.17:6 Earnest Money

The amount of earnest money is negotiable and depends on several factors, including the purchase price, the type of financing, and the relative financial strengths of the parties.

§ 16.17:7 Independent Consideration

If the buyer terminates the contract before the end of the inspection period, and the buyer is otherwise entitled to have the earnest money returned, the contract provides that a stated amount should not be returned to the buyer but should be paid to the seller, because that amount is the independent consideration to the seller for the buyer’s right to terminate the contract.

§ 16.17:8 Real Property

The real property is the land from which the groundwater is to be sold and is described in exhibit A. Any fixtures and personal property to be conveyed with the groundwater rights at closing also should be described in exhibit A. The contract should describe the real and personal property with legal specificity. If the property is not described sufficiently, the contract may be unenforceable because of vagueness. See chapter 3 in this manual for a discussion of property descriptions. Attention should also be given to the conveyance of appurtenant rights, such as permits, licenses, access easements, access to utilities, and similar rights. Because it is not clear whether some types of property, such as the components of a well, are personal property or fixtures, if wells or similar items are being conveyed at closing, it is advisable to treat them as both real and personal property in the conveyance documents.
§ 16.17:9  Groundwater Defined

The definition of groundwater is derived in part from *Pecos County WCID No. 1 v. Williams*, 271 S.W.2d 503, 505–06 (Tex. Civ. App.—El Paso 1954, writ ref’d n.r.e.).

§ 16.17:10  Groundwater Rights

The contract defines groundwater rights to include the right to use the surface of the land for exploration, drilling, and production and any governmental licenses or permits to so use the groundwater.

§ 16.17:11  Reserved Groundwater

If the seller intends to reserve ownership of or the right to use groundwater, the reserved rights should be described with specificity, including any limitation on use of the groundwater or the quantity of groundwater that may be pumped. In general, it is customary for the seller to retain a right of usage to accommodate the seller’s needs, without retention of an undivided ownership interest in the groundwater. Form 16-1 reserves the seller’s right to use groundwater. The form should be amended if the parties intend for the seller to reserve an undivided interest in the groundwater and should specify the percentage interest reserved. The reservation should be carefully drafted to protect the buyer’s rights in the groundwater without unnecessarily curtailing the surface owner’s right to use its property. If the buyer is acquiring the groundwater for commercial use, the buyer will want to prohibit the seller from using the reserved groundwater for commercial uses or production. The restriction on the seller’s use may include restrictions on using groundwater for oil and gas exploration or production. The seller’s water production may be limited in various ways, as by specifying the amount of groundwater that can be produced from the real property on a per-year or other basis or by limiting the number of seller’s wells that may be maintained in operation on the real property at any one time. The parties may wish to specify whose right to the groundwater is paramount in the event of an extreme drought or production limitations. The following is a sample reservation provision for a deed:

Grantor reserves for itself and Grantor’s successors and assigns the right to utilize Groundwater, at no cost, solely for domestic and livestock use on the Real Property. The term *domestic and livestock use* means use of the Groundwater on the Real Property solely for household uses by Grantor, Grantor’s employees, and their respective families for the watering of domestic and grazing animals and for Grantor’s limited oil and gas use permitted by this deed. The right to utilize Reserved Groundwater includes the right to drill, use, and operate domestic-type wells or windmills but does not include the right to drill, use, or operate any industrial-type or irrigation-type wells on the Real Property or to use Groundwater for the creation or maintenance of ponds. No Reserved Groundwater may be used for the operation of crop irrigation, feedyard purposes, dairy operations, confined animal feeding operations, mining operations, or other industrial or commercial purposes, except that Grantor will have the right to use one existing well, or to drill and use one well, for each oil and gas well drilled as reasonably necessary during the drilling, completion, recompletion, reworking, remediation, and revegetation process (but not for water flooding and secondary recovery operations). After these processes have been completed, Grantor will have the right to use these wells for domestic and livestock purposes subject to the limitations set forth in this deed. The aggregate number of wells for the production of Reserved Groundwater existing at any time on the Real Property may not exceed, on the average, one well per [number] acres. If at any time Grantor fails to pump all the Reserved Groundwater to which Grantor is entitled, Grantee will have the right to pump all Groundwater not pumped by the Grantor without additional consideration or compensation.
The parties may wish to provide that the seller’s right to use groundwater will terminate if water sufficient to meet the seller’s needs becomes available to the property from some other source, such as a public water supply system, or from other land owned by the seller.

§ 16.17:12 Hydrogeological Testing

Paragraph G.3. of form 16-1 authorizes the buyer to perform hydrogeological testing during the inspection period to determine the quality of the groundwater, to estimate the quantity of the groundwater, to establish well locations, and to form the basis for establishing the purchase price of the groundwater as described in section 16.17:13 below.

§ 16.17:13 Purchase Price

There is no standard method of determining the purchase price for groundwater rights. The purchase price may be based on a dollar amount per acre of land from which the groundwater rights will be obtained or on the appraised value of the groundwater rights as determined by an appraiser. The field of groundwater rights appraisal is still evolving. In areas where there are numerous groundwater sales or leases, it is possible to obtain an appraisal of groundwater rights based on comparable sales. In areas where there are few sales or lease transactions or where the water quantity or quality is highly variable, it may be difficult to obtain a reliable appraisal of groundwater rights without obtaining hydrogeological information on the groundwater. Where groundwater is obtained over a large area that may exhibit variability in water quality, volume, or sustainability, the calculation of the purchase price in the contract may be based on an estimate of these variables as determined by a hydrogeological study, so that the purchase price for groundwater in lands with a higher quality or greater volume of groundwater will be higher than the purchase price for groundwater in lands with lower quality or less sustainable groundwater.

Exhibit I may be used if the parties agree to seller financing of the purchase. If obtaining third-party financing is a condition to the buyer’s obligations, that fact and the terms of the complying financing should be addressed in the contract. See chapters 6 and 8 in this manual for further discussion of financing.

§ 16.17:14 Buyer’s and Seller’s Liquidated Damages

These sections of the contract are provided so that the parties can agree on additional liquidated damages to be paid by the defaulting party to the nondefaulting party on default.

§ 16.17:15 Title Commitment and Title Information

Title insurance to insure title to severed groundwater rights is no longer generally offered by title insurance underwriters in Texas, although it may still be available from a small number of insurers. If the seller is not required to provide a title commitment, or if a title commitment is not available for the groundwater rights, the contract requires the seller to provide the buyer with an abstract of title. The contract provides that the buyer may have the abstract of title reviewed by an attorney of the buyer’s choice, at the expense of the seller or buyer as specified in the contract. If the buyer obtains an abstract of title, the buyer should have it reviewed by an attorney who is experienced in land titles and knowledgeable about groundwater rights.
§ 16.17:16 Title Documents

The contract defines title documents to include the seller’s permit and instruments affecting title to the groundwater and the real property referenced in the title commitment or title information, survey, or UCC search or to be provided as part of the seller’s records. Title documents may include probate records, marital records, and birth and death certificates. Under paragraph F.7. of the contract, title objections can be made on the basis of the title documents. This provides the buyer with the ability to make objections to title based on the seller’s permit or unrecorded documents provided as part of the seller’s records.

§ 16.18 Deadlines

Section A of the contract groups most of the deadlines for ease of reference and provides two alternate ways to determine most of the deadlines: either a stated date or a specified number of days after the effective date of the contract or another specific date. The contract provides that time is of the essence. The contract provides that closing will occur a certain number of days after the expiration of the inspection period, but closing may also be specified to occur a certain number of days following a different event or on a certain date. The closing date may also be specified as “on or before” a certain date or event.

§ 16.19 Closing Documents

Section B of the contract lists the documents to be signed and delivered to close the transaction and serves as a checklist to prepare for closing. Section C contains a number of exhibits. The attorney should choose the specific exhibits appropriate for the sale.

§ 16.19:1 Exhibit B—Representations; Environmental Matters

Exhibit B contains the parties’ representations. These items are always negotiated by the parties and will vary from transaction to transaction.

§ 16.19:2 Exhibit C—Seller’s Records

Exhibit C is a list of the seller’s records of the property that will be delivered or made available to the buyer for review during the inspection period and also delivered to the buyer at closing.

§ 16.19:3 Exhibit D—Notices, Statements, and Certificates

Exhibit D lists notices, statements, and certificates required by federal and state law and regulations to be delivered when common real estate contracts are executed. The items applicable to a specific transaction should be selected. See chapter 2 in this manual for brief discussions of each law and regulation and for references to other laws and regulations that require notices, statements, and certificates for less common transactions. Some of the statutory provisions would appear to include the sale of groundwater, simply because they apply to a sale or conveyance of real property, and no exemption is made for the sale of groundwater.
§ 16.19:4 Exhibit E—Permits

Copies of the seller’s permits should be attached to the contract as an exhibit. If copies cannot be attached for some reason, they should be described with specificity, including any permit numbers.

§ 16.19:5 Exhibit F—Leases and Contracts to Be Terminated

This exhibit lists the seller’s leases and contracts affecting the real property or groundwater that will be terminated at or before closing.

§ 16.19:6 Exhibit G—Leases and Contracts Not to Be Terminated

This exhibit lists the seller’s leases and contracts affecting the real property or groundwater that will be assumed by the buyer or taken subject to.

§ 16.19:7 Exhibit I—Seller Financing

Exhibit I contains seller-financing terms.

§ 16.19:8 Exhibit J—Easement Agreement

The deed conveying the groundwater should grant basic surface use rights for access to, and development of, the groundwater. Forms 16-1 and 16-2 accomplish this by defining “Groundwater Rights” to include these basic surface use rights. It is advisable, however, that the parties agree on more extensive surface use rights and surface use restrictions for both the surface owner and the groundwater rights owner and set out these rights and restrictions in a separate easement agreement. The owner of the groundwater estate has easement rights implied by law to use as much of the surface estate as is reasonably necessary to produce groundwater. *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016). However, many issues can arise when the surface owner and the groundwater rights owner both use the surface estate for their respective purposes, and it is important for the parties to consider and agree on specific terms that will establish their respective rights, priorities, and limitations with regard to the use of the surface estate. It is advisable for these terms to be set out in a separate easement agreement, rather than in the deed, so that they can be described in detail, along with indemnifications and other terms that are not customary in deeds.

The easement documents included in this chapter consist of a blanket easement agreement for surface use (form 16-3), with three optional addenda that impose surface use restrictions (form 16-6, surface use restrictions addendum), require payments for use of the surface estate (form 16-5, surface damage payment addendum), and require the groundwater rights owner to limit its use of the surface estate to specific locations over time (form 16-4, easement location addendum). In light of the Texas Supreme Court’s decision in *Coyote Lake Ranch*, attorneys using the easement forms should modify them as necessary to clearly identify the respective surface use rights of the parties. Consideration should be given to incorporating into the easement documents the concept that the owners of the surface and groundwater estates will each make reasonable accommodations to the other in the use of the surface estate. Any obligation to make accommodations should be expressly stated, and the action required to fulfill this obligation should be clearly set out. The court’s analysis of when the accommodation doctrine applies, discussed below, can be used as a template in drafting this language.
In *Coyote Lake Ranch*, the court held that the owner of the groundwater estate has implied easements for access and use over the surface estate as reasonably necessary to develop the groundwater and that these easements are dominant to the surface use rights of the surface owner. Despite the broad surface use rights granted to the city, the court found that the language in the deed did not address all of the surface use issues raised by the ranch owner. The court held that when the documents creating the surface use rights do not fully address questions on surface use, the accommodation doctrine can be applied to limit the surface use by the owner of the groundwater estate.

Under the *Coyote Lake Ranch* holding, to successfully assert a claim that the accommodation doctrine applies, the surface owner must prove that—

1. the groundwater rights owner’s use completely precludes or substantially impairs the existing use; and
2. there is no reasonable alternative method available to the surface owner by which the existing use can be continued; and
3. there are alternative reasonable, customary, and industry-accepted methods available to the groundwater rights owner that will allow recovery of the groundwater and also allow the surface owner to continue the existing use.

*Coyote Lake Ranch*, 498 S.W.3d at 64. The court’s decision in this case underscores the importance of drafting surface use rights in a manner that is clear and unambiguous about the nature and extent of the authorized use.

Form 16-3 includes the grant of a 150-foot-wide sanitary control easement around each groundwater well as required by the TCEQ for wells that are part of a municipal water supply system. See 30 Tex. Admin. Code §§ 290.38(73), 290.41(c). The purpose of the easement is to create an area around each well in which uses that could adversely affect the quality of the groundwater are prohibited. The requirement for a sanitary control easement is included in the form because a grantee acquiring groundwater for domestic and livestock use may want this protection for its well. The blanket easement agreement also contains a provision requiring the grantor to execute a separate sanitary control easement in the form promulgated by the TCEQ at the grantee’s request. The TCEQ easement form requires the specific location of the well and easement to be identified. The grantee may not know the location of future wells at the time it acquires the easement, but the grantee can have the separate sanitary control easement executed when the location of each well is established.

§ 16.19:9 Exhibit K—Memorandum of Contract

If it is anticipated that there may be a significant amount of time between the date the contract is signed and the date of closing, it is advisable to have the memorandum of contract signed and recorded in the real property records to provide notice of the buyer’s contract rights. See form 16-16 in this chapter.

§ 16.19:10 Exhibit L—Notice of Termination of Contract

If the memorandum of contract is used, the parties should execute the notice of termination of contract form at the same time and deliver it to the title company or escrow agent for recordation in the event the contract is terminated before closing. See form 16-17 in this chapter.
§ 16.20 Investment of Earnest Money

The contract provides that the buyer may direct the title company or escrow agent to invest the earnest money in an interest-bearing account in a federally insured financial institution. If the earnest money is to be invested, the title company will require the buyer’s tax identification or Social Security number so that accrued interest may be reported to the Internal Revenue Service.

§ 16.21 Title and Survey

The contract incorporates the statutory notice that the Texas Real Estate License Act requires real estate brokers and real estate salespersons to give to a buyer, advising that the buyer should either have title examined by an attorney or obtain a title insurance policy, if available. See Tex. Occ. Code § 1101.652(b)(29). If a broker or salesperson is not involved, the paragraph may be deleted.

The contract requires that the seller provide to the buyer by the deadlines stated in the contract the title commitment or title information, the survey (if required), the UCC search, and legible copies of each document referred to in these instruments.

The contract follows a typical procedure under which the buyer reviews the title commitment or title information, the survey, the seller’s permit, the documents provided by the seller, and the UCC search and notifies the seller of any objections. After notice, the seller may elect to cure the buyer’s objections but is not required to do so. If the seller does not agree to cure, the buyer may either proceed to close the transaction and accept the groundwater rights subject to the uncured matters or terminate the contract. However, the seller is obligated to resolve all items listed on Schedule C of the title commitment at or before closing and to cure title matters that arise by, through, or under the seller after the contract is signed.

Attorneys reviewing title should look for contracts or for provisions in existing oil and gas leases that allow injection or disposal into or onto the land of saltwater or other substances that can adversely affect the quality of the groundwater. Owners of the mineral estate, including oil and gas lessees, can use as much of the groundwater as is reasonably necessary to produce minerals, including using groundwater for hydraulic fracturing (“fracking”). See Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972); Fleming Foundation v. Texaco, Inc., 337 S.W.2d 846 (Tex. Civ. App.—Amarillo 1960, writ ref’d n.r.e.).

It is unlikely that the seller will be able to modify or terminate existing oil and gas leases, so it is important to evaluate their effect on the groundwater estate. If the surface owner is also the owner of the mineral estate, the buyer can negotiate restrictions on the mineral estate limiting the use of groundwater for fracking and prohibiting the injection or disposal of saltwater and other substances in or on the land so that these practices will not be allowed in future leases and contracts.

§ 16.21:1 Review of Title Commitment

The contract provides that the condition of title will be established by either a title commitment or an abstract of title, as agreed to by the buyer and the seller. If an abstract of title is furnished, the buyer may have the abstract of title reviewed by an attorney and obtain the attorney’s written opinion of the abstract of title. The benefit of obtaining title insurance, if available, over an attorney’s opinion of title is that title insurers are required to maintain reserves to cover claims that are greater than the malpractice coverage maintained by most law firms. Consequently, there is an increased likelihood of recovery if an error is made by the title company in its determination of title.
An essential reference on title insurance is the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*, available from the Texas Department of Insurance at https://www.tdi.texas.gov/title/titleman.html. The manual contains Texas rate and procedural rules; the text of title 11 of the Texas Insurance Code, relating to title insurance; and various bulletins of the Texas State Board of Insurance dealing with title insurance practices.

The attorney should review the signature and effective date of the commitment. The attorney should confirm that the commitment is signed and that the issuance date is not more than ninety days before the closing. Otherwise, a new or revised commitment should be ordered.

**Schedule A:** The attorney should confirm that the proposed insured parties are correctly named, the amounts of insurance are correctly stated, and the correct estate is insured. The commitment should list two estates to be insured, the fee ownership of the groundwater estate, and the buyer’s easement estate. Record title should be vested in the seller. The attorney should confirm that the property description is correct and conforms to the description in the contract and in the survey (if applicable).

**Schedule B:** The attorney should review the following matters:

- **Item 1**, relating to covenants and restrictions, should be noted as either “Covenants, conditions, and restrictions (other than any restrictions indicating preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin) as set forth in [recording data] of the real property records of [county] County, Texas” or “Item 1 of Schedule B is hereby deleted in its entirety.”

- **Item 2**, relating to the standard survey exception, may be amended and partially deleted to read “any shortages in area” if a current survey approved by the title company is obtained. An additional 5 percent premium is charged to amend the owner policy for a residential transaction; an additional 15 percent premium is charged to amend the owner policy for a commercial transaction. No additional premium is required to amend the mortgagee policy. The responsibility for paying the extra premium for the survey modification in the owner policy of title insurance is often negotiated between the parties, although the pertinent provision in the contract form provides for the extra premium to be paid by the buyer.

- **Item 3**, relating to homestead or community property or survivorship rights, and **item 4**, relating to tidelines, lands comprising the shores and beds of waterways, lands beyond the line of the harbor or bulkhead lines, filled-in lands, artificial islands, statutory water rights, and areas extending from the line of mean low tide to the line of vegetation, apply only to the owner policy and cannot be deleted or amended.

- **Item 5**, relating to property taxes, should be reviewed for the status of tax payments and the existence of rollback taxes.

- **Item 6**, relating to the terms and conditions of the documents creating the insured’s interest in the land, cannot be revised. The referenced documents should, however, be reviewed.

- **Item 7**, relating to materialman’s and mechanic’s liens, applies only to the mortgagee policies on interim construction loans and may be deleted if satisfactory evidence that the paragraph does not apply is furnished to the title company.

- **Item 8**, relating to subordinate liens and leases, applies only to the mortgagee policy.

- **Item 9**, relating to existing liens, should show only liens permitted by the contract. Copies of all lien documents should be reviewed with regard to due-on-sale provisions; dragnet clauses relating to other debt; condemnation provisions; notice, cure, and default provisions; and subordinate financing. A superior lienholder’s estoppel agreement should be obtained from any lienholder whose note and lien are being either assumed or taken “subject to.”
All other special exceptions, such as easements, mineral interests, leases, or matters shown on a current survey, should be carefully reviewed to determine if they affect the buyer’s groundwater rights. The commitment should indicate whether these exceptions apply to the groundwater estate, the easement estate, or both. If the real property consists of more than one tract of land, the commitment should specify which items apply to which tract or tracts.

Schedule C: The attorney should ensure that the seller has complied with the contract by curing and effectively removing all matters appearing on Schedule C at or before closing. Schedule C matters may require obtaining releases of liens, settling specific claims or lawsuits affecting title to the property, furnishing evidence of good standing and authority (corporate resolution or partnership agreement), and obtaining proof of property settlement and divorce, proof of heirship or probate of a particular estate, or evidence relating to a bankruptcy. From the buyer’s perspective, curative matters appearing on Schedule C should be attended to by either the seller or the title company. The contract requires that the seller resolve all Schedule C items before closing, but if that provision is not used, the buyer should object to all Schedule C items in the commitment to ensure that they are not added to Schedule B of the title policy.

The Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas should be consulted for information on the various types of policies and endorsements that are available and their respective costs.

§ 16.21:2 Review of Abstract of Title

If the seller is obligated to provide an abstract of title, the contract provides that the buyer may have the abstract of title reviewed by an attorney at either the buyer’s or seller’s expense, as specified in the contract. If the condition of title is to be determined based on an abstract of title, the buyer should have the abstract of title reviewed by an attorney experienced in land title examination and knowledgeable about groundwater rights, and should obtain a written opinion of title in time to make title objections within the deadline specified in section A of the contract.

The abstract of title required by the contract covers the period from the first conveyance from the sovereignty to the present. It is possible to obtain an abstractor’s certificate from a title or abstract company that covers a shorter period and may contain a conclusion by the abstractor as to the identity of the current record owner of property, the existence of any outstanding liens, and other title encumbrances affecting the real property. While this information is useful, it is not a satisfactory substitute for an abstract of title as specified in the contract and an attorney’s opinion of title. Often, the title or abstract company preparing the abstractor’s certificate or abstract of title will limit liability for error to the amount charged for the certificate or abstract.

§ 16.21:3 Review of Survey

The seller is required to provide copies of any existing surveys under exhibit C (seller’s records). The contract allows the buyer to require the seller to provide a new survey of the real property, at the seller’s expense, as specified in the contract. The required survey category should be set out in the contract in the indicated place under the block for information on the surveyor. Different types of surveys and survey certifications are available, depending on the nature of the property and the requirements of the parties. An excellent resource on surveys is the Manual of Practice for Land Surveying in the State of Texas, published by the Texas Society of Professional Surveyors, which may be contacted at www.tspso.org. It describes the various categories and conditions for surveys in Texas, the level of accuracy required for each category of survey, matters to be depicted on the survey, and the nature of certificates.

The attorney should keep the following points in mind when reviewing a boundary survey:
• The survey should bear a recent date and should conform to the required category and condition for the type of survey specified in the contract and location of the property.

• The certificate should be sealed and signed and should conform to any certificate specified in the contract.

• There should be a north compass bearing on the survey.

• The attorney should observe the system of reference used for the survey, locate the beginning point, and determine that it is monumented and locatable.

• The survey, particularly all course and distance notations, should be compared to the legal description either appearing on or attached to the survey. This description then should be compared to the one appearing in the contract and the title commitment or title opinion.

If a more extensive survey, such as a land title survey, is obtained, the attorney should also keep the following points in mind:

• All recorded easements appearing in the title commitment or title opinion should be located and noted on the survey with the appropriate recording data, and blanket easements should be noted in the surveyor’s notes. The surveyor should also note any items shown in Schedule B that the surveyor determines do not affect the real property. Conversely, the attorney should examine the survey for any matters (such as easements) not appearing in the title commitment or title opinion.

• The survey should be examined for the location of improvements. The attorney should determine if the improvements protrude onto adjoining property or easement areas, if there are encroachments of improvements from adjoining property onto the property, and if there are building setback line violations.

• The survey should be examined for the depiction of overhead lines, roadways, or other uses of the property that are not within an easement area covered by a recorded easement, as these may indicate the existence of prescriptive easement rights. Any written notations on the survey, such as those relating to rights of parties in possession, should be reviewed to determine their effects on the property and its anticipated use.

• The property should have legal and adequate access to public streets or roads.

• The survey should show the existence and location of utilities.

• The surveyor’s certificate should indicate the location of the floodplain, if applicable.

§ 16.21:4 Review of UCC Search

The contract includes provisions for the conveyance of personal property and fixtures and requires that the seller furnish UCC searches of the UCC records of the Texas secretary of state and the UCC records of any other appropriate state. It should be remembered that groundwater permits, wells, and other property may fall within broad collateral descriptions such as “equipment” and “general intangibles” in security agreements and financing statements.

§ 16.22 Inspection Period

The inspection period is intended to give the buyer the opportunity to investigate the groundwater and real property and decide whether to close the transaction. The contract provides that the buyer may terminate the contract at any time before the end of the inspection period for any reason and have the earnest money returned, except for the independent consideration provided in the contract.

The contract provides for reasonable rules of entry and that the buyer will indemnify the seller for claims resulting from the buyer’s inspection of the property. Except for the environmental indemnity stated in exhibit B (if used), the indemnity provisions of the contract are not intended to shift risk from the indemnified party to the indemnitor for the indemnified party’s own negligence. One consequence of this allocation of risk is that the indemnified party may not be able to recover the costs of
defense from the indemnitee if the indemnitee party is sued for the consequences of its alleged negligence. See Fisk Electric Co. v. Constructors & Associates, 888 S.W.2d 813 (Tex. 1994). The environmental indemnity, if used, shifts risk for the seller’s own negligence from the seller to the buyer. It is unlikely, however, that the environmental indemnity will be effective to shift risk in the event of misrepresentation or fraud.

It is prudent for the purchaser of groundwater rights to be produced on site, whether or not previously severed, to obtain an environmental site assessment on the land overlying the groundwater that meets the requirements of the “all appropriate inquiries” rule under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675, in order to secure protection as an “innocent landowner” from strict liability for groundwater contamination. While there is no case law in which the owner of a groundwater right has been held strictly liable for groundwater contamination as a result of his ownership of the groundwater right, the owner of a mineral estate has been held to be an “owner” under CERCLA because it is the owner of a fee simple estate separate from the surface estate. See City of Grass Valley v. Newmont Mining Corp., No. 2:04-cv-00149-GEB-DAD, 2007 WL 4287603 (E.D. Cal. Dec. 4, 2007) (also cited in Halliburton Energy Services, Inc. v. NL Industries, 648 F. Supp. 2d 840, 896–97 (S.D. Tex. 2009)). An owner of a groundwater rights estate would, under the court’s reasoning in Edwards Aquifer Authority v. Day, 369 S.W.3d 814 (Tex. 2012), be the owner of a fee simple estate separate from the surface estate and could, therefore, be held to have strict liability for groundwater contamination. See William D. Dugat, All Appropriate Inquiries in Connection with Groundwater Purchases, in The Changing Face of Water Rights in Texas, State Bar of Texas (2015).

The contract provides that the earnest money will be deposited in one lump sum. The parties alternatively may agree that the buyer is obligated to deposit additional earnest money after agreed conditions have been satisfied—for example, if the buyer decides not to terminate the contract at the end of the inspection period and to proceed to closing.

§ 16.23 Representations and Warranties

Representations and warranties are negotiated by the parties with specific reference to the transaction. They may include such matters as ownership of the real property and groundwater rights; organization of the parties; authority to execute the contract and close the transaction; condition of title; parties in possession; pending litigation and claims that may ripen into litigation; pending or threatened condemnation or other taking; use restrictions, such as zoning and restrictive covenants; condition of the property or disclaimer of representations (for example, “as is” language); presence of landfills or hazardous and toxic wastes; floodplain location; utility availability and capacity; compliance with all laws; effectiveness of required licenses and permits; status of leases; operation and maintenance of property before closing; accuracy of books and records; agricultural or other special-use tax assessment; payment of ad valorem taxes; and status of debt to be assumed or taken “subject to.”

In negotiating representations, the parties should specify whether representations are to be absolute or based on the seller’s knowledge and belief; whether the representations will be based on the knowledge of the entity that is the seller or on the knowledge of specified individuals; whether the seller must perform further investigation to make the representations or may rely on its current knowledge, without further investigation; and whether and to what extent the representations will survive closing.

The approach used in this contract limits the seller’s representations and warranties, but it is not intended to insulate the seller from liability for fraud or misrepresentation.
• The seller represents only facts, not opinions. For example, the seller does not represent whether, in the seller’s opinion, the property is in compliance with applicable laws and regulations. Instead, the seller represents that it has not received notice of violation of any law, ordinance, regulation, or requirement affecting the property or use of the property, except as stated in the contract.

• The seller makes no representations or warranties that are not stated in the contract, including exhibit D (notices, statements, and certificates required by law and regulation), or in the closing documents.

The following optional clauses are also provided:

• The buyer agrees to accept the property in its “as is, where is” condition, investigate the property on the buyer’s own behalf, and not rely on information or representations attributable to the seller, except to the extent stated in the contract.

• The buyer waives its rights under the Texas Deceptive Trade Practices–Consumer Protection Act.

• The buyer assumes responsibility after closing for all environmental matters relating to the property.

If the parties negotiate different representations, exhibit B must be revised accordingly.

The contract provides that the parties’ representations are true and correct when made and must be true and correct at closing, or the buyer may terminate the contract.

It is common practice to include representations regarding the organization and authority of the parties in contracts but to defer the obligation to deliver documentary evidence confirming those representations until the closing of the transaction. That evidence customarily consists of certificates of existence and good standing from public officials, certified copies of organizational documents, certified corporate resolutions or partnership consents, and certificates of incumbency. The attorney may consider requiring such documentary evidence at the execution of the contract to avoid encountering a claim, after substantial obligations have been paid or incurred, that the other party is not authorized to consummate the transaction. While the seller’s organizational documents should be available at the time of execution of the contract, the buyer’s organizational documents are often not prepared until shortly before closing.

§ 16.24 Condition of Property until Closing; Cooperation; No Recording

The parties’ signing of the contract obligates them concerning maintenance and operation of the property, casualty damage, condemnation, claims, governmental proceedings, permits, licenses, and inspections. The contract also sets out the parties’ agreement not to record the contract. Oil and gas leases may be of concern to the buyer of groundwater, because the lessee has the right to use groundwater in connection with its operations whether that right is stated in the lease or not. In addition, oil and gas leases may expressly allow the lessee to use significant amounts of groundwater for flooding or secondary recovery operations or may permit activities that could contaminate the groundwater, such as the injection or disposal of saltwater onto the real property. Paragraph I.2. of the contract contains provisions that restrict the ability of the seller to enter into oil and gas leases before and after closing.

§ 16.25 Termination

The contract provides for disposition of the earnest money after termination and for posttermination obligations in certain events. If the memorandum of contract is used, the title company or escrow agent should record the notice of termination of contract if the contract is terminated before closing. See form 16-17 in this chapter.
§ 16.26 Closing

The contract provides that, unless the parties agree otherwise before closing, certain closing documents will use the forms contained in the current edition of the Texas Real Estate Forms Manual. This approach defers the time and expense of negotiating the closing documents until after the contract is signed, while providing certainty if the parties do not otherwise negotiate closing documents. Alternately, the closing documents can be negotiated before the contract is signed and, if so, should be attached as exhibits to the contract.

The contract allocates closing obligations and transaction costs between the parties.

The contract provides that the buyer acquires possession of the property at closing. The parties may agree, however, on earlier or later possession by the buyer. If the buyer takes possession before closing, a groundwater lease may be appropriate.

Although it is not common, a seller or buyer may be represented by a real estate broker in a groundwater transaction. Real estate brokers and real estate salespersons must have a written commission agreement to enforce payment of a real estate commission. The commission may be payable on contract execution, when the contract closes, or as otherwise agreed by the parties. The contract provides that the commission agreement is a separate document between the broker and the party responsible for paying the commission. For applicable forms, see forms 26-29 through 26-31 in this manual. Alternately, the contract may include the commission agreement or restate its key terms. The parties indemnify each other against claims by brokers and finders arising by, through, or under the indemnifying party. The contract may state that there are no brokers, but there is no requirement to do so.

If either the buyer or the seller is licensed as a real estate salesperson or real estate broker and is acting as a broker in the transaction, a disclosure to that effect is required under the Real Estate License Act. See Tex. Occ. Code § 1101.652(b)(16).

§ 16.27 Default and Remedies

The contract provides that the buyer may elect one of the following remedies for the seller’s default: termination (with disposition of the earnest money and payment of additional liquidated damages to the nondefaulting party) or specific performance. In addition, the buyer may terminate if the seller’s representations are not true and correct or if a warranty set forth in the contract is breached. The parties may be entitled to payment of actual damages and perhaps of consequential damages if the untruth or breach is first discovered after closing. The contract is drafted to limit the parties’ remedies, but remedies are often negotiated.

The contract provides that the party prevailing in litigation is entitled to recover attorney’s fees and court and other costs.

§ 16.28 Assignment

The contract contains alternate clauses concerning assignment. The buyer either may not assign the contract or may assign the contract only to an entity controlled by the buyer.

If the contract provides that the buyer has the right to assign, the assignment provision should state whether the buyer is relieved from obligations under the contract after assignment.
§ 16.29 Closing Functions

The party handling the closing (the title company or escrow agent) commonly attends to the matters discussed in the following sections.

§ 16.29:1 Payoff Information and Other Closing Expenses

Written request should be made to each lienholder for the lienholder’s written payoff statement. The lienholder should be requested through an authorized representative to state the remaining principal balance due on the note, the accrued interest as of a certain date, a per diem amount of interest, and whether the lienholder will credit the amount held in the escrow account, if one exists, to the total due or, alternatively, refund the amount directly to the borrower. Closing must occur and payment be made to the lienholder before the release of lien will be signed.

Additionally, information concerning other matters requiring payment at closing should be obtained, such as payoff amounts for mechanic’s lien claims, federal or state tax liens, property taxes, paving assessments, and abstracted judgments that affect the property.

The closing agent must also determine the amounts of closing costs, such as surveying expenses, attorney’s fees, brokers’ commissions, and loan fees.

§ 16.29:2 Ad Valorem Taxes and Groundwater Authority Fees

Currently groundwater is not assessed and taxed independently from the surface estate for ad valorem tax purposes. Consequently, the contract does not provide for a proration of ad valorem property taxes at closing, but it does require that the taxes be paid in full at closing by the seller, if they are due and payable at the time of closing. Under current law, the sale of the groundwater rights, at least when the buyer retains sufficient reserved groundwater to enable it to continue its existing use of the real property, would not appear to trigger the assessment of rollback taxes. Consequently, the contract provides that if the real property has been, or at any time after closing is, the subject of special valuation and reduced tax assessments pursuant to the provisions of chapter 23, subchapter D, of the Texas Tax Code, the seller will be responsible for the payment of any such taxes, penalties, and interest, including rollback taxes. If the seller is not reserving sufficient groundwater to continue the seller’s existing use of the real property, the parties should consider modifying this provision.

After closing, the seller will continue to pay all ad valorem taxes and assessments due in connection with the real property before delinquency, except that if ad valorem taxes are ever assessed separately against the buyer’s groundwater rights after closing, the buyer will be responsible for paying such taxes and assessments if the buyer is obligated to pay such taxes under applicable law. After closing, the buyer will be responsible for paying all fees, assessments, taxes, and charges of any kind imposed by the groundwater authority or any successor authority in connection with the buyer’s use of the groundwater, and the seller will be obligated to pay such taxes and assessments with regard to the reserved groundwater, if any. The provisions regarding taxes should be set out in the deed and easement agreement signed by the parties at closing.

§ 16.29:3 Preparation of Closing Documents

The closing agent may be expected to prepare several documents.
Closing Statements: Closing statements may be on either the federally prescribed settlement statement, the State Board of Insurance settlement statement, or a separate seller’s, buyer’s, or borrower’s statement, depending on the nature of the transaction. The purpose of a closing statement is to assemble in one document all the pertinent financial features of the contract, including purchase price, loan amounts, costs and expenses of closing the transaction, and prorations. Execution of the statement evidences the parties’ agreement with the numbers and computations appearing on the statement.

Affidavits: Affidavits concerning debts and liens, parties in possession, identity of the parties, leases, and the parties’ marital status will likely be required at closing by the title company, escrow agent, or a party’s attorney.

Financing documents are typically prepared by the lender’s attorney. Conveyancing and other closing documents may be prepared by the parties to the transaction, their attorneys, or an attorney for the closing agent.

§ 16.29:4 Funding

The closing agent typically disburses funds in connection with closing. Disbursements are made according to the closing statement, usually from funds paid by the buyer and its lenders.

Except in the case of certain nontaxable sales of principal residences, the person responsible for closing a real estate transaction is required to file with the Internal Revenue Service an information return relating to the transaction and is subject to penalties for failing to report. See 26 U.S.C. § 6045. This reporting requirement is often satisfied by the responsible person by delivering the seller’s closing statement, together with an attachment of additional required information, to the IRS.

If funds will be disbursed at closing, payments must be made to the closing agent with “good funds” as defined by the regulations of the Texas State Board of Insurance or immediately available funds. See Procedural Rule P-27, Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

If it is not necessary to disburse funds at closing, the parties need not comply with the “good funds” rule, and payment may be made in other ways.

In a lending transaction, the attorney for the lender should consider obtaining an insured closing service letter from the title insurance underwriter, if title insurance is available, whose policies are to be issued. This letter indemnifies the lender for any fraudulent acts of the closing title insurance company relating to the handling of closing funds. See forms T-50 and T-51 of the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas. See https://www.tdi.texas.gov/title/titlemm5.html.

§ 16.29:5 Recording Documents

The title company or escrow agent is responsible for recording documents intended to be recorded. This responsibility extends to the recording of releases or transfers of liens for notes paid at closing. Each document should be checked before recording to ensure that exhibits referred to in the document are attached and the name and address of the person to whom the document is to be returned after recording is included.
§ 16.29:6 Closing Instructions

Attorneys for the buyer, the seller, and the lender may each prepare closing instructions for the closing agent. For applicable forms, see forms 26-15 through 26-18 in this manual. These instructions relate to the conditions precedent to closing, including the status of the title after closing, the title insurance policies to be issued, disposition of funds, and distribution of documents received by the closing agent.

§ 16.30 Additional Considerations

§ 16.30:1 Transactions Involving Foreign Persons

Buyer: If the buyer is a foreign person, certain disclosures and reports may be required under the Foreign Investment in Real Property Tax Act of 1980. See 26 U.S.C. § 6039C.

Seller: With certain exceptions, anyone purchasing real property located in the United States from a foreign person must withhold 15 percent of the price and remit the funds to the Internal Revenue Service within twenty days of the date of transfer. See 26 U.S.C. § 1445(a), (b). The transferee should assume that the seller is a foreign person until the contrary is established, because transferees act at their own peril until they obtain a nonforeign affidavit. See 26 U.S.C. § 1445(b)(2). The nonforeign affidavits (forms 26-19 and 26-20 in this manual) are suggested for use in all transactions.

§ 16.30:2 Closing Checklist

The attorney should prepare a closing checklist, itemizing the documents that will be required to close the transaction, including curative documents. The checklist should also refer to all other preclosing considerations relating to the transaction.

§ 16.30:3 Postclosing Considerations

After closing, recorded documents and relevant title insurance policies issued after closing should be reviewed for accuracy and compliance with the title commitment. The owner policy should be dated on or after the recording date of the deed conveying title to the buyer, and the mortgagee policy should be dated on or after the recording date of the deed of trust of the insured lien.

An original or title company’s certified copy of each executed document relating to the closing should be provided to the seller and the buyer or the borrower by their attorneys. Generally, the party benefiting from a document receives the original, and the other parties receive copies.

[Sections 16.31 through 16.40 are reserved for expansion.]
III. Groundwater Transaction Guide for Sale of Permitted Groundwater Rights for Off-Site Production

§ 16.41 Sale of Permitted Groundwater Rights for Production Off-Site

The rights to produce and transport groundwater can be sold under a contract of sale and conveyed by deed and easement agreement. These rights can also be leased under a groundwater lease. (But see section 16.1 above for a discussion of ownership of groundwater rights.) This part of this chapter applies to the sale and conveyance of permitted groundwater rights for off-site production. The sale or conveyance of groundwater for on-site production is addressed in part II. of this chapter. The sale and conveyance of surface water rights is addressed in part IV. Financing documents for use in transactions in which the groundwater rights and permit constitute the collateral are discussed in part V.

The forms discussed in this part of this chapter are for general use. Users should be aware that modifications may be required for specific transactions. For all groundwater sales, it is imperative that attorneys involved in the transaction identify the regulatory agencies with jurisdiction over the groundwater rights (referred to collectively in this transaction guide as the “groundwater authority”) and obtain copies of all rules and regulations pertaining to groundwater as early in the transaction as possible. The rules may contain requirements that have an important bearing on the transaction, such as minimum acreage requirements for production, limitations on production, and requirements for the issuance and transfer of permits. It may be necessary for the practitioner to make modifications to the forms based on the rules of the groundwater authority. The forms require significant modifications for use in the sale of groundwater subject to the rules of the Edwards Aquifer Authority.

§ 16.42 Groundwater Rights Sales Contract, Deed, and Related Forms; Place for Recordation

Whether the seller is the owner of both the surface and groundwater estates in the land or is the owner only of groundwater pursuant to ownership of all or part of a permit for production of groundwater, if the seller is selling the permitted groundwater for production at a location other than the land from which the original permit was derived, only the groundwater sales contract, form 16-9 in this chapter, should be used in the transaction. Specifically, in some groundwater authorities, notably the Edwards Aquifer Authority (EAA), a purchaser may buy all or a portion of the unrestricted right to produce groundwater pursuant to the terms of a permit issued by the EAA and then elect to withdraw the water from a location different from the original permit location as long as the new location is within the jurisdiction of the EAA. Form 16-9 specifically contemplates a transaction in which a groundwater authority has issued a permit for the production of groundwater, and the groundwater, through the mechanism of the permit, is what is being sold. The production of the groundwater will occur at a well location other than the land set forth in the permit. The new location for production will be designated by the buyer at some point in the transfer mechanism with the groundwater authority. With these types of transactions, it is never contemplated that the buyer will actually produce groundwater on the land owned by the seller, and, in fact, the contract and the subsequent deed prohibit the buyer from having access to the land owned by the seller.

All recordable documents, including the new permit when issued, should be recorded in the county or counties in which the land from which the groundwater and permit rights were originally obtained is located. In addition, if a new withdrawal location is selected in a different county, all of the same documents, including the new permit, should also be recorded in that county. For example, if the original permit was derived from land in Medina County, but the new withdrawal location is to be in Bexar County, all documentation should be recorded in both Medina and Bexar counties. Although not required, deeds, deeds of trust, and other recordable documents may, in addition, be filed in any county in which land from which the permit is derived is located. This may include land that was at one time owned or leased by the permit holder or the holder’s predeces-
The basic sales documents include the following:

2. Groundwater Rights Warranty Deed (Off-Site) (form 16-10).
3. Permit Transfer Request (form 16-12) or a transfer form promulgated or approved by the groundwater authority or another form promulgated by the groundwater authority, if it has a particular form for transfer.
4. Partial Release of Lien (form 16-11) if the seller has an existing lien on the land and only the groundwater rights are being released from the lien at closing.
5. Release of Lien (form 10-2 in this manual) if the seller’s entire lien will be released at closing.
6. Form UCC3 (form 9-14 in this manual), a form promulgated by the Texas secretary of state, if there is a security interest that covers or that could be construed to cover the groundwater or the permit to be conveyed at closing.
7. Assignment and Assumption of Lease (form 16-14) if there is an existing lease of the groundwater.
8. Lessee Estoppel Certificate (form 16-15) used to assure the buyer that the groundwater lease is valid and not in default and that the lessee understands the lease is being assigned.
9. Affidavit of Debts and Liens [and Indemnity] (form 16-13) (if this form is not being provided by a title company) used to provide additional protection to the buyer, especially in instances in which no title insurance will be obtained or title insurance is not available.
10. Loan documents required by the lender.

§ 16.43 General Considerations

The groundwater rights sales contract, form 16-9 in this chapter, is drafted as a neutral form of contract, intending to favor neither the buyer nor the seller. For each contract, the basic elements of the transaction are, in general, stated in the sections to be completed at the beginning of the form. Some provisions, however, are required to be completed throughout the contract. The general terms that follow in the form may be used for many transactions. However, the sale of groundwater is an emerging area of law, and there are no well-established terms of sale. Contracts for the purchase and sale of groundwater are diverse, and additional drafting may be necessary. The following commentary is organized in the same order as the sections of the contract.

§ 16.44 Introductory Paragraph: Offer and Acceptance

The introductory paragraph of the contract states what the parties must do to form the contract of purchase and sale. If the buyer’s earnest money cannot be collected, the buyer will be in default.
§ 16.45 Defined Terms

§ 16.45:1 Seller and Buyer

There are sections for the names of and other information concerning the seller, the buyer, and their attorneys. Proper identification of the parties is important, and the seller and buyer should be identified as fully as possible. Capacity and authority should be considered, especially if a party is not an individual acting on his own behalf. See chapter 3 in this manual for a discussion of party designations. It should be noted that if the owner of the real property and the owner of the permit are not the same party, the attorney for the buyer must make certain that both parties sign all closing documents. Most groundwater authorities will not mediate ownership of groundwater rights.

§ 16.45:2 Title Company or Escrow Agent

Title insurance to insure title to groundwater rights in Texas is not generally offered by title insurance underwriters in Texas, although currently there is at least one insurer that offers title insurance for water rights. To the extent it is available, the title insurance product is a variation of a title policy on the real property. In many ways, it may not provide the parties with the complete coverage and closing details they are used to receiving in a land closing and title policy. For that reason, many sales of groundwater, in particular permitted groundwater transactions, are completed through the use of a title opinion based on information prepared by a title company. Nonetheless, the contract designates a title company or escrow agent to act as the escrow and closing agent in order to address either option. The title company or escrow agent is responsible for closing the transaction and receiving and disbursing funds under the terms of the contract. If a title opinion is provided as evidence of title to the groundwater rights, it should be reviewed by an attorney who is knowledgeable about land titles and groundwater rights.

It is advisable to have a written escrow agreement between the title company or escrow agent, the buyer, and the seller that defines the rights and duties of the title company or escrow agent. Form 4-2 in this manual is an escrow agent receipt and escrow agreement. It can be modified for use with an escrow agent other than a title company.

§ 16.45:3 Surveyor

A survey is rarely used in the sale of permitted groundwater, as the underlying issue is not the location of the real property but rather the chain of title related to the real property and the permit. If there is a need for a survey, a section could be drafted for the contract.

§ 16.45:4 Groundwater Authority

Generally, for a groundwater transaction involving a permit, the real property is located within a groundwater conservation district or other groundwater authority, and the authority should be identified. It is imperative that the buyer’s attorney consult the rules of the groundwater authority to determine all restrictions on the use and production of groundwater, requirements for sale of groundwater, and rules regarding the issuance or transfer of a permit. Generally, copies of the rules can be obtained only from the groundwater authority. The buyer’s attorney should also obtain, and personally review, copies of all documents maintained by the groundwater authority pertaining to the groundwater and permit being sold. The attorney should note all relevant information from the file, such as yearly allocations, if applicable, and should determine the feasibility of meeting all conditions of the groundwater authority’s approval of the sale within the buyer’s required time frame.
§ 16.45:5   Seller’s Permit

It is important for the buyer to determine the status of the seller’s permit issued by the groundwater authority in connection with the groundwater and what the groundwater authority requires for the transfer of the permit. Cooperation by the seller in the transfer of the permit should be set out in the contract and is paramount to the buyer’s efforts to obtain approval of the transfer. All permit information should be set out in the contract.

§ 16.45:6   Earnest Money

The amount of earnest money is negotiable and depends on several factors, including the purchase price, the type of financing, and the relative financial strengths of the parties.

§ 16.45:7   Independent Consideration

If the buyer terminates the contract before the end of the inspection period and the buyer is otherwise entitled to have the earnest money returned, the contract provides that a stated amount should not be returned to the buyer but should be paid to the seller, because that amount is the independent consideration to the seller for the buyer’s right to terminate the contract.

§ 16.45:8   Real Property

The real property is the land from which the groundwater or permit is to be sold and is described in exhibit A of the contract. The contract should describe the real and personal property with legal specificity. If the property is not described sufficiently, the contract may be unenforceable because of vagueness. See chapter 3 in this manual for a discussion of property descriptions. Attention also should be given to the conveyance of appurtenant rights, such as permits, licenses, and similar rights.

§ 16.45:9   Groundwater Defined

The definition of groundwater is derived in part from Pecos County WCID No. 1 v. Williams, 271 S.W.2d 503, 505–06 (Tex. Civ. App.—El Paso 1954, writ ref’d n.r.e.).

§ 16.45:10   Groundwater Rights

The contract defines groundwater rights to include the right to withdraw a stated quantity of groundwater from a specific aquifer as described in the permit (the “groundwater”) and all rights and interests relating to the groundwater, including—

all of the real and personal property rights, appurtenances, authorities, licenses, consents, and contracts, if any, relating to or pertaining to the Groundwater, which will also include all common-law property rights in and to the Groundwater as well as those rights or interests that now or in the future may be useful or necessary to withdraw or otherwise beneficially use the Groundwater Rights . . . .

§ 16.45:11   Reserved Groundwater

Generally, the seller will retain ownership of some permitted rights; however, a specific reservation is not usually required, as the description of the groundwater will describe specifically what number of acre-feet of water will be sold out of the permit. In addition, if the permit being transferred is that of an irrigation groundwater right, in some groundwater districts, there is a
certain required acre-feet of groundwater that cannot be severed or sold from the real property. In the case of the Edwards Aquifer Authority, one acre-foot of irrigation groundwater is known as the base water and, with a few specific exceptions, cannot be sold from the real property from which it derived.

§ 16.45:12 Purchase Price

There is no standard method of determining the purchase price for groundwater rights; however, in the case of permitted groundwater, the sales have been based most often on a price per acre-foot of water. The field of groundwater rights appraisal is still evolving. In areas in which there are numerous groundwater sales, such as the Edwards Aquifer, it is possible to obtain an appraisal of groundwater rights based on comparable sales. The contract provides for the purchase price based on a stated price per acre of groundwater being purchased. The buyer will be paying for the groundwater under each acre of land, based on a stated price per acre, regardless of how much or how little water is actually under the land. Exhibit E of the contract may be used if the parties agree to seller financing of the purchase. If obtaining third-party financing is a condition to the buyer’s obligations, that fact and the terms of the complying financing should be addressed in the contract. See chapters 6 and 8 in this manual for further discussion of financing.

§ 16.45:13 Buyer’s and Seller’s Liquidated Damages

The liquidated damages sections of the contract are provided so that the parties can agree on additional liquidated damages to be paid by the defaulting party to the nondefaulting party on default.

§ 16.45:14 Title Commitment and Title Information

Title insurance may not be available to insure title to groundwater rights, but even if available, the parties may agree not to procure title insurance. If the seller is not required to provide a title commitment, the contract requires the seller to provide the buyer with title information. The contract provides that the buyer may have the title information reviewed by an attorney of the buyer’s choice, at the expense of the seller or buyer as specified in the contract. If the buyer obtains title information, the buyer should have it reviewed by an attorney who is experienced in land titles and knowledgeable about groundwater rights.

§ 16.45:15 Title Documents

The contract defines title documents to include the seller’s “Permit and instruments affecting title to the Groundwater and the Real Property” referenced in the title commitment or title information and UCC search. These documents are to be provided as part of the seller’s records. Under paragraph F.6. of the contract, title objections can be made on the basis of the title documents. This provides the buyer with the ability to make objections to title based on the seller’s permit or unrecorded documents provided as part of the seller’s records.

§ 16.46 Deadlines

Section A of the contract contains most of the deadlines, grouped for ease of reference, and provides two alternate ways to determine most of the deadlines: either a stated date or a specified number of days after the effective date of the contract or another specific date. The contract provides that time is of the essence and that closing will occur a certain number of days after the expiration of the inspection period, but closing may also be specified to occur a certain number of days following a different event or on a certain date. The closing date may also be specified as “on or before” a certain date or event.
§ 16.47 Closing Documents

Section B of the contract lists the documents to be signed and delivered to close the transaction and serves as a checklist to prepare for closing. Section C contains a number of exhibits. The attorney should choose the specific exhibits appropriate for the sale.

§ 16.47:1 Exhibit B—Representations; Environmental Matters

Exhibit B contains the parties’ representations. These items are always negotiated by the parties and will vary from transaction to transaction.

§ 16.47:2 Exhibit C—Seller’s Records

Exhibit C is a list of the seller’s records of the property that will be delivered or made available to the buyer for review during the inspection period and also delivered to the buyer at closing.

§ 16.47:3 Exhibit D—Notices, Statements, and Certificates

Exhibit D lists notices, statements, and certificates required by federal and state law and regulations to be delivered when common real estate contracts are executed. The items applicable to a specific transaction should be selected. See chapter 2 in this manual for brief discussions of laws and regulations that require notices, statements, and certificates. Some of the statutory provisions would appear to include the sale of groundwater, simply because they apply to a sale or conveyance of real property, and no exemption is made for the sale of groundwater.

§ 16.47:4 Exhibit E—Seller Financing

Exhibit E contains seller-financing terms.

§ 16.47:5 Exhibit F—Memorandum of Contract

If it is anticipated that there may be a significant amount of time between the date the contract is signed and the date of closing, it is advisable to have the memorandum of contract signed and recorded in the real property records to provide notice of the buyer’s contract rights. See form 16-16 in this chapter.

§ 16.47:6 Exhibit G—Notice of Termination of Contract

If the memorandum of contract is used, the parties should execute the notice of termination of contract form at the same time and deliver it to the title company or escrow agent for recordation in the event the contract is terminated before closing. See form 16-17 in this chapter.

§ 16.48 Investment of Earnest Money

The contract provides that the buyer may direct the title company or escrow agent to invest the earnest money in an interest-bearing account in a federally insured financial institution. If the earnest money is to be invested, the title company will
require the buyer’s tax identification or Social Security number so that accrued interest may be reported to the Internal Revenue Service.

§ 16.49  Title

The contract incorporates the statutory notice that the Texas Real Estate License Act requires real estate brokers and real estate salespersons to give to a buyer, advising that the buyer should either have the title examined by an attorney or obtain a title insurance policy, if available. Tex. Occ. Code § 1101.652(b)(29). If a broker or salesperson is not involved, the paragraph may be deleted.

The contract requires that the seller provide to the buyer the title commitment or title information, the UCC search, and legible copies of each document referred to in these instruments by the deadlines stated in the contract. The contract follows a typical procedure under which the buyer reviews the title commitment or title information, the seller’s permit, the documents provided by the seller, and the UCC search and notifies the seller of any objections. After notice, the seller may elect to cure the buyer’s objections but is not required to do so. If the seller does not agree to cure, the buyer may either proceed to close the transaction and accept the groundwater subject to the uncured matters or terminate the contract. However, the seller is obligated to resolve all items listed on Schedule C of the title commitment at or before closing and to cure title matters that arise by, through, or under the seller after the contract is signed.

§ 16.49:1  Review of Title Commitment

The contract provides that the condition of title will be established by either a title commitment or title information, as agreed to by the buyer and the seller. If title information is furnished, the buyer may have the title information reviewed by an attorney and obtain the attorney’s written opinion of the title information. The benefit of obtaining title insurance, if such insurance is available, over an attorney’s opinion of title is that title insurers are required to maintain reserves to cover claims that are greater than the malpractice coverage maintained by most law firms. Consequently, there is an increased likelihood of recovery if an error is made by the title company in its determination of title. See also section 16.21:1 above.

An essential reference on title insurance is the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas, available from the Texas Department of Insurance at https://www.tdi.texas.gov/title/titleman.html. The manual contains Texas rate and procedural rules; the text of title 11 of the Texas Insurance Code, relating to title insurance; and various bulletins of the Texas State Board of Insurance dealing with title insurance practices.

The attorney should review the signature and effective date of the commitment. The attorney should confirm that the commitment is signed, and the issuance date is not more than ninety days before the closing. Otherwise, a new or revised commitment should be ordered.

Schedule A:  The attorney should confirm that the proposed insured parties are correctly named, the amounts of insurance are correctly stated, and the correct estate is insured, including the correct number of acre-feet of groundwater and the correct reference to the permit. Record title should be vested in the seller. The attorney should confirm that the property description is correct and conforms to the description in the contract.

Schedule B:  The attorney should review the following matters:
• Item 1, relating to covenants and restrictions, should be noted as either “Covenants, conditions, and restrictions (other than any restrictions indicating preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin) as set forth in [recording data] of the real property records of [county] County, Texas” or “Item 1 of Schedule B is hereby deleted in its entirety.”

• Item 3, relating to homestead or community property or survivorship rights, should be reviewed to verify ownership rights.

• Item 5, relating to property taxes, should be reviewed for the status of tax payments and the existence of rollback taxes.

• Item 6, relating to the terms and conditions of the documents creating the insured’s interest in the land, cannot be revised. The referenced documents should, however, be reviewed.

• Item 7, relating to materialman’s and mechanic’s liens, applies only to the mortgagee policies on interim construction loans and may be deleted if satisfactory evidence that the paragraph does not apply is furnished to the title company.

• Item 8, relating to subordinate liens and leases, applies only to a mortgagee policy and may not be applicable for every water transaction.

• Item 9, relating to existing liens, should show only liens permitted by the contract. Copies of all lien documents should be reviewed with regard to due-on-sale provisions; dragnet clauses relating to other debt; condemnation provisions; notice, cure, and default provisions; and subordinate financing. A superior lienholder’s estoppel agreement should be obtained from any lienholder whose note and lien are being either assumed or taken “subject to.”

All other special exceptions should be carefully reviewed to determine if they affect the buyer’s groundwater rights. If there is more than one set of groundwater rights being insured, the commitment should specify which exceptions apply to which set of groundwater rights.

Schedule C: The attorney should ensure that the seller has complied with the contract by curing and effectively removing all matters appearing on Schedule C at or before closing. Schedule C matters may require obtaining releases of liens, settling specific claims or lawsuits affecting title to the property, furnishing evidence of good standing and authority (corporate resolution or partnership agreement), and obtaining proof of property settlement and divorce, proof of heirship or probate of a particular estate, or evidence relating to a bankruptcy. From the buyer’s perspective, curative matters appearing on Schedule C should be attended to by either the seller or the title company. The contract requires that the seller resolve all Schedule C items before closing, but if that provision is not used, the buyer should object to all Schedule C items in the commitment to ensure that they are not added to Schedule B of the title policy.

The Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas should be consulted for information on the various types of policies and endorsements that are available and their respective costs.

§ 16.49:2 Review of Abstract of Title or Title Information

If the seller is obligated to provide an abstract of title or title information, the contract provides that the buyer may have the abstract of title or title information reviewed by an attorney at either the buyer’s or seller’s expense, as specified in the contract. If the condition of title is to be determined based on an abstract of title or title information, the buyer should have it reviewed by an attorney experienced in land title examination and knowledgeable about groundwater rights, and should obtain a written opinion of title in time to make title objections within the deadline specified in section A of the contract.

The abstract of title required by the contract covers the period from the first conveyance from the sovereignty to the present. It is possible to obtain an abstractor’s certificate from a title or abstract company that covers a shorter period and may contain a conclusion by the abstractor as to the identity of the current record owner of property, the existence of any outstanding liens, and other title encumbrances affecting the real property. While this information is useful, it is not a satisfactory substitute for
an abstract of title or title information as specified in the contract and an attorney’s opinion of title. Often, the title or abstract company preparing the abstractor’s certificate or abstract of title will limit liability for error to the amount charged for the certificate or abstract.

§ 16.49:3 Review of Survey

A survey is not required for a transaction involving off-site production.

§ 16.49:4 Review of UCC Search

The contract includes provisions that require the seller to furnish searches of the UCC records of the Texas secretary of state and the UCC records of any other appropriate state. Groundwater permits, wells, and other property may fall within broad collateral descriptions such as “equipment” and “general intangibles” in security agreements and financing statements.

§ 16.50 Inspection Period

The inspection period is intended to give the buyer the opportunity to investigate the groundwater and real property and decide whether to close the transaction. The contract provides that the buyer may terminate the contract at any time before the end of the inspection period for any reason and have the earnest money returned, except for the independent consideration provided in the contract.

The contract provides for reasonable rules of entry and that the buyer will indemnify the seller for claims resulting from the buyer’s inspection of the property, although in the case of the purchase of permitted groundwater to be produced from another location, the need to visually inspect the real property is rare. Generally, inspection periods in these types of contracts are used more as a feasibility period, allowing the buyer time to evaluate the overall purchase of the groundwater rather than inspect the actual property.

Except for the environmental indemnity stated in exhibit B (if used), the indemnity provisions of the contract are not intended to shift risk from the indemnified party to the indemnitor for the indemnified party’s own negligence. One consequence of this allocation of risk is that the indemnified party may not be able to recover the costs of defense from the indemnitor if the indemnified party is sued for the consequences of its alleged negligence. See Fisk Electric Co. v. Constructors & Associates, 888 S.W.2d 813 (Tex. 1994). The environmental indemnity, if used, shifts risk for the seller’s own negligence from the seller to the buyer. It is unlikely, however, that the environmental indemnity will be effective to shift risk in the event of misrepresentation or fraud.

The contract provides that the earnest money will be deposited in one lump sum. The parties alternatively may agree that the buyer is obligated to deposit additional earnest money after agreed conditions have been satisfied—for example, if the buyer decides not to terminate the contract at the end of the inspection period and to proceed to closing.

§ 16.51 Representations and Warranties

Representations and warranties are negotiated by the parties with specific reference to the transaction. They may include such matters as ownership of the real property and groundwater, organization of the parties, authority to execute the contract and close the transaction, condition of title, pending litigation and claims that may ripen into litigation, pending or threatened con-
condemnation or other taking, disclaimer of representations (for example, “as is” language), compliance with all laws, status of leases, payment of ad valorem taxes, and status of debt to be assumed or taken “subject to.”

In negotiating representations, the parties should specify whether representations are to be absolute or based on the seller’s knowledge and belief; whether the representations will be based on the knowledge of the entity that is the seller or on the knowledge of specified individuals; whether the seller must perform further investigation to make the representations or may rely on its current knowledge, without further investigation; and whether and to what extent the representations will survive closing.

The approach used in this contract limits the seller’s representations and warranties, but it is not intended to insulate the seller from liability for fraud or misrepresentation.

- The seller represents only facts, not opinions. For example, the seller does not represent whether, in the seller’s opinion, the property is in compliance with applicable laws and regulations. Instead, the seller represents that it has not received notice of violation of any law, ordinance, regulation, or requirement affecting the property or use of the property, except as stated in the contract.

- The seller makes no representations or warranties that are not stated in the contract, including exhibit D (notices, statements, and certificates required by law and regulation), or in the closing documents.

The following optional clauses are also provided:

- The buyer agrees to accept the property in its “as is, where is” condition, investigate the property on the buyer’s own behalf, and not rely on information or representations attributable to the seller, except to the extent stated in the contract.

- The buyer waives its rights under the Texas Deceptive Trade Practices–Consumer Protection Act.

If the parties negotiate different representations, exhibit B must be revised accordingly.

The contract provides that the parties’ representations are true and correct when made and must be true and correct at closing, or the buyer may terminate the contract. Termination of the contract may not be a satisfactory remedy for the buyer, in which case other remedies could be negotiated, such as a reduction in the sales price.

It is common practice to include representations regarding the organization and authority of the parties in contracts but to defer the obligation to deliver documentary evidence confirming those representations until the closing of the transaction. That evidence customarily consists of certificates of existence and good standing from public officials, certified copies of organizational documents, certified corporate resolutions or partnership consents, and certificates of incumbency. The attorney may consider requiring such documentary evidence at the execution of the contract to avoid encountering a claim, after substantial obligations have been paid or incurred, that the other party is not authorized to consummate the transaction. While the seller’s organizational documents should be available at the time of execution of the contract, the buyer’s organizational documents are often not prepared until shortly before closing.

§ 16.52 Condition of Property until Closing; Cooperation; No Recording

The parties’ signing of the contract obligates them concerning the groundwater, condemnation, claims, governmental proceedings, permits, licenses, and inspections. The contract also sets out the parties’ agreement not to record the contract.
§ 16.53 Termination

The contract provides for disposition of the earnest money after termination and for posttermination obligations in certain events. If the memorandum of contract is used, the title company or escrow agent should record the notice of termination of contract if the contract is terminated before closing. See form 16-17 in this chapter.

§ 16.54 Closing

The contract provides that, unless the parties agree otherwise before closing, certain closing documents will use the forms contained in the current edition of the Texas Real Estate Forms Manual. This approach defers the time and expense of negotiating the closing documents until after the contract is signed, while providing certainty if the parties do not otherwise negotiate closing documents. Alternately, the closing documents can be negotiated before the contract is signed and, if so, should be attached as exhibits to the contract.

The contract allocates closing obligations and transaction costs between the parties.

The contract provides that the buyer acquires possession of the groundwater at closing; however, the groundwater authority may not actually approve the transfer of the permit until weeks after closing. For this reason, the continued cooperation of the seller, if necessary, is required should there be any impediment at the office of the groundwater authority.

If closing is performed by an escrow agent, the escrow agent should be responsible for getting the affidavit of debts and liens (form 16-13 in this chapter), the settlement statement, and similar documents typically provided by a title company, signed at closing.

Although it is not common, a seller or buyer may be represented by a real estate broker in a groundwater transaction. Real estate brokers and real estate salespersons must have a written commission agreement to enforce payment of a real estate commission. The commission may be payable on contract execution, when the contract closes, or as otherwise agreed by the parties. The contract provides that the commission agreement is a separate document between the broker and the party responsible for paying the commission. For applicable forms, see forms 26-29 through 26-31 in this manual. Alternately, the contract may include the commission agreement or restate its key terms. The parties indemnify each other against claims by brokers and finders arising by, through, or under the indemnifying party. The contract may state that there are no brokers, but there is no requirement to do so.

If either the buyer or the seller is licensed as a real estate salesperson or real estate broker and is acting as a broker in the transaction, a disclosure to that effect is required under the Real Estate License Act. Tex. Occ. Code § 1101.652(b)(16).

§ 16.55 Default and Remedies

The contract provides that each party may elect one of the following remedies for the other’s default: termination (with disposition of the earnest money and payment of additional liquidated damages to the nondefaulting party) or specific performance. In addition, the buyer may terminate if the seller’s representations are not true and correct or if a warranty set forth in the contract is breached, and as noted earlier, if termination is not a satisfactory remedy for the buyer, other remedies such as a reduction in the purchase price can be negotiated and included in the contract. The parties may be entitled to payment of actual damages and perhaps of consequential damages if the untruth or breach is first discovered after closing. The contract is drafted to limit the parties’ remedies, but remedies are often negotiated.
The contract provides that the party prevailing in litigation is entitled to recover attorney’s fees and court and other costs.

§ 16.56 Assignment

The contract contains alternate clauses concerning assignment. The buyer may either not assign the contract or assign the contract only to an entity controlled by the buyer.

If the contract provides that the buyer has the right to assign, the assignment provision should state whether the buyer is relieved from obligations under the contract after assignment.

§ 16.57 Closing Functions

The party handling the closing (the title company or escrow agent) commonly attends to the matters discussed in the following sections.

§ 16.57:1 Payoff Information and Other Closing Expenses

Written request should be made to each lienholder for the lienholder’s written payoff statement. The lienholder should be requested, through an authorized representative, to state the remaining principal balance due on the note, the accrued interest as of a certain date, a per diem amount of interest, and whether the lienholder will credit the amount held in the escrow account, if one exists, to the total due or, alternatively, refund the amount directly to the borrower. Closing must occur and payment be made to the lienholder before the release of lien will be signed. In many cases, when only permitted groundwater is being sold, the lender will provide only a partial release and the amount of the payoff will be determined by a lender formula related to the value of the permitted water compared with the remaining value of the mortgaged asset.

Additionally, information concerning other matters requiring payment at closing should be obtained, such as payoff amounts for mechanic’s lien claims, federal or state tax liens, property taxes, estate taxes, and abstracted judgments that affect the real property or groundwater.

The closing agent must also determine the amounts of closing costs, attorney’s fees, brokers’ commissions, and loan fees.

§ 16.57:2 Ad Valorem Taxes and Groundwater Authority Fees

Currently groundwater is not assessed and taxed independently from the surface estate for ad valorem tax purposes. Consequently, the contract does not provide for a proration of ad valorem property taxes at closing, but it does require that the taxes be paid in full at closing by the seller, if they are due and payable at the time of closing. The sale of the groundwater, at least when the buyer retains sufficient reserved groundwater to enable it to continue its existing use of the real property, would not appear to trigger the assessment of rollback taxes. Consequently, the contract provides that if the real property has been, or at any time after closing is, the subject of special valuation and reduced tax assessments pursuant to the provisions of chapter 23, subchapter D, of the Texas Tax Code, the seller will be responsible for the payment of any such taxes, penalties, and interest, including rollback taxes. If the seller is not reserving sufficient groundwater to continue the seller’s existing use of the real property, the parties should consider modifying this provision.

After closing, the seller will continue to pay all ad valorem taxes and assessments due in connection with the real property before delinquency. However, if ad valorem taxes are assessed separately against the buyer’s groundwater rights after closing,
the buyer will be responsible for paying such taxes and assessments if the buyer is obligated to pay such taxes under applicable law. After closing, the buyer will be responsible for paying all fees, assessments, taxes, and charges of any kind imposed by the groundwater authority or any successor authority in connection with the buyer’s use of the groundwater; the seller will be obligated to pay such taxes and assessments with regard to the reserved groundwater, if any. The provisions regarding taxes should be set out in the groundwater deed signed by the parties at closing.

§ 16.57:3 Preparation of Closing Documents

The closing agent may be expected to prepare several documents.

**Closing Statements:** Closing statements may be on either the federally prescribed HUD-1 settlement statement, the State Board of Insurance settlement statement, or a separate seller’s, buyer’s, or borrower’s statement, depending on the nature of the transaction. The purpose of a closing statement is to assemble in one document all the pertinent financial features of the contract, including purchase price, loan amounts, costs and expenses of closing the transaction, and prorations. Execution of the statement evidences the parties’ agreement with the numbers and computations appearing on the statement.

**Affidavits:** Affidavits concerning debts and liens, parties in possession, identity of the parties, leases, and the parties’ marital status will likely be required at closing by the title company, escrow agent, or a party’s attorney.

Financing documents are typically prepared by the lender’s attorney. Conveyancing and other closing documents may be prepared by the parties to the transaction, their attorneys, or an attorney for the closing agent.

§ 16.57:4 Funding

The closing agent typically disburses funds in connection with closing. Disbursements are made according to the closing statement, usually from funds paid by the buyer and its lenders.

Except in the case of certain nontaxable sales of principal residences, the person responsible for closing a real estate transaction is required to file an information return with the Internal Revenue Service relating to the transaction and is subject to penalties for failing to report. See 26 U.S.C. § 6045. This reporting requirement is often satisfied by the responsible person by delivering the seller’s closing statement, together with an attachment of additional required information, to the IRS.

If funds will be disbursed at closing, payments must be made to the closing agent with “good funds” as defined by the regulations of the Texas State Board of Insurance. See Procedural Rule P-27, Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

If it is not necessary to disburse funds at closing, the parties need not comply with the “good funds” rule, and payment may be made in other ways.

In a lending transaction, the attorney for the lender should consider obtaining an insured closing service letter from the title insurance underwriter, if title insurance is available, whose policies are to be issued. This letter indemnifies the lender for any fraudulent acts of the closing title insurance company relating to the handling of closing funds. See forms T-50 and T-51 of the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas. See https://www.tdi.texas.gov/title/titlemm5.html.
§ 16.57:5  Recording Documents

The title company or escrow agent is responsible for recording documents intended to be recorded. This responsibility extends to the recording of releases or transfers of liens for notes paid at closing. Each document should be checked before recording to ensure that exhibits referred to in the document are attached and the name and address of the person to whom the document is to be returned after recording is included. The deed and other recordable documents should be recorded in the county or counties in which the groundwater is permitted to be withdrawn.

§ 16.57:6  Closing Instructions

Attorneys for the buyer, the seller, and the lender may each prepare closing instructions for the closing agent. For applicable forms, see forms 26-15 through 26-18 in this manual. These instructions relate to the conditions precedent to closing, including the status of the title after closing, the title insurance policies to be issued, if applicable, disposition of funds, and distribution of documents received by the closing agent.

§ 16.58  Additional Considerations

§ 16.58:1  Transactions Involving Foreign Persons

Buyer:  If the buyer is a foreign person, certain disclosures and reports may be required under the Foreign Investment in Real Property Tax Act of 1980. 26 U.S.C. § 6039C.

Seller:  With certain exceptions, anyone purchasing real property located in the United States from a foreign person must withhold 15 percent of the price and remit the funds to the Internal Revenue Service within twenty days of the date of transfer. See 26 U.S.C. § 1445(a), (b). The transferee should assume that the seller is a foreign person until the contrary is established, because transferees act at their own peril until they obtain a nonforeign affidavit. 26 U.S.C. § 1445(b)(2). The nonforeign affidavits (forms 26-19 and 26-20 in this manual) are suggested for use in all transactions.

§ 16.58:2  Closing Checklist

The attorney should prepare a closing checklist, itemizing the documents that will be required to close the transaction, including curative documents. The checklist should also refer to all other preclosing considerations relating to the transaction.

§ 16.58:3  Postclosing Considerations

After closing, if a title policy has been obtained, recorded documents and relevant title insurance policies issued after closing should be reviewed for accuracy and compliance with the title commitment. The owner policy should be dated on or after the recording date of the deed conveying title to the buyer, and the mortgagee policy should be dated on or after the recording date of the deed of trust of the insured lien.

An original or title company’s certified copy of each executed document relating to the closing should be provided to the seller and the buyer or the borrower by their attorneys. Generally, the party benefiting from a document receives the original, and the other parties receive copies. If no title company is involved in the transaction, the closing agent should perform this task.
IV. Surface Water Rights Transaction Guide

§ 16.61 Sale of Surface Water Rights

This part of the chapter applies to the sale and conveyance of surface water evidenced by a permit or certificate of adjudication. It does not cover the sale or conveyance of groundwater rights, which is covered in parts II. and III. of this chapter.

Surface water in Texas is generally owned by the state. One may obtain a right to use the state’s surface water under the state’s statutory appropriation process. Under this process, the state may grant precisely defined surface water rights, evidenced by a permit or certificate of adjudication. The surface water rights consist of the right to use water in a specific amount, from a specified body of water, by diversion at a definite location or locations (“point of diversion”) for a specified use.

If the surface water is authorized for use in connection with an identified tract of land (as in the case of water permitted for irrigating a specific tract of land), the water right is considered “appurtenant” to that land unless the water right is held by a water corporation or governmental entity authorized to supply water to others. 30 Tex. Admin. Code § 297.81. If land subject to an appurtenant surface water right is conveyed, the water right passes with the conveyance of title to the land, unless the water right has been expressly reserved or excepted or the water right has been granted for the irrigation of land not owned by the applicant. 30 Tex. Admin. Code § 297.81. Once a surface water right has been put to beneficial use according to its terms, the right is “perfected” and becomes a vested property interest. Tex. Water Code §§ 11.025–.026.

The forms contained in this chapter are for general use. The forms conveying surface water rights assume that the water rights to be conveyed have already been appropriated, as is the case with most surface water rights in Texas. Surface water rights that are the subject of a proposed transfer will therefore be represented by either a permit or a certificate of adjudication. The term permit refers to the document the Texas Commission on Environmental Quality (TCEQ) or its predecessor water authority issued when the surface water right was first appropriated. If the applicable river basin or stream segment has not been adjudicated, or if a new water right is recognized following the conclusion of adjudication proceedings, the document evidencing the water right will usually be a TCEQ permit. The surface water rights, whether evidenced by a permit or a certificate of adjudication, are real property. See sections 16.5:1 through 16.5:3 above.

Adjudication occurs when existing water rights (whether represented by permit, certified filing, or riparian rights) for a particular river basin or stream segment are subjected to administrative and judicial proceedings that recognize ownership of water rights and determine the quantities, priority dates, and other terms and conditions of each of the water rights from that river basin or stream segment. See generally Tex. Water Code §§ 11.301–.324. At the conclusion of the adjudication process, the recognized holders of then-existing water rights are issued certificates of adjudication to show what rights have been adjudicated to them in that proceeding. Thereafter, that certificate of adjudication is the document evidencing the owner’s surface water rights and is required to be recorded with the county clerk of each county in which the appropriation is made. Tex. Water Code § 11.324. Most stream adjudications in Texas were concluded in the 1970s and 1980s. The Upper Rio Grande adjudication was completed in 2007.

Thus, new (or any postadjudication) surface water rights issued by the TCEQ are in the form of a water rights permit. As with certificates of adjudication, the law requires the permit to be recorded with the county clerk of the county in which the appropriation is to be made. Tex. Water Code § 11.136. An existing certificate of adjudication is amended, when necessary, through
the same TCEQ process as for water rights permits. The processes for obtaining a permit for previously unappropriated surface water rights and for adjudicating water rights in Texas are beyond the scope of this chapter.

As early in the surface water transaction as possible, it is imperative that the attorneys involved (1) examine the permit or certificate of adjudication evidencing the water rights, including all amendments to it; (2) identify the regulatory agencies with jurisdiction over the surface water rights (referred to collectively in this part of the chapter as the “water authority”); (3) obtain copies of all rules and regulations pertaining to the surface water rights; and (4) obtain a title report or title commitment on any appurtenant land to determine whether the surface water rights have been previously severed or whether there are liens on the land that may affect the water rights. The rules and regulations for surface water rights transactions may vary depending on the river basin involved in the transaction. See 30 Tex. Admin. Code chs. 281, 288, 295, 297–299, 303, 304. If the transaction involves an interbasin transfer, there are other statutory and regulatory implications affecting the water rights, which are beyond the scope of this chapter. See Tex. Water Code § 11.085; 30 Tex. Admin. Code §§ 295.13, 295.155, 295.177, 297.1, 297.18.

The TCEQ is the water authority that has jurisdiction over all surface water rights transactions in Texas, including the issuance, amendment, cancellation, and transfer of water rights permits. See Tex. Water Code §§ 5.011–.013; Tex. Water Code ch. 11. For river basins in which a watermaster has been appointed, the TCEQ administers adjudicated water rights through a watermaster and a watermaster advisory committee appointed for each water division. See Tex. Water Code §§ 11.326, 11.3261. See generally 30 Tex. Admin. Code chs. 303, 304. The watermaster divides the water of the streams (or other sources of supply) in the division based on the adjudicated water rights. Tex. Water Code § 11.327(a). The watermaster also regulates controlling works and diversion works in times of shortage to protect existing water rights, prevent waste, and prevent practices in excess of adjudicated rights. Tex. Water Code § 11.327(b). Currently, there are watermaster programs for South Texas, the Rio Grande, the Concho River, and the Brazos River.

More information regarding the watermaster programs can be found on the TCEQ’s website at https://www.tceq.texas.gov.

An attorney representing a purchaser or lender acquiring an interest in water rights that are subject to a watermaster program should become familiar with the applicable statutory and program provisions at Tex. Water Code §§ 11.325–.3291, 30 Tex. Admin. Code chs. 303, 304 (Watermaster Operations), and the TCEQ website. Water rights in the Rio Grande below Lake Amistad are allocated on an account basis based on the use of the water, such as municipal and irrigation, instead of on a seniority basis, with priority being given to municipal use. If, in any given month, surplus water is identified over the water needed for municipal use, the water is allocated to the other accounts, such as irrigation. In purchasing water rights, the buyer should determine whether an allocation has been made to the seller, and if so, the purchase contract should address how the water allocation will be divided between the parties at closing. The cost of administration of water rights by watermasters is allocated among the adjudicated water rights holders, and assessments are made by the TCEQ. In general, no water may be diverted, taken, or stored by or delivered to a person while he is delinquent in the payment of his assessed costs. See Tex. Water Code §§ 11.329, 11.455. Purchasers should determine the amount of assessments that have been made against a seller and the payment status as part of their due diligence. The purchase contract should address the manner in which these assessments will be allocated at closing, if appropriate.

§ 16.62 Surface Water Rights Sales Contract and Related Forms; Place for Recordation

The surface water rights sales contract, form 16-18 in this chapter, represents an approach to the sale of surface water rights under which a conditional closing of the transaction first occurs, pending the required water authority’s prior approval of the
The basic sales documents include the following:

2. TCEQ Change of Ownership Form (Form TCEQ-10204), plus any additional applications, forms, and supplemental materials necessary to obtain the amendments to the permit or certificate of adjudication to accommodate the buyer’s intended use of the water rights.
3. Surface Water Rights Conveyance—Conditional (form 16-19). Frequently, this is the only conveyance document used by the parties, as they deem the conditional conveyance final once the stated condition—TCEQ approval of necessary amendments—has occurred.
4. TCEQ Amendment to Permit or Certificate of Adjudication, or letter amendment (Form TCEQ-10201).

In addition, the release of lien (form 10-2) or partial release of lien (form 10-3) in this manual, bill of sale (form 5-16), assignment and assumption of lease (form 5-21), and other forms may need to be adapted for use in connection with the transaction.

Although many attorneys rely on the files maintained by the TCEQ to determine ownership of surface water rights, rather than the real property records, recordation of surface water rights documents in the county real property records is still a legal requirement. See Tex. Water Code § 11.136. The attorney for the buyer of a surface water right should be aware that the buyer is responsible for making sure that the certificate of adjudication, permit, or any amendments, the surface water conveyance document, and other recordable real property documents are recorded with the county clerk of the appropriate county or counties. See Tex. Water Code § 11.136. In some instances, there can be uncertainty as to which of two or more locations is the correct place for recordation. If there is uncertainty, it is advisable to record the document in all the locations.

The Texas Water Code states that the TCEQ is required to transfer the certificate of adjudication or permit for recordation to the county clerk of the county in which appropriation is made. Tex. Water Code §§ 11.136, 11.324. In practice, however, the TCEQ does not do this. Instead the TCEQ sends the certificate of adjudication, permit, or amendment to the applicant for recordation along with a card. The applicant must send the document and card to the county clerk of the proper county or counties for recordation. In general, the certificate, permit, or amendment should be recorded in each county in which the points of diversion are located. If the water right is appurtenant to land, the certificate, permit, or amendment should also be recorded in the county or counties in which the water is used (that is, where the land is located). If a TCEQ amendment issued in connection with the transfer changed the land to which the water right is appurtenant to a different county, the conveyance document should be recorded in both counties. The county clerk is required to index the document by the name of the applicant and the stream or source of the water supply. Tex. Water Code §§ 11.136, 11.324. The county clerk should fill out the card with the recording information and send it to the TCEQ. It is incumbent on the attorney to make sure the county clerk records the documents and provides the information to the TCEQ. The attorney should also obtain the recording information for the transaction. Once the water authority (that is, the TCEQ) has approved the change in ownership and any amendments to the permit or certificate of adjudication sought by the buyer or required by the TCEQ, there is a final closing of the transaction. Alternatives to this “conditional closing followed by a final closing” approach include granting the buyer an option to purchase the water rights, or leasing the water rights to the buyer, pending TCEQ approval; however, the water right must be used in accordance with the terms of the permit or certificate of adjudication until such time as the TCEQ has granted any necessary amendments to the permit/certificate of adjudication.
The attorney's own records. The attorney should ensure that proper postage is added to the card provided by the TCEQ for completion and return mailing by the county clerk(s). This will increase the likelihood of the card’s being returned to the TCEQ.

It is important to identify the county or counties in which the documents affecting the surface water rights should be recorded to ensure that the public is put on constructive notice. Section 297.83 of the TCEQ regulations states that the “written instrument evidencing a water right ownership transfer shall be recorded in the office of the county clerk,” but does not specify in which county clerk’s office the instrument should be recorded. See 30 Tex. Admin. Code § 297.83. See generally Tex. Water Code § 11.136. As a rule, a surface water right conveyance document should be recorded in the real property records of each county in which the points of diversion and places of use are located. In addition, if the surface water rights are appurtenant to land (and there is no proposed amendment to change the land to which the surface water rights are appurtenant), the conveyance documents should also be recorded in the real property records of each county in which the land is located. If, however, the sale transaction contemplates an amendment that changes the land to which the surface water rights are appurtenant, only the final surface water rights conveyance—unconditional form should be recorded in each county in which the land is located. Recordation of the initial surface water rights conveyance—conditional document, before the TCEQ approved the amendment changing the land to which the surface water rights are appurtenant, could cloud the records and titles if the TCEQ did not approve the requested amendment.

As an added precaution, it is advisable to record the final documents in the real property records of each county in which the water is used, if different from the county or counties in which the points of diversion are located. It is helpful to have duplicate originals of the conveyance document executed for this purpose. Deeds of trust, leases, and other real estate documents pertaining to the surface water rights should be recorded in the same counties as the conveyance document.

The law requires an owner of a surface water right to promptly inform the executive director of the TCEQ of any transfer of water right or change of the owner’s address. See Tex. Water Code § 11.122; 30 Tex. Admin. Code § 297.82. Persons seeking to transfer surface water rights must file with the TCEQ executive director certified copies or photocopies of the recorded instruments establishing the complete chain of title between the owners of record and the new owner, along with the change of ownership form and the required fee. 30 Tex. Admin. Code § 297.83.

If the surface water rights are subject to the jurisdiction of a watermaster, the TCEQ Watermaster Operations Rules require the new owner to promptly inform the TCEQ executive director of the change of ownership and provide the appropriate ownership documents. 30 Tex. Admin. Code §§ 303.44, 304.43. If the new ownership record is not complete, the executive director will inform the alleged owner by letter of the required submission. For a sixty-day period following the date of that letter, the watermaster will honor “declarations of intent” by the alleged owner in accordance with the water right; after that, however, no such declaration will be honored until the executive director informs the watermaster of the approved change in ownership. 30 Tex. Admin. Code § 304.43.

Because the place for recordation of surface water rights documents is somewhat unusual, there may be some benefit in recording duplicate originals of the conveyance document in additional county records, in order to provide actual notice of the buyer’s surface water rights to any person who may consult these records. As examples, additional locations may include Travis County (where the TCEQ main administrative office is located) and, if the water rights are subject to regulation by a watermaster, the county in which the administrative office of the watermaster is located.

Attorneys dealing with water rights where a watermaster is located should be aware of recording requirements. See generally 30 Tex. Admin. Code chs. 303, 304. This is particularly true for water rights subject to the jurisdiction of the Rio Grande
watermaster. There are two subsections (j) to section 11.3271 of the Texas Water Code adopted by the legislature in 2003 that have never been reconciled. See Tex. Water Code § 11.3271. Under one subsection (j), the watermaster with jurisdiction over the Rio Grande is made the official recorder for all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens that the TCEQ authorizes or requires to be filed in connection with a water right relating to water in the lower, middle, or upper basin of the Rio Grande and that are subject to a permit, certified filing, or certificate of adjudication, and the filing will have the same legal effect as filing under other law for the same type of instrument. Under the other subsection (j), the watermaster is required to maintain a central repository that includes certified copies of all instruments, including deeds, deeds of trust, and liens that the TCEQ requires to be filed in connection with the same type of water rights as are described in the first-referenced subsection (j), and it is expressly stated that on and after September 1, 2003, a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster and all requirements under other law are met. It would be prudent when conveying rights or interests in water rights in the Rio Grande to record a duplicate set of original documents with the Texas watermaster, as well as in the real property records of the county or counties in which the documents are otherwise authorized to be recorded, and to also file a certified copy of the documents recorded in the county real property records (at least with regard to liens) with the watermaster.

§ 16.63 General Considerations

The surface water rights sales contract, form 16-18 in this chapter, is drafted as a neutral form of contract, intending to favor neither the buyer nor the seller. For each contract, the basic elements of the transaction are, in general, stated in the sections to be completed at the beginning of the form. Some provisions, however, are required to be completed throughout the contract. The general terms that follow in the form may be used for many transactions. However, the sale of surface water rights is an emerging area of law, and there are no well-established terms of sale. The terms in contracts for the purchase and sale of surface water rights are diverse and heavily negotiated. Additional drafting may be necessary to tailor the forms to the transaction.

§ 16.64 Surface Water Rights Sales Contract

The following sections describe the provisions and terms of form 16-18 in this chapter and include considerations for the attorney in drafting or reviewing a contract, assisting the client during investigation of the surface water rights, and closing the transaction. This commentary is organized in the same order as the sections of the contract.

§ 16.65 Introductory Paragraph: Offer and Acceptance

The introductory paragraph of the contract states what the parties must do to form the contract of purchase and sale. If the buyer’s earnest money cannot be collected, the buyer will be in default.

§ 16.66 Defined Terms

§ 16.66:1 Seller and Buyer

There are sections for the names of and other information concerning the seller, the buyer, and their attorneys. Proper identification of the parties is important, and the seller and buyer should be identified as fully as possible. Capacity and authority
should be considered, especially if a party is not an individual acting on his own behalf. See chapter 3 in this manual for a discussion of party designations.

§ 16.66:2 Title Company or Escrow Agent

Title insurance to insure title to surface water rights in Texas is no longer generally offered by Texas title insurance underwriters, and it is uncertain whether it will be available in the future. Even if available, parties may choose not to obtain title insurance or to close the transaction through a title company. The contract designates a title company or escrow agent to act as the escrow and closing agent in order to address either option. The title company or escrow agent will be responsible for closing the transaction and receiving and disbursing funds under the terms of the contract.

It is advisable to have a written escrow agreement between the title company or escrow agent, the buyer, and the seller that defines the rights and duties of the title company or escrow agent. Form 4-2 in this manual is an escrow agent receipt and escrow agreement. It can be modified for use with an escrow agent other than a title company.

In surface water transactions in which no appurtenant land is being transferred, the parties generally do not provide for a survey. The form provides optional language, however, if there is appurtenant land to be surveyed.

§ 16.66:3 Water Authority

The water rights authorities with jurisdiction over the subject surface water rights will include, at a minimum, the TCEQ. There may also be a watermaster appointed for the river basin and division in which the water rights are located. See section 16.6 above.

§ 16.66:4 Permit or Certificate of Adjudication

Permits and certificates of adjudication have a TCEQ number designation and establish the priority date of the water rights. In addition, the permit or certificate of adjudication, as it may have been previously amended, will describe the water rights authorized in the particular river basin and stream, including any rights of diversion, use, or storage. Diversion and use rights will include, at a minimum, the following details: (1) quantity, expressed in terms of a right to divert a certain number of acre-feet of water, often also limited to a certain rate of diversion (expressed in gallons per minute or cubic feet per second), from a particular watercourse; (2) the current ownership; (3) the place of use; (4) the purpose of use (for example, municipal, irrigation, industrial, recreational); and (5) the precise location of the point or points of diversion. Depending on the river basin from which the water rights are derived, there may be further descriptions. For example, Rio Grande Valley water rights are further described by class (for example, “Class B Water Rights”), a designation relating to the priority and use of the water rights. The permit or certificate of adjudication will also identify any other special terms or conditions defining the water rights or affecting the owner’s exercise of those rights (for example, streamflow restriction requirements or other environmental or conservation requirements).

§ 16.66:5 Buyer’s Intended Use of Water Rights

The description of the buyer’s intended use (purpose and place of use) of the water rights is important for purposes of determining what amendments to the permit or certificate of adjudication must be obtained from the TCEQ and any other applicable water authority, such as a watermaster, before the transfer of the water rights. The approval process can be both costly and
lengthy, particularly if the buyer’s intended use requires amendments to the permit or certificate beyond ownership of the water rights, and especially if these amendments are contested by the TCEQ staff, by other water rights holders in the basin, or by other affected parties.

The statement of the buyer’s intended use also affects the parties’ rights in the event of condemnation before conveyance of the water rights.

§ 16.66:6 Water Rights

The description of the water rights to be conveyed will be based on the permit or certificate of adjudication, amended as needed to accommodate the buyer’s intended use, including the rights of diversion, use, or storage set out in the permit or certificate of adjudication, as described in section 16.61 above. Surface water rights may be conveyed in whole or in part, like land. The contract should clearly indicate if only portions of the water rights are being conveyed. The parties can contract for the sale and purchase of all or a portion of (1) the number of acre-feet authorized to be diverted, (2) the diversion rate, (3) storage capacity, or (4) storage reservoirs authorized by the water right. Accordingly, the parties should be specific regarding components of the water right to be sold.

§ 16.66:7 Appurtenant Land

The surface water rights to be sold may be appurtenant to specific land. The description of any appurtenant land is important, regardless of whether the appurtenant land is also to be purchased by the buyer. There may be liens on the appurtenant land that, absent language in the lien documents to the contrary, attach to the water rights. A description of the appurtenant land is therefore important to the buyer’s due diligence inquiries, the title investigation, and the determination of the need for lien releases, subordination agreements, or other documents required at closing.

If the water rights permit authorizes the irrigation of specific land, it generally will be appurtenant to the land, unless the water right is owned by a water supply corporation, water district, river authority, or governmental entity authorized to supply water to others. 30 Tex. Admin. Code § 297.81(b). If the buyer intends to use the water on land other than as specified in the permit or certificate of adjudication, an amendment to the permit or certificate of adjudication must be obtained before use. The land to which the water rights are appurtenant may not be the land from which the water is diverted. The permit or certificate of adjudication, or other water authority records, will identify the land authorized to be irrigated (“place of use”) to which the permit or certificate of adjudication is appurtenant. Under current TCEQ rules, conveyance of the land to which water rights are appurtenant conveys the water rights, unless the conveyance specifically reserves or excepts the water rights, or the water right has been granted for the irrigation of land not owned by the applicant. 30 Tex. Admin. Code § 297.81(a).

If the water rights are appurtenant to land and the land is not also being conveyed to the buyer, the attorney should verify that the water rights can be severed from the land under applicable statutory, regulatory, and case law. See Herrmann v. Lindsey, 136 S.W.3d 286 (Tex. App.—San Antonio 2004, no pet.). If the appurtenant land is also being purchased by the buyer, the drafter can adapt the additional provisions in the forms in chapter 4 in this manual. If the buyer will purchase a portion of the land and a portion of the water rights with which to irrigate the land, the parties should expressly describe in the contract the specific allocation of the water rights to the specific tract of land.
In addition, any fixtures and personal property to be conveyed with the land or the surface water rights should be described in the applicable contract forms. Contract provisions discussed in section 16.21:4 above, providing for UCC searches, should be inserted into the contract form if fixtures or personal property are included in the transaction.

§ 16.66:8 Reserved Surface Water Rights

The seller of surface water rights may retain ownership of some permitted rights; however, a specific reservation is not usually required, as the description of the surface water will specify the number of acre-feet of water that will be sold out of the certificate of adjudication.

In instances in which surface water rights are appurtenant to land, however, if the seller is selling the land and some portion of the water rights, the conveyance of the land and unsevered surface water rights will be by deed, and the seller should expressly state in the contract and the deed the acre-feet of surface water rights that will be severed from the land and retained by the seller. After closing, the seller will generally need to file an application with the TCEQ either to change the designated land on which the severed agricultural or irrigation water rights may be used and the point of diversion or to change the use of the severed water rights from agricultural or irrigation to some other permitted use and to obtain approval of a new point of diversion.

If the water right is being purchased independently of the appurtenant land, and the parties agree that the buyer will have certain use rights on the appurtenant land, such as the right to use the same diversion point(s) or to use storage facilities located at the land, the parties will need to address these property rights in the contract by providing for the seller to grant or convey an easement, a license, a lease, or another property interest at closing.

§ 16.66:9 Earnest Money

The amount of earnest money is negotiable and depends on several factors, including the purchase price, the type of financing, and the relative financial strengths of the parties. Additional factors unique to surface water rights transactions include the required prior approval from the TCEQ and any other applicable water authority, and a generally longer due diligence period.

The parties therefore often provide for more than one earnest money deposit, either over a period of time or based on certain events. In the description of the initial and each additional earnest money deposit inserted into the form, the drafter needs to specify the time when each earnest money deposit is to be made and whether each earnest money deposit is refundable or non-refundable, in relation to the occurrence of events as the parties proceed towards conditional and final closing of the transaction.

§ 16.66:10 Independent Consideration

If the buyer terminates the contract before the end of the inspection period and the buyer is otherwise entitled to have the earnest money returned, the contract provides that a stated amount should not be returned to the buyer but should be paid to the seller, because that amount is the independent consideration to the seller for the buyer’s right to terminate the contract.

§ 16.66:11 Purchase Price

There is no standard method of determining the purchase price for surface water rights. For further discussion on this topic, the attorney may want to consult Martyn C. Glen, Valuation of Water Rights, in The Changing Face of Water Rights in Texas,
State Bar of Texas (2004). Exhibit F may be used if the parties agree to seller financing of the purchase. If obtaining third-party financing is a condition to the buyer’s obligations, that fact and the terms of the complying financing should be addressed in the contract. See part V. in this chapter and chapters 6 and 8 in this manual for further discussions of financing.

§ 16.66:12 Buyer’s and Seller’s Liquidated Damages

These sections of the contract are provided so that the parties can agree on additional liquidated damages to be paid by the defaulting party to the nondefaulting party on default.

§ 16.66:13 Title Commitment/Title Information

Title insurance to insure title to surface water rights in Texas is no longer generally offered by Texas title insurance underwriters, and it is uncertain whether it will be available in the future. If title insurance is not available, or if the parties agree not to procure title insurance, the contract may instead call for an opinion of counsel to be provided as evidence of title. In that event, certain title information, on which the buyer’s title inspection is to be based, is to be delivered to the buyer.

§ 16.66:14 Title Documents

The contract defines title documents to include the permit or certificate of adjudication and instruments affecting title to the surface water rights and the real property referenced in the title commitment or title information. Under paragraph G.2. of the contract, the buyer can terminate the contract on the basis of the title commitment and title documents or the seller’s failure to cure the buyer’s objections to matters disclosed therein. This provides the buyer with the ability to make objections to title based on the permit or certificate of adjudication or unrecorded documents provided as part of the seller’s records.

In addition to checking these documents, the buyer should also review (1) the annual water use reports the seller has filed with the TCEQ, (2) the priority of the seller’s water rights relative to other water rights in the same source of supply, and (3) the TCEQ’s current records and any applicable TCEQ or watermaster rules reflecting any loss of water rights or priority as a result of the seller’s nonuse.

An attorney representing a purchaser or lender acquiring an interest in water rights that are subject to a watermaster program should become familiar with the applicable statutory and program provisions at Tex. Water Code §§ 11.325–.3291, 30 Tex. Admin. Code chs. 303, 304 (Watermaster Operations), and the TCEQ website. Water rights in the Rio Grande below Lake Amistad are allocated on an account basis based on the use of the water, such as municipal and irrigation, instead of on a seniority basis, with priority being given to municipal use. If, in any given month, surplus water is identified over the water needed for municipal use, the water is allocated to the other accounts, such as irrigation. In purchasing water rights, the buyer should determine whether an allocation has been made to the seller, and if so, the purchase contract should address how the water allocation will be divided between the parties at closing. The cost of administration of water rights by watermasters is allocated among the adjudicated water rights holders, and assessments are made by the TCEQ. In general, no water may be diverted, taken, or stored by or delivered to a person while he is delinquent in the payment of his assessed costs. See Tex. Water Code §§ 11.329, 11.455. Purchasers should determine the amount of assessments that have been made against a seller and the payment status as part of their due diligence. The purchase contract should address the manner in which these assessments will be allocated at closing, if appropriate.
§ 16.67  Deadlines

Section A of the contract groups most of the deadlines for ease of reference. Most of the deadlines are stated in terms of a specified number of days after the effective date of the contract or another specific date. The contract provides that time is of the essence; however, final closing cannot occur until such time as the TCEQ and any other applicable water authority has approved the change in ownership and any other amendments to the permit or certificate of adjudication representing the water rights.

§ 16.68  Closing Documents

Section B of the contract lists the documents to be signed and delivered to close the transaction. Paragraph B.1. lists the documents for the conditional closing (before the TCEQ or other water authority approval of the transaction). The parties might consider adding to the list of documents for the conditional closing a power of attorney appointing the buyer as agent of the seller to pursue the necessary proceedings with the TCEQ for approval of the sale and any amendments to the certificate of adjudication or permit. Paragraph B.2. lists the documents for the final closing. Form 16-20 in this chapter is for conveyance of the surface water rights once the TCEQ has approved the change of ownership and any other amendments to the permit or certificate of adjudication. The parties sometimes do not provide for or sign a final unconditional conveyance document, instead relying on the TCEQ’s issuance of an amendment to the certificate or permit as satisfying the condition stated in the earlier conditional conveyance document. Both paragraphs B.1. and B.2. in the contract serve as checklists to prepare for closing.

Section C contains a number of exhibits. The attorney should choose the specific exhibits appropriate for the sale.

§ 16.68:1  Exhibit C—Representations; Environmental Matters

Exhibit C contains the parties’ representations. These items are always negotiated by the parties and will vary from transaction to transaction. Exhibit C is offered as a checklist; however, not all items will necessarily apply to a sale of surface water rights, and the buyer may want to seek additional representations or warranties with respect to water quality, environmental matters, and the like.

§ 16.68:2  Exhibit D—Seller’s Records

Exhibit D is a list of the seller’s records of the property that will be delivered or made available to the buyer for review during the inspection period and also delivered to the buyer at closing.

§ 16.68:3  Exhibit E—Notices, Statements, and Certificates

Exhibit E lists notices, statements, and certificates required by federal and state law and regulations to be delivered when common real estate contracts are executed. The items applicable to a specific transaction should be selected. See chapter 2 in this manual for brief discussions of laws and regulations that require notices, statements, and certificates. Some of the statutory provisions would appear to include the sale of surface water rights, simply because they apply to a sale or conveyance of real property, and no exemption is made for the sale of surface water rights.
§ 16.68:4 Exhibit F—Seller Financing

Exhibit F contains seller-financing terms.

§ 16.69 Investment of Earnest Money

The contract provides that the buyer may direct the title company or escrow agent to invest the earnest money in an interest-bearing account in a federally insured financial institution. If the earnest money is to be invested, the title company will require the buyer’s tax identification or Social Security number so that accrued interest may be reported to the Internal Revenue Service.

§ 16.70 Title

The contract requires that the seller provide to the buyer by the deadlines stated in the contract the title commitment or title information and legible copies of each document referred to in these instruments.

The contract follows a typical procedure in which the buyer reviews the title commitment or title information, with the permit or certificate of adjudication and the documents provided by the seller. The buyer’s review is done during the inspection period. The buyer then has a right to terminate the contract based on the buyer’s review or can notify the seller of any objections. After notice, the seller may elect to cure the buyer’s objections but is not required to do so. If the seller does not agree to cure, the buyer may either proceed to close the transaction and accept the surface water rights subject to the uncured matters or terminate the contract. However, the seller is obligated to resolve all items listed on Schedule C of the title commitment at or before closing and to cure title matters that arise by, through, or under the seller after the contract is signed.

The contract provides that the condition of title will be established by either a title commitment or an abstract of title, as agreed to by the buyer and the seller. If an abstract of title is furnished, the buyer may have the abstract of title reviewed by an attorney and obtain the attorney’s written opinion of the abstract of title. The benefit of obtaining title insurance over an attorney’s opinion of title is that title insurers are required to maintain reserves to cover claims that are greater than the malpractice coverage maintained by most law firms. Consequently, there is an increased likelihood of recovery if an error is made by the title company in its determination of title.

An essential reference on title insurance is the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas, available from the Texas Department of Insurance at https://www.tdi.texas.gov/title/titleman.html. The manual contains Texas rate and procedural rules; the text of title 11 of the Texas Insurance Code, relating to title insurance; and various bulletins of the Texas State Board of Insurance dealing with title insurance practices.

The attorney should review the signature and effective date of the commitment. The attorney should confirm that the commitment is signed and the issuance date is not more than ninety days before the closing. Otherwise, a new or revised commitment should be ordered.

Schedule A: The attorney should confirm that the proposed insured parties are correctly named, the amounts of insurance are correctly stated, and the correct estate is insured. Record title should be vested in the seller. The attorney also should confirm that the property description is correct and conforms to the description in the contract.

Schedule B: The attorney should review the following matters:
• Item 1, relating to covenants and restrictions, should be noted as either “Covenants, conditions, and restrictions (other than any restrictions indicating preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin) as set forth in [recording data] of the real property records of [county] County, Texas” or “Item 1 of Schedule B is hereby deleted in its entirety.”

• Item 2 is the standard, preprinted survey exception. It generally would not apply to a transaction involving only surface water rights. If the surface water rights are being conveyed along with land, this exception may be amended and partially deleted to read “any shortages in area” if a current survey approved by the title company is obtained. An additional 5 percent premium is charged to amend the owner policy for a residential transaction; an additional 15 percent premium is charged to amend the owner policy for a commercial transaction. No additional premium is required to amend the mortgagee policy. The responsibility for paying the extra premium for the survey modification in the owner policy of title insurance is often negotiated between the parties, although the pertinent provision in the contract form provides for the extra premium to be paid by the buyer.

• Standard preprinted exceptions item 3 (relating to homestead or community property or survivorship rights) and item 4 (relating to tidelines, lands comprising the shores and beds of waterways, lands beyond the line of the harbor or bulkhead lines, filled-in lands, artificial islands, statutory water rights, and areas extending from the line of mean low tide to the line of vegetation) apply only to the owner policy and cannot be deleted or amended.

• Item 5, relating to property taxes, can be reviewed for the status of tax payments and the existence of rollback taxes; however, taxes generally are not involved in a transaction involving only surface water rights.

• Item 6, relating to the terms and conditions of the documents creating the insured’s interest in the land, cannot be revised. The referenced documents should, however, be reviewed.

• Item 7, relating to materialman’s and mechanic’s liens, applies only to the mortgagee policies on interim construction loans and may be deleted if satisfactory evidence that the paragraph does not apply is furnished to the title company. This exception would not generally apply to a transaction involving only surface water rights.

• Item 8, relating to subordinate liens and leases, applies only to the mortgagee policy.

• Item 9, relating to existing liens, should show only liens permitted by the contract. Copies of all lien documents should be reviewed with regard to due-on-sale provisions; dragnet clauses relating to other debt; condemnation provisions; notice, cure, and default provisions; and subordinate financing. A superior lienholder’s estoppel agreement should be obtained from any lienholder whose note and lien are being either assumed or taken “subject to.”

All other special exceptions should be carefully reviewed to determine if and how they affect the buyer’s surface water rights.

Schedule C: The attorney should ensure that the seller has complied with the contract by curing and effectively removing all matters appearing on Schedule C at or before closing. Schedule C matters may require obtaining releases of liens, settling specific claims or lawsuits affecting title to the water rights, furnishing evidence of good standing and authority (corporate resolution or partnership agreement), and obtaining proof of property settlement and divorce, proof of heirship or probate of a particular estate, or evidence relating to a bankruptcy. From the buyer’s perspective, curative matters appearing on Schedule C should be attended to by either the seller or the title company. The contract requires that the seller resolve all Schedule C items before closing, but if that provision is not used, the buyer should object to all Schedule C items in the commitment to ensure that they are not added to Schedule B of the title policy.
The Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas should be consulted for information on the various types of policies and endorsements that are available and their respective costs.

§ 16.71 Inspection Period

The inspection period is intended to give the buyer the opportunity to investigate the surface water rights and real property and decide whether to close the transaction. The contract provides that the buyer may terminate the contract at any time before the end of the inspection period for any reason and have the earnest money returned. The inspection is based on the seller’s records and information in either the title commitment and documents referenced therein, if the parties have provided for title insurance, or the title information as defined.

§ 16.72 Representations and Warranties

Representations and warranties are negotiated by the parties with specific reference to the transaction. They may include such matters as ownership of the real property and surface water rights; organization of the parties; authority to execute the contract and close the transaction; condition of title; parties in possession; pending litigation and claims that may ripen into litigation; pending or threatened condemnation or other taking; use restrictions, such as zoning and restrictive covenants; condition of the property or disclaimer of representations (for example, “as is” language); presence of landfills or hazardous and toxic wastes; floodplain location; utility availability and capacity; compliance with all laws; effectiveness of required licenses and permits; status of leases; operation and maintenance of property before closing; accuracy of books and records; agricultural or other special-use tax assessment; payment of ad valorem taxes; and status of debt to be assumed or taken “subject to.”

In negotiating representations, the parties should specify whether representations are to be absolute or based on the seller’s knowledge and belief; whether the representations will be based on the knowledge of the entity that is the seller or on the knowledge of specified individuals; whether the seller must perform further investigation to make the representations or may rely on its current knowledge, without further investigation; and whether and to what extent the representations will survive closing.

The approach used in this contract limits the seller’s representations and warranties, but it is not intended to insulate the seller from liability for fraud or misrepresentation.

- The seller represents only facts, not opinions. For example, the seller does not represent whether, in the seller’s opinion, the property is in compliance with applicable laws and regulations. Instead, the seller represents that it has not received notice of violation of any law, ordinance, regulation, or requirement affecting the property or use of the property, except as stated in the contract.
- The seller makes no representations or warranties that are not stated in the contract, including exhibit E (notices, statements, and certificates required by law and regulation), or in the closing documents.

The following optional clauses are also provided:

- The buyer agrees to accept the property in its “as is, where is” condition, investigate the property on the buyer’s own behalf, and not rely on information or representations attributable to the seller, except to the extent stated in the contract.
- The buyer waives its rights under the Texas Deceptive Trade Practices–Consumer Protection Act.
- The buyer assumes responsibility after closing for all environmental matters relating to the property.

If the parties negotiate different representations, exhibit C must be revised accordingly.
The contract provides that the parties’ representations are true and correct when made and must be true and correct at closing, or the buyer may terminate the contract.

It is common practice to include representations regarding the organization and authority of the parties in contracts but to defer the obligation to deliver documentary evidence confirming those representations until the closing of the transaction. That evidence customarily consists of certificates of existence and good standing from public officials, certified copies of organizational documents, certified corporate resolutions or partnership consents, and certificates of incumbency. The attorney may consider requiring such documentary evidence at the execution of the contract to avoid encountering a claim, after substantial obligations have been paid or incurred, that the other party is not authorized to consummate the transaction. While the seller’s organizational documents should be available at the time of execution of the contract, the buyer’s organizational documents are often not prepared until shortly before closing.

§ 16.73 Conveyance of Water Rights—Conditional; Application for Approval; Cooperation; Condition of Water Rights until Final Closing; Memorandum/No Recording of Contract

The parties’ signing of the contract and the expiration of the inspection period without the buyer’s termination of the contract obligates the seller to conditionally convey the water rights to the buyer, pending the TCEQ’s and any other required water authority’s approval of the change in ownership and any amendments necessary to accommodate the buyer’s intended use. It also obligates the parties to pursue and cooperate in the water authority approval process, to maintain and operate the water rights in a certain manner pending the approval process, and to proceed in a certain fashion in the event of condemnation or claims affecting the water rights. The contract also sets out the parties’ agreement not to record the contract; however, given the sometimes lengthy duration involved in obtaining water authority approval, the buyer may want to record a memorandum of the contract in the public records. See form 16-16 in this chapter.

Form 16-19 is a proposed form of conditional conveyance to be signed by the parties at the initial, conditional closing on the contract. The surface water rights are not deemed transferred, however, until the TCEQ (and any other applicable water authority) has approved the change in ownership and any amendments to the certificate or permit. The parties often do not execute a second unconditional conveyance document (form 16-20); rather, once the condition (TCEQ approval) has been satisfied through issuance of the amended certificate or permit, the conveyance is treated as final.

§ 16.74 Conditions of Contract and Termination

The contract provides for disposition of the earnest money if the TCEQ does not approve the transfer of ownership and any other amendments sought by the buyer by a specific date and after any other termination of the contract. It also provides for posttermination obligations. It is possible that the TCEQ’s approval of a transfer may be overturned on judicial review, and the parties may want to provide how the sale is affected if judicial review is sought by a protestant.

§ 16.75 Final Closing

Once the TCEQ has approved the transaction and issued any necessary amendments to the permit or certificate of adjudication, the parties proceed to the final closing. The contract allocates closing obligations and transaction costs between the parties. In the case of irrigation surface water rights, the water rights will become appurtenant to the land approved for the “place of use” in the amended certificate or permit. To facilitate title examinations, the parties may want to describe this appurtenant property in an unconditional conveyance document signed at the final closing (form 16-20 in this chapter). The parties do not
want to describe this property as appurtenant in the initial, conditional conveyance document (form 16-19), because of the risk that the TCEQ or other applicable water authority may not approve the transaction. There may be a cloud on the title to the water rights if the water rights were described as appurtenant to property in the initial conditional conveyance but not later approved as appurtenant to property by the applicable water authority.

§ 16.76 Default and Remedies

The contract provides that the buyer may elect one of the following remedies for the seller’s default: termination (with disposition of the earnest money and payment of additional liquidated damages to the nondefaulting party) or specific performance. In addition, the buyer may terminate if the seller’s representations are not true and correct or if a warranty set forth in the contract is breached. The parties may be entitled to payment of actual damages and perhaps of consequential damages if the untruth or breach is first discovered after closing. The contract is drafted to limit the parties’ remedies, but remedies are often negotiated.

The contract provides that the party prevailing in litigation is entitled to recover attorney’s fees and court and other costs.

§ 16.77 Assignment

The contract contains alternate clauses concerning assignment. The buyer either may not assign the contract or may assign the contract only to an entity controlled by the buyer.

If the contract provides that the buyer has the right to assign, the assignment provision should state whether the buyer is relieved from obligations under the contract after assignment.

§ 16.78 Closing Functions

The party handling the closing (the title company or escrow agent) commonly attends to the matters discussed in the following sections.

§ 16.78:1 Payoff Information and Other Closing Expenses

Written request should be made to each lienholder for the lienholder’s written payoff statement. The lienholder should be requested through an authorized representative to state the remaining principal balance due on the note, the accrued interest as of a certain date, a per diem amount of interest, and whether the lienholder will credit the amount held in the escrow account, if one exists, to the total due or, alternatively, refund the amount directly to the borrower. Closing must occur and payment be made to the lienholder before the release of lien will be signed.

Additionally, information concerning other matters requiring payment at closing should be obtained, such as payoff amounts for mechanic’s lien claims, federal or state tax liens, property taxes, paving assessments, and abstracted judgments that affect the property.

The closing agent must also determine the amounts of closing costs, such as surveying expenses, attorney’s fees, brokers’ commissions, and loan fees.
§ 16.78:2  Ad Valorem Taxes

Currently surface water rights are not assessed and taxed independently from the surface estate for ad valorem tax purposes. Consequently, the contract does not provide for a proration of ad valorem property taxes at closing, but it does require that the taxes be paid in full at closing by the seller if they are due and payable at the time of closing.

§ 16.78:3  Closing Documents

The closing agent may be expected to prepare or provide several documents.

**Closing Statements:** Closing statements may be on either the federally prescribed HUD-1 settlement statement, the State Board of Insurance settlement statement, or a separate seller’s, buyer’s, or borrower’s statement, depending on the nature of the transaction. The purpose of a closing statement is to assemble in one document all the pertinent financial features of the contract, including purchase price, loan amounts, costs and expenses of closing the transaction, and prorations. Execution of the statement evidences the parties’ agreement with the numbers and computations appearing on the statement.

**Affidavits:** Affidavits concerning debts and liens, parties in possession, identity of the parties, leases, and the parties’ marital status will likely be required at closing by the title company, escrow agent, or a party’s attorney.

Financing documents are typically prepared by the lender’s attorney. Conveyancing and other closing documents may be prepared by the parties to the transaction, their attorneys, or an attorney for the closing agent.

§ 16.78:4  Funding

The closing agent typically disburses funds in connection with closing. Disbursements are made according to the closing statement, usually from funds paid by the buyer and its lenders.

Except in the case of certain nontaxable sales of principal residences, the person responsible for closing a real estate transaction is required to file an information return with the Internal Revenue Service relating to the transaction and is subject to penalties for failing to report. See 26 U.S.C. § 6045. This reporting requirement is often satisfied by the responsible person by delivering the seller’s closing statement, together with an attachment of additional required information, to the IRS.

If funds will be disbursed at closing, payments must be made to the closing agent with “good funds” as defined by the regulations of the Texas State Board of Insurance. See Procedural Rule P-27, Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

If it is not necessary to disburse funds at closing, the parties need not comply with the “good funds” rule, and payment may be made in other ways.

If title insurance is obtained through a title agent or fee attorney, the attorney for the lender and buyer should consider obtaining an insured closing service letter from the title insurance underwriter whose policies are to be issued. This letter indemnifies the lender or buyer for certain wrongful acts of the title agent or fee attorney relating to the handling of closing funds. See forms T-50 and T-51 of the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas. See https://www.tdi.texas.gov/title/titlemm5.html.
§ 16.78:5  Recording Documents

The title company or escrow agent is responsible for recording documents intended to be recorded. This responsibility extends to the recording of releases or transfers of liens for notes paid at closing. Each document should be checked before recording to ensure that exhibits referred to in the document are attached and the name and address of the person to whom the document is to be returned after recording is included.

Section 297.83 of the Texas Commission on Environmental Quality regulations currently provides only that the “written instrument evidencing a water right ownership transfer shall be recorded in the office of the county clerk.” 30 Tex. Admin. Code § 297.83. It does not specify in which county clerk’s office the instrument should be recorded. To assure notice to all persons in affected counties, the parties may want to prepare several duplicate originals to be filed in Travis County (where the TCEQ is located) and in each of the counties (1) from which the water is appropriated (that is, diverted), (2) in which the water is used, (3) in which any of the appurtenant land is located, and (4) in which the watermaster is located.

Attorneys dealing with water rights within a watermaster operation should be aware of the notice and recording requirements applicable to watermaster operations. See generally 30 Tex. Admin. Code chs. 303, 304. This is particularly true for the Rio Grande watermaster. There are two subsections (j) to section 11.3271 of the Texas Water Code adopted by the legislature in 2003 that have never been reconciled. See Tex. Water Code § 11.3271. Under one subsection (j), the watermaster with jurisdiction over the Rio Grande is made the official recorder for all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens that the TCEQ authorizes or requires to be filed in connection with a water right relating to water in the lower, middle, or upper basin of the Rio Grande and that are subject to a permit, certified filing, or certificate of adjudication, and the filing will have the same legal effect as filing under other law for the same type of instrument. Under the other subsection (j), the watermaster is required to maintain a central repository that includes certified copies of all instruments, including deeds, deeds of trust, and liens that the TCEQ requires to be filed in connection with the same type of water rights as are described in the first-referenced subsection (j), and it is expressly stated that on and after September 1, 2003, a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster and all requirements under other law are met. It would be prudent when conveying rights or interests in water rights in the Rio Grande to record a duplicate set of original documents with the Texas watermaster, as well as in the real property records of the county or counties in which the documents are otherwise authorized to be recorded, and to also file a certified copy of the documents recorded in the county real property records (at least with regard to liens) with the watermaster.

§ 16.78:6  Closing Instructions

Attorneys for the buyer, the seller, and the lender may each prepare closing instructions for the closing agent. For applicable forms, see forms 26-15 through 26-18 in this manual. These instructions relate to the conditions precedent to closing, including the status of the title after closing, the title insurance policies to be issued, disposition of funds, and distribution of documents received by the closing agent.

§ 16.79  Additional Considerations

§ 16.79:1  Transactions Involving Foreign Persons

Buyer: If the buyer is a foreign person, certain disclosures and reports may be required under the Foreign Investment in Real Property Tax Act of 1980. See 26 U.S.C. § 6039C.
Seller: With certain exceptions, anyone purchasing real property located in the United States from a foreign person must withhold 15 percent of the price and remit the funds to the Internal Revenue Service within twenty days of the date of transfer. See 26 U.S.C. § 1445(a), (b). The transferee should assume that the seller is a foreign person until the contrary is established, because transferees act at their own peril until they obtain a nonforeign affidavit. See 26 U.S.C. § 1445(b)(2). The nonforeign affidavits (forms 26-19 and 26-20 in this manual) are suggested for use in all transactions.

§ 16.79:2 Closing Checklist

The attorney should prepare a closing checklist, itemizing the documents that will be required to close the transaction, including curative documents. The checklist should also refer to all other preclosing considerations relating to the transaction.

§ 16.79:3 Postclosing Considerations

After closing, recorded documents and relevant title insurance policies issued after closing should be reviewed for accuracy and compliance with the title commitment. The owner policy should be dated on or after the recording date of the deed conveying title to the buyer, and the mortgagee policy should be dated on or after the recording date of the deed of trust of the insured lien.

An original or title company’s certified copy of each executed document relating to the closing should be provided to the seller and the buyer or the borrower by their attorneys. Generally, the party benefiting from a document receives the original, and the other parties receive copies.

If the transaction fails to close, but the TCEQ and any other water authority have approved the transfer or any amendments to the permit or certificate of adjudication, the parties can ask the TCEQ and any other water authority to delete the amendment to the permit or certificate of adjudication.

[Section 16.80 is reserved for expansion.]

V. Water Rights Lien Documents

§ 16.81 General Considerations

The lien forms contained in this chapter may be used, with appropriate modification, for either groundwater rights or surface water rights transactions.

To address both the real and the personal property characteristics of water rights, it is advisable to incorporate both deed-of-trust provisions and security agreement provisions in loan documents. This can be done in one or more documents, depending on the transaction. The water rights deed of trust (form 16-21 in this chapter) is an adaptation to water rights of the basic deed of trust (form 8-1 in this manual). The water rights security agreement (form 16-22) is an adaptation of form 9-2, the basic form for security agreement found in chapter 9. Depending on the nature and use of the water rights being pledged, and the other collateral associated with those water rights, the additional clauses and forms from chapters 8 and 9 should be added to the basic forms appearing in this chapter. These additional clauses from chapters 8 and 9 are thus referenced in this chapter and should be inserted into the form 16-21 and form 16-22, as appropriate.
In any transaction, the pledged water rights may have both real and personal property characteristics. For example, surface water rights are real property, requiring use of a deed of trust. Once the water is transported for use, however, the water may become personal property. In addition, the permit or certificate of adjudication evidencing the surface water rights may constitute a separate property right. It is not clear under existing case law whether the permit or certificate of adjudication would constitute an interest in real property, similar to a license or land development permit, or whether it would be considered personal property in the nature of a general intangible. Consequently it is advisable to use both a deed of trust and a security agreement with financing statements in loans secured by groundwater or surface water rights, to ensure that the lender has a lien on all real and personal property. The separate security agreement (form 16-22, adapted from the basic form for security interests in personalty) may be used if there is other purely personal property that secures the loan. Form 16-21 (which includes the additional security agreement language of clause 8-9-10) may be used to create both the real property lien and a personal property security interest in a single deed of trust document when there is no other personal property.

In other types of transactions, for example, groundwater rights completely severed from real property and represented by only permits (as described in part III. of this chapter) or groundwater rights for on-site production and for which a groundwater permit may have been issued (as described in part II.), the groundwater rights are real property, the produced water may be personal property, and the permit itself may be either an interest in real property or a general intangible under the Texas Uniform Commercial Code.

If a facility such as a well or pipeline is included in the collateral, this property may constitute either a fixture or equipment. Consequently, it is advisable to describe this type of facility in the deed of trust and security agreement and to file financing statements as both a fixture filing and a personal property filing.

In loan transactions in which water rights, permits, or facilities are used as collateral, the attorney drafting the loan documents will want to consider the importance of including in the loan documents a UCC article 9 security agreement, UCC financing statements, and a deed of trust to address both the real and the personal property aspects of water rights. The places for recording the deed of trust and financing statements are discussed in section 16.81:4 below.

In addition to using a deed of trust and security agreement, the attorney should consider using other documents to more fully protect the lender’s lien rights, particularly in instances in which the water rights are subject to the jurisdiction of a water authority (for example, the TCEQ, a watermaster, or a groundwater district authority). Persons dealing with water rights, including the water authority itself, may not check the real property records or the UCC lien records (particularly those in another state) before taking action in connection with the water rights. They instead may look solely at the information filed in the water authority’s records. There is currently no mechanism for recording liens in the records of any water authority. Furthermore, there is no statutory or case law that clearly requires a water authority to consult real property records or UCC lien records, or to acknowledge the rights of a lender, before authorizing a modification, termination, or transfer of a permit.

Consequently, the owner of the water rights pledged as collateral may adversely affect the value of those water rights to the lender by obtaining a change in the permitted use of the water rights or transferring the permit in whole or in part to another person without the lender’s knowledge. The lender may then have a difficult time re-establishing its rights in the collateral. In order to put the water authority, and persons checking the water authority’s records, on actual notice of the lender’s lien on the water rights, the attorney may want to file a form for notice of lender’s rights in the records of the water authority. The attorney may also want to have the owner of the water rights give written instructions to the water authority directing it not to take any action with regard to the permit or certificate of adjudication without the written authorization of the lender. Because there is no formal mechanism for filing such notice or instructions with a water authority, it is possible that the water authority may
reject such a filing or refuse to comply with the instructions. Nevertheless, the lender will be in a better position to assert its rights against the water authority or a person who obtained a transfer of the permit or certificate, if such notice or instructions were delivered to the water authority, to be placed in the records pertaining to the permit or certificate for the pledged water rights. One or more of the following forms may be used: memorandum of groundwater loan (form 16-23), notice of the lender’s interest in water rights (form 16-24), and the permittee’s instruction letter to water authority (form 16-25).

§ 16.81:1 Groundwater vs. Surface Water

Form 16-21 and form 16-22 in this chapter are designed for establishing a lien on or security interest in either groundwater or surface water rights. The forms contain suggested alternative clauses to describe the type of water rights being encumbered as security and categories of additional property associated with the water rights that might also serve as collateral for the loan.

§ 16.81:2 Deed of Trust

A deed of trust is a mortgage on real property with a power of sale. Although a deed of trust by its literal terms conveys the real property in trust to the trustee, its actual effect under Texas law is to create a lien against the property to secure a debt of the grantor of the lien to the beneficiary of the lien. This chapter provides one basic water rights deed of trust form (form 16-21), which is an adaptation to water rights of form 8-1 in this manual. If the borrower is assuming obligations under the seller’s existing loan for which the water rights serve as collateral, similar adaptations can be made to the deed of trust to secure assumption (form 8-2). If a leasehold interest in the water rights is collateral for the loan, the leasehold deed of trust (form 8-10) can be revised. As discussed in this chapter and chapter 8, the forms may be adapted to a variety of situations.

A description of collateral in the deed of trust should be inserted for each category of property intended as collateral. In the water rights category, the description will include such identifying information from the permit or certificate of adjudication as the TCEQ or other water authority number designation, priority date, amendments, water rights authorized (including any rights of diversion, use, or storage), quantity, particular watercourse or aquifer from which the water rights come, ownership, place of use, purpose of use (for example, municipal, irrigation, industrial, recreational), and point of diversion. Also, if adapting form 8-10 for a leasehold deed of trust on the water rights, note that the description of the property in the leasehold deed of trust should be of the leasehold interest of the lessee granting the deed-of-trust lien.

In the case of irrigation surface water rights, the water rights will be appurtenant to the land designated as the “place of use” in the certificate or permit. If the land to which the water rights are appurtenant is also intended as collateral for the loan, the description of that land should be inserted in the definition of “appurtenant land.” If the land from which the water is diverted or on which it is to be used is not intended as collateral for the loan, the land should be described here as the “surface estate.”

The deed of trust for water rights contains security agreement and financing statement language. This security agreement language, in addition to addressing the personal property aspects of water rights, can also be used to create a security agreement in any fixtures associated with the real estate and water rights. For drafting instructions and guidance in using a deed of trust with a security agreement, see sections 8.11 and 9.8.

There are a number of other considerations in using a deed-of-trust form, depending on the nature of the loan transaction and related collateral. The attorney can consult chapter 8 to determine whether and to what extent these additional considerations apply, and find additional guidance for completing and modifying the provisions of form 16-21 to reflect the dynamics in the loan transaction.
§ 16.81:3 Security Agreement

Chapter 9 of the Texas Business and Commerce Code, titled “Secured Transactions,” governs consensual, contractual security interests in personal property and fixtures that secure payment or performance of an obligation. Tex. Bus. & Com. Code § 9.109(a)(1). Almost all water rights in Texas are evidenced by a permit or a certificate of adjudication. Because a permit or certificate of adjudication resembles a general intangible, form 16-22 in this chapter, for creating a security interest in water rights, is an adaptation of form 9-2, the security agreement found in chapter 9 in this manual.

If water rights are considered real property, an argument can be made that the secured transactions provisions of chapter 9 of the Business and Commerce Code do not apply to liens or security interests in water rights. Chapter 9 contains a real property interest exclusion. With an exception for fixtures, the creation or transfer of an interest in or a lien on real property, including a lease or rents, as defined by section 64.001 of the Property Code, is not governed by chapter 9. Tex. Bus. & Com. Code § 9.109(d)(11). By comparison, however, the definition of “account” under chapter 9 explicitly includes rights to payment for property (real or personal) sold. Tex. Bus. & Com. Code § 9.102(a)(2). In addition, security interests in farm products are governed by chapter 9, and specifically include supplies produced or used in farming operations, including aquatic farming operations. See Tex. Bus. & Com. Code § 9.102(a)(34), (35).

To eliminate the risks associated with water rights collateral being classified as either exclusively real or exclusively personal property to which different rules may apply, a lender may ask the debtor to provide both a deed of trust and a security agreement. Although the deed of trust (form 16-21) contains security agreement language that may be sufficient to create a lien on the personal property aspect of water rights, the additional provisions in the security agreement (form 16-22) may provide greater clarity and guidance regarding the parties’ rights and obligations, particularly if related collateral for the loan has strictly personal property characteristics.

The rules for creating and perfecting a security interest are complex. Accordingly, in the context of any particular transaction, the attorney should consult chapter 9, giving due consideration to all of the types of collateral involved in the loan transaction. The rules relating to classification and definitions of collateral, creation, attachment, perfection, priority, choice of law, and other issues will vary, depending on the transaction. Chapter 9 contains instructions that will provide guidance in completing and modifying form 16-22 and additional clauses that should be considered. Because of the complexity of the rules for creating and perfecting a security interest, the attorney should also consult the statutory text, the official comments, secondary sources, and any relevant case law.

§ 16.81:4 Attachment, Perfection, and Recording

There are currently no express rules governing attachment and perfection of a security interest in water rights. For other types of collateral, there are four basic methods of perfecting an attached security interest, although as few as one of those methods may be effective, depending on the specific category of collateral. Those methods include (1) a properly completed financing statement (see Tex. Bus. & Com. Code § 9.102(a)(39)) filed in the appropriate UCC filing offices, (2) possession of the collateral in the secured party, (3) the secured party’s control of the collateral, and (4) in a few cases, automatic perfection on attachment of a security interest. If there are alternative methods of perfection, one secured party may obtain priority over another secured party, depending on the method used to perfect. For guidance on the various methods of attachment and perfection, consult sections 9.4 and 9.5 in this manual.
The lender should record the deed of trust in the place for recordation of the deed or conveyance documents described in section 16.12 above (groundwater rights for production on-site), in section 16.42 (permitted groundwater rights for production off-site), and in section 16.62 (surface water rights), as applicable. Given the ambiguities surrounding attachment and perfection of a security interest in water rights, and the different locations from which surface water rights or permitted groundwater rights may originate or be used, a lender may want to use as many means as it can to make sure persons are put on actual and constructive notice of the lender’s lien rights and security interests. Consequently, note should be taken of the additional alternative places for recording documents described in sections 16.42, 16.62, and 16.78:5.

Attorneys dealing with water rights within a watermaster operation should be aware of the notice and recording requirements applicable to watermaster operations. See generally 30 Tex. Admin. Code chs. 303, 304. This is particularly true for the Rip Grande watermaster. There are two subsections (j) to section 11.3271 of the Texas Water Code adopted by the legislature in 2003 that have never been reconciled. See Tex. Water Code § 11.3271. Under one subsection (j), the watermaster with jurisdiction over the Rio Grande is made the official recorder for all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens that the TCEQ authorizes or requires to be filed in connection with a water right relating to water in the lower, middle, or upper basin of the Rio Grande and that are subject to a permit, certified filing, or certificate of adjudication, and the filing will have the same legal effect as filing under other law for the same type of instrument. Under the other subsection (j), the watermaster is required to maintain a central repository that includes certified copies of all instruments, including deeds, deeds of trust, and liens that the TCEQ requires to be filed in connection with the same type of water rights as are described in the first-referenced subsection (j), and it is expressly stated that on and after September 1, 2003, a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster and all requirements under other law are met. It would be prudent when conveying rights or interests in water rights in the Rio Grande to record a duplicate set of original documents with the Texas watermaster, as well as in the real property records of the county or counties in which the documents are otherwise authorized to be recorded, and to also file a certified copy of the documents recorded in the county real property records (at least with regard to liens) with the watermaster.

Because water rights, permits, and facilities have both real and personal property characteristics, financing statements used in the loan transaction should be treated as applying to both fixtures and personal property and should be recorded in the appropriate locations as provided by the Uniform Commercial Code (title 1 of the Texas Business and Commerce Code). If applicable law requires the financing statement to be filed with the secretary of state of a state other than Texas (for example, in the state of the debtor’s location), the lender may still want to file an additional financing statement with the Texas secretary of state, to provide actual notice of the security interest to persons who check for filings in Texas. The UCC forms are available in a fill-in-the-blank format over the Internet from the Texas secretary of state at www.sos.state.tx.us/ucc/uccforms.shtml. For guidance in filling out the UCC forms, consult sections 9.13 through 9.17 in this manual.


Groundwater Rights Sales Contract [For Sale of Groundwater Rights in Place for On-Site Production
If Seller Owns Groundwater and Surface Estate]

This contract to buy and sell groundwater rights [include if applicable: and fixtures and personal property] is between Seller and Buyer as identified below and is effective on the date (“Effective Date”) of the last of the signatures by Seller and Buyer as parties to this contract and by [Title Company/Escrow Agent] to acknowledge receipt of the Earnest Money. Buyer must deliver the Earnest Money to [Title Company/Escrow Agent] and obtain a signature acknowledging receipt of the Earnest Money before the Earnest Money Deadline provided in paragraph A.1. for this contract to be effective. If the Earnest Money is paid by check and payment on presentation is refused, Buyer is in default.

Seller: [include the names of all persons owning the groundwater; also include all owners of the surface of the property, if different from the owners of the groundwater]

Address:

Phone:

E-mail:

Type of entity:

Seller’s Attorney:

Law firm:

Address:

Phone:
Groundwater Rights Sales Contract [On-Site Production]

E-mail:

Seller’s Broker:

Brokerage firm:

Address:

Phone:

E-mail:

Buyer:

Address:

Phone:

E-mail:

Type of entity:

Buyer’s Attorney:

Law firm:

Address:

Phone:

E-mail:

Buyer’s Broker:

Brokerage firm:
Groundwater Rights Sales Contract [On-Site Production]

Address:

Phone:

E-mail:

[Title Company/Escrow Agent]: [identify title company or, if title insurance will not be obtained, identify person who will act as escrow agent]

Address:

Phone:

E-mail:

[Underwriter:]

Include the following if applicable.

Surveyor:

Address:

Phone:

E-mail:

Survey Category:

Continue with the following.

If there is no groundwater authority with jurisdiction over the real property, modify the contract as appropriate.

Groundwater Authority: [list any groundwater conservation districts or other groundwater authority with jurisdiction over the real property]
Seller’s Permit: [describe and provide all of seller’s permits, e.g., [permit title] Permit No. [number], issued and approved by [name of groundwater authority] on [date].]

Earnest Money: $[amount]

Real Property: The Real Property described in Exhibit A [include if applicable: together with the fixtures and personal property described in Exhibit A]. [Include if a survey is required under the contract: The metes-and-bounds description of the Real Property, as reflected by the Survey, will automatically be incorporated into this contract in Exhibit A and will supersede any prior Exhibit A when the Survey is approved by Seller and Buyer, and the acreage will be automatically adjusted to the acreage amount reflected by the Survey.]

Groundwater: All of the underground water, percolating water, artesian water, and any other water from any and all depths and reservoirs, formations, depths and horizons beneath the surface of the Real Property, excluding underflow or flow in a defined subterranean channel.

Groundwater Rights: (1) The legal title to the Groundwater [include if applicable: subject to the Reserved Groundwater] and the right to test, explore for, drill for, develop, withdraw, capture, or otherwise beneficially use the Groundwater; (2) the right to use the surface of the Real Property for access to and to explore for, develop, treat, produce, and transport the Groundwater; and (3) all permits, licenses, or other governmental authorizations relating to any of the foregoing. If a separate Easement Agreement is required by this contract, the Groundwater Rights include the easement rights.

Reserved Groundwater: Seller reserves the right to use the Groundwater in connection with its surface estate in the Real Property for the following purposes only: [state purposes for]
which the reserved groundwater may be used and any limit on the quantity of reserved groundwater that seller may use including any limit on the number of wells that seller may drill or maintain].

Excepted Groundwater: Seller excepts from the sale the rights to use the Groundwater in connection with prior grants or conveyances or grants to use the Groundwater affecting the conveyance.

Buyer’s Intended Use of Groundwater: [specify]

Purchase Price:

Select one of the following.

$[amount], which is determined on the basis of [describe basis for determining purchase price, e.g., $[amount] per acre of Real Property from which the Groundwater Rights are obtained] [include if applicable: and $[amount] for the personal property and fixtures].

Or

To be determined after obtaining the hydrogeological information described in paragraph G.3. during the Inspection Period. [State the basis on which price is to be calculated, including any applicable provisions in paragraph G.3. below] [include if applicable: and $[amount] for the personal property and fixtures].

Continue with the following.

Cash portion:

Seller-financed portion (principal amount of note):

Interest rate:

Maturity date:
Payment schedule:

Third-party-financed portion:

Buyer’s Liquidated Damages: $[\text{amount}]$

Seller’s Additional Liquidated Damages: $[\text{amount}]$

Title Information: If Seller is not required to provide a Title Commitment and Title Policy, Seller will have the obligation to provide to Buyer, at Seller’s expense, the Title Information as defined in paragraph F.3. Buyer may have the Title Information reviewed and obtain a written opinion of title by an attorney selected by Buyer, at [Seller/Buyer]’s expense.

Title Documents: The Seller’s Permit and instruments affecting title to the Groundwater and the Real Property referenced in the [Title Commitment/Title Information] [, Survey,] and UCC Search are to be provided as part of Seller’s Records.

A. Deadlines and Other Dates

All deadlines in this contract expire at 5:00 P.M. local time where the Real Property is located. If a deadline falls on a Saturday, Sunday, or national holiday, the deadline will be extended to the next day that is not a Saturday, Sunday, or national holiday. A national holiday is a holiday designated by the federal government. Time is of the essence.

A.1. Earnest Money Deadline: [date]

Select one of the following.

A.2. Delivery of Title Commitment: [[date]/[number] days after the Effective Date]

Or
A.2. Delivery of Title Information: [(date)/(number) days after the Effective Date]

Select one of the following.


A.3. Delivery of Survey: [(date)/(number) days after the Effective Date]

Continue with the following.

A.4. Delivery of UCC Search: [(date)/(number) days after the Effective Date]

A.5. Delivery of legible copies of the Title Documents: [(date)/(number) days after the Effective Date]

A.6. Delivery of Title Objections: [(date)/(number) days after delivery of the last of the [Title Commitment/Title Information], [Survey,] UCC Search, and legible copies of the Title Documents]

A.7. Delivery of Seller’s Records as specified in Exhibit C: [(date)/(number) days after the Effective Date]

A.8. End of Inspection Period: [(date)/(number) days after the Effective Date, or at the date specified if the Inspection Period is extended]

A.9. Closing Date: [(date)/(number) days after the End of the Inspection Period]

A.10. Closing Time: [time]

B. Closing Documents

B.1. At Closing, Seller will deliver the following items:
Groundwater Rights [General/Special] Warranty Deed [**include if applicable:**
with Vendor’s Lien] (“Groundwater Rights Warranty Deed”)

Easement Agreement for Groundwater Rights as shown in Exhibit J

Release of Lien

Partial Release of Lien as to Groundwater Rights

Lienholder Consent and Subordination to Easement Agreement

Assignment of Seller’s Permit or transfer form promulgated or approved by relevant groundwater authority

Bill of Sale

IRS Nonforeign Person Affidavit

Evidence of Seller’s authority to close this transaction

Notices, statements, and certificates as specified in Exhibit D

Affidavit of Debts and Liens

Assignment and Assumption of Leases

Assignment and Assumption of Contracts

Tenant Estoppel Certificate

Releases of any leases or contracts affecting the Groundwater Rights that will be terminated at Closing
B.2. At Closing, Buyer will deliver the following items:

- Balance of Purchase Price
- Easement Agreement for Groundwater Rights
- Evidence of Buyer’s authority to close this transaction
- Deceptive Trade Practices Act waiver
- Assignment and Assumption of Leases
- Seller-financing documents
  - Promissory Note
  - Deed of Trust
  - Security Agreement
  - Financing Statement
- Loan Documents required by third-party lender
- Releases of any leases, contracts, or other legal interests affecting the Groundwater agreed to be terminated before or at Closing

The documents listed in this section B. are collectively known as the “Closing Documents.” The Closing Documents for which forms exist in the current edition of the Texas Real Estate Forms Manual (State Bar of Texas) will be prepared using those forms.
C. Exhibits

The following are attached to and are a part of this contract:

Exhibit A—Description of the Real Property [include if applicable: and Fixtures and Personal Property]

Exhibit B—Seller’s Representations and Warranties

Exhibit C—Seller’s Records

Exhibit D—Notices, Statements, and Certificates

Exhibit E—Copies of Seller’s Permits issued by the Groundwater Authority

Exhibit F—List of Seller’s leases or other contracts affecting the Groundwater Rights or Real Property to be terminated before Closing

Exhibit G—List of Seller’s leases or other contracts affecting the Groundwater Rights or Real Property that will survive Closing

Exhibit H—Groundwater Rights Warranty Deed

[Include if applicable: Exhibit I—Seller Financing Addendum]

[Include if applicable: Exhibit J—Easement Agreement]

[Include if applicable: Exhibit K—Memorandum of Contract]

[Include if applicable: Exhibit L—Notice of Termination of Contract]
D. **Purchase and Sale of Groundwater Rights**

Seller agrees to sell and convey the Groundwater Rights to Buyer, and Buyer agrees to buy and pay Seller for the Groundwater Rights. The promises by Buyer and Seller stated in this contract are the consideration for the formation of this contract.

E. **Interest on Earnest Money**

Buyer may direct [Title Company/Escrow Agent] to invest the Earnest Money in an interest-bearing account in a federally insured financial institution by giving notice to [Title Company/Escrow Agent] and satisfying [Title Company/Escrow Agent]’s requirements for investing the Earnest Money in an interest-bearing account. Any interest earned on the Earnest Money will become part of the Earnest Money.

F. **Title [and Survey]**

**F.1. Review of Title.** The following statutory notice is provided to Buyer on behalf of the real estate licensees, if any, involved in this transaction: Buyer is advised that it should either have the abstract covering the Real Property examined by an attorney of Buyer’s own selection or be furnished with or obtain a policy of title insurance.

**F.2. Title Commitment; Title Policy.** “Title Commitment” means a Commitment for Issuance of an Owner Policy of Title Insurance by Title Company, as agent for Underwriter, or directly by Underwriter, stating the condition of title to the Groundwater and the Real Property. The effective date stated in the Title Commitment must be after the Effective Date of this contract. “Title Policy” means an Owner Policy of Title Insurance issued by Title Company, as agent for Underwriter, or directly by Underwriter, in conformity with the last Title Commitment delivered to and approved by Buyer.
F.3. **Title Information.** “Title Information” means an abstract of title prepared by a title insurance company or an abstract company licensed by the Texas State Board of Insurance, covering the period from the first conveyance of title to the Real Property out of the sovereignty to the Effective Date, and containing complete and legible copies of all the deeds, easements, liens, and other documents affecting title to the Real Property and the Groundwater.

Include the following if applicable.

F.4. **Survey.** “Survey” means an on-the-ground, staked plat of survey and metes-and-bounds description of the Real Property, prepared by Surveyor or another surveyor satisfactory to [Title Company/Escrow Agent], dated after the Effective Date, and certified to Seller, Buyer, [Title Company/Escrow Agent], and any other person specified by Buyer, to comply with the current standards and specifications as published by the Texas Society of Professional Surveyors for the Survey Category.

Continue with the following.

F.5. **UCC Search.** “UCC Search” means written reports stating the instruments that are on file in the Texas secretary of state’s UCC records, the UCC records of any other appropriate state, and the UCC records in the jurisdiction in which the Seller is organized, showing as debtor Seller and all other owners of the Real Property and Groundwater [**include if applicable:** and fixtures and personal property] during the five years before the Effective Date of this contract.

Continue with the following.

F.6. **Delivery of [Title Commitment/Title Information], [Survey,] UCC Search, and Title Documents.** Seller must deliver the [Title Commitment/Title Information] to Buyer and Buyer’s attorney by the deadline stated in paragraph A.2. above; the Survey, if required,
by the deadline stated in paragraph A.3.; the UCC Search by the deadline stated in paragraph A.4.; and legible copies of the Title Documents by the deadline stated in paragraph A.5.

F.7. **Title Objections.** Buyer has until the deadline stated in paragraph A.6. above ("Title Objection Deadline") to review the Survey, [Title Commitment/Title Information], UCC Search, and legible copies of the Title Documents, notify Seller of Buyer’s objections to any of them, and request any additional information needed to evidence Seller’s title to the Real Property and the Groundwater ("Title Objections"). Buyer will be deemed to have approved all matters reflected by the Survey, [Title Commitment/Title Information], Title Documents, and UCC Search to which Buyer has made no Title Objection by the Title Objection Deadline. The matters that Buyer either approves or is deemed to have approved are "Permitted Exceptions." If Buyer notifies Seller of any Title Objections, Seller has five days from receipt of Buyer’s notice to notify Buyer whether Seller agrees to cure the Title Objections before Closing ("Cure Notice"). If Seller does not timely give its Cure Notice or timely gives its Cure Notice but does not agree to cure all the Title Objections before Closing, Buyer may, within five days after the deadline for the giving of Seller’s Cure Notice, notify Seller that either this contract is terminated or Buyer will proceed to close, subject to Seller’s obligations to resolve the items [listed in Schedule C of the Title Commitment/listed in the Title Information], remove all liquidated liens, remove all exceptions that arise by, through, or under Seller after the Effective Date, and cure only the Title Objections that Seller has agreed to cure in the Cure Notice. At or before Closing, Seller must resolve the items that are [listed in Schedule C of the Title Commitment/listed in the Title Information], remove all liquidated liens, remove all exceptions that arise by, through, or under Seller after the Effective Date of this contract, and cure the Title Objections that Seller has agreed to cure.
G. Inspection Period

G.1. Review of Seller’s Records. Seller, at Seller’s expense, will deliver to Buyer copies of Seller’s Records specified in Exhibit C, or otherwise make those records available for Buyer’s review, by the deadline stated in paragraph A.7. above.

G.2. Entry onto Real Property. Buyer may enter the Real Property before Closing to perform all investigations Buyer deems appropriate, at Buyer’s cost, including exploration for, drilling for, and testing of Groundwater, subject to the following conditions.

G.2.a. Buyer must deliver evidence to Seller that Buyer has liability insurance for its proposed inspection activities, with coverages and in amounts that are substantially the same as those maintained by Seller or with such lesser coverages and in such lesser amounts as are reasonably satisfactory to Seller.

G.2.b. Buyer may not interfere in any material manner with existing operations or occupants of the Real Property.

G.2.c. Buyer must notify Seller in advance of Buyer’s plans to conduct tests so that Seller may be present during the tests.

G.2.d. If the Real Property is physically altered because of Buyer’s inspections, Buyer must return the Real Property to its preinspection condition promptly after the alteration occurs.

G.2.e. Buyer must deliver to Seller copies of all inspection reports that Buyer prepares or receives from third-party consultants or contractors within three days after their preparation or receipt.

G.2.f. Buyer must abide by any other reasonable entry rules imposed by Seller.
G.3. Hydrogeological Testing. Buyer has the right to perform investigations to estimate the quality, quantity, and sustainability of the Groundwater.

The parties agree that the Purchase Price is to be determined based on [specify basis for pricing the groundwater rights, such as average saturated foot of groundwater or some other calculation related to the estimated quality, quantity, or sustainability of the groundwater available for production]. Buyer will perform investigations during the Inspection Period, at [Buyer’s/Seller’s/both parties’] expense, to estimate the quality, quantity, and sustainability of the Groundwater. Buyer and Seller will select a mutually acceptable independent hydrogeologist (“Hydrogeologist”) to perform the evaluation of the Groundwater. If Seller and Buyer are not able to choose a hydrogeologist within twenty days after the Effective Date, each will select a hydrogeologist, and the two hydrogeologists selected will choose a third hydrogeologist to perform the evaluation. The investigations will include such test drilling, logging, and data analysis on the Real Property [include if applicable: and on property within the region of the Real Property] as Hydrogeologist deems appropriate. If [Seller/Buyer] desires more test wells than Hydrogeologist determines is necessary, [Seller/Buyer] may cause additional test wells to be drilled and logged at [Seller/Buyer]’s expense. The data from Buyer’s investigations, Seller’s logs, if applicable, and Seller’s Records will be submitted to Hydrogeologist. The parties agree to be bound by the determination of Hydrogeologist.

G.4. Appraisal of Groundwater. Buyer has the right to have an appraisal performed of the Groundwater Rights, Seller’s Permits (if any), and the Real Property. The cost of the appraisal [will be paid at Closing by [Buyer/Seller]/will be shared at Closing by Buyer and Seller].

G.5. Adequacy of Seller’s Permit. If a Seller’s Permit has been issued, Buyer will have the right to determine whether Seller’s Permit, on transfer to Buyer, will be adequate for
Buyer’s intended use of the Groundwater, whether an alternative permit or permit amendment will be required, and the requirements of the Groundwater Authority for the transfer of Seller’s Permit. Seller will cooperate with Buyer at all times in obtaining any information and forms required from the Groundwater Authority. On Buyer’s request, Seller, at [Seller’s/ Buyer’s] expense, will execute and transmit to the Groundwater Authority all necessary applications, forms, and documentation required for the transfer of Seller’s Permit to Buyer, provided that the transfer will not be effective until Closing. Seller will not take any action before or after Closing to oppose the transfer of Seller’s Permit to Buyer, the issuance of an amendment to Seller’s Permit, or other permitting sought by Buyer to enable Buyer to use the Groundwater for Buyer’s Intended Use of the Groundwater.

Buyer’s obligation to purchase the Groundwater Rights is contingent on the Groundwater Authority approving, before the expiration of the Inspection Period, the Required Permitting (as defined below) contingent on Closing or, in the sole discretion of Buyer, providing sufficient assurance that the Groundwater Authority will issue the Required Permitting after Closing. Required Permitting means [issuance of a production permit authorizing [specify]/ transfer of Seller’s Permit/transfer of Seller’s Permit and amendment of the Permit to authorize [specify]]. Buyer will initiate action to obtain the Required Permitting promptly after the Effective Date and diligently pursue obtaining the Required Permitting during the Inspection Period. [Include if applicable: If Buyer has been unable to obtain approval of the Required Permitting, or assurance satisfactory to Buyer of obtaining the Required Permitting after Closing, despite Buyer’s diligence, Buyer will have the right to extend the Inspection Period solely for the purpose of obtaining the Required Permitting for a period not to exceed [number] days, by giving Seller written notice of the extension before the termination of the Inspection Period. Buyer’s right to terminate this contract before the end of the extension period is limited to the failure to obtain, or to obtain satisfactory assurance of, the Required Permitting.]
G.6. Environmental Assessment. Buyer has the right to conduct environmental assessments of the Real Property and Groundwater. Seller will provide, or will designate a person with knowledge of the use and condition of the Real Property and Groundwater to provide, information requested by Buyer or Buyer’s agent or representative regarding the use and condition of the Real Property and Groundwater during the period of Seller’s ownership of the Property. Seller will cooperate with Buyer in obtaining and providing to Buyer, its agent, or representative information regarding the Real Property and Groundwater.

G.7. Buyer’s Right to Terminate. Buyer may terminate this contract for any reason by notifying Seller before the end of the Inspection Period.

G.8. Buyer’s Indemnity and Release of Seller

G.8.a. Indemnity. Buyer will indemnify, defend, and hold Seller harmless from any loss, attorney’s fees, expenses, or claims arising out of Buyer’s investigation, except those arising out of the acts or omissions of Seller and those for repair or remediation of existing conditions discovered by Buyer’s inspection. The obligations of Buyer under this provision will survive termination of this contract and Closing.

G.8.b. Release. Buyer releases Seller and those persons acting on Seller’s behalf from all claims and causes of action (including claims for attorney’s fees and court and other costs) resulting from Buyer’s investigation of the Groundwater and Real Property.

H. Representations and Warranties

The parties’ representations stated in Exhibit B are true and correct as of the Effective Date and must be true and correct on the Closing Date. Seller will promptly notify Buyer if Seller becomes aware that any of the representations are not true and correct.
I. **Condition of the Property until Closing; Cooperation; No Recording of Contract**

**1.1. Maintenance and Operation.** Until Closing, Seller will (a) maintain the Real Property [include if applicable: , the personal property and fixtures,] and the Groundwater Rights as they existed on the Effective Date [include if applicable: , except for reasonable wear and tear and casualty damage]; (b) use the Real Property and the Groundwater Rights in the same manner as they were used on the Effective Date; [and] (c) comply with all permits, contracts, laws, and regulations affecting the Real Property and the Groundwater Rights [include if applicable: ; and (d) not transfer or dispose of any of the personal property and fixtures, except to sell inventory, replace equipment, and use supplies in the normal course of operating the personal property and fixtures]. [Include if applicable: Until the end of the Inspection Period, Seller will not enter into, amend, or terminate any contract that affects the personal property and fixtures other than in the ordinary course of operating such property and will promptly give notice to Buyer of each new, amended, or terminated contract, including a copy of the contract, in sufficient time so that Buyer may consider the new information before the end of the Inspection Period. If Seller’s notice is given within three days before the end of the Inspection Period, the Inspection Period will be extended for three days.] Until the end of the Inspection Period, Seller will not (a) grant or convey any easement, lease, license, option, or other right affecting the Real Property or the Groundwater Rights, including the right to use the Groundwater; (b) enter into any lease or agreement that allows the surface of the Real Property to be mined or excavated; or (c) enter into any oil and gas lease [include if applicable: or surface use agreement or subsurface use agreement that does not comply with paragraph 1.2. below]. After the end of the Inspection Period, Seller may not enter into, amend, or terminate any contract that affects the Groundwater, the Groundwater Rights, or the Real Property without first obtaining Buyer’s written consent.

**1.2. Oil and Gas Leases.** Before and after Closing, Seller will not enter into any oil and gas lease [affecting the Real Property/or surface use agreement that allows (a) flooding of
the Real Property, (b) injection into or disposal of saltwater or other substance onto the Real Property, or (c) use of Groundwater for any purpose other than drilling, completion, recompletion, reworking, remediation, and revegetation]. This provision will survive Closing and will be set forth in one or more of the Closing Documents.

I.3. Condemnation. Seller will notify Buyer promptly after Seller receives notice that any part of the Real Property or Groundwater Rights has been or is threatened to be condemned or otherwise taken by a governmental or quasi-governmental authority. Buyer may terminate this contract if the condemnation would materially affect Buyer’s intended use of the Groundwater Rights by giving notice to Seller within fifteen days after receipt of Seller’s notice to Buyer (or before Closing if Seller’s notice is received less than fifteen days before Closing). The condemnation will be deemed to materially affect Buyer’s intended use of the Groundwater Rights if [specify reason, e.g., the condemnation would result in Buyer’s not being able to produce more than [number] acre-feet of Groundwater]. If Buyer does not terminate this contract, (a) Buyer and Seller will each have the right to appear and defend their respective interests in the Groundwater Rights in the condemnation proceedings; (b) any award in condemnation will be assigned to Buyer to the extent necessary to compensate Buyer for the loss of or reduction in the Groundwater Rights; and (c) if the taking occurs before Closing, the description of the Real Property or Groundwater Rights will be revised to delete the portion taken.

I.4. Claims; Hearings. Seller will notify Buyer promptly after Seller receives notice of any claim or administrative hearing that is threatened, filed, or initiated before Closing that affects the Groundwater Rights.

I.5. Cooperation. Seller will cooperate with Buyer (a) before and after Closing to transfer the applications, permits, and licenses held by Seller and used in the production of the Groundwater and to obtain any consents necessary for Buyer to withdraw or produce the Groundwater; (b) before closing, with any reasonable evaluation, inspection, or study of the
Real Property or the Groundwater; and (c) in all other matters related to, or arising out of or in connection with, this contract. These provisions will survive Closing.

1.6. **Casualty or Other Loss or Damage.** Until Closing has been completed and funded, Seller will bear the risk of any damage, casualty, or other loss to the Real Property or Groundwater Rights [include if applicable: and the personal property and fixtures]. If any damage, casualty, or other loss results in a material adverse change in the quality, quantity, or usability of the Groundwater, Buyer will have the right to terminate this contract. [include if applicable: If personal property or fixtures are damaged by casualty, the portion of the purchase price attributable to the personal property and fixtures will be equitably reduced.]

1.7. **Memorandum of Contract; Termination of Contract; No Recording of Contract.** At the request of Buyer, Seller will execute a memorandum of this contract, in a mutually acceptable form, to be recorded in the real property records of [county] County, Texas. At the time the memorandum is signed, Buyer and Seller will also sign a termination of contract in recordable form and deposit it into escrow with [Title Company/Escrow Agent]. The parties authorize [Title Company/Escrow Agent] to record the termination of contract as provided in section J. below. Neither Buyer nor Seller may file this contract in the real property records of any county. If either party records this contract, the other party may terminate this contract and record a notice of termination.

J. **Termination**

J.1. **Disposition of Earnest Money after Termination**

J.1.a. **To Buyer.** If Buyer terminates this contract in accordance with any of Buyer’s rights to terminate, then unless Seller delivers notice of Seller’s objection to [Title Company/Escrow Agent]’s release of the Earnest Money to Buyer within five days after Buyer delivers Buyer’s termination notice to Seller and [Title Company/Escrow Agent], [Title Company/Escrow Agent] is authorized, without any further authorization from Seller, to deliver the Ear-
nest Money to Buyer, less $100, which will be paid to Seller as consideration for the right granted by Seller to Buyer to terminate this contract. [Title Company/Escrow Agent] will record the termination of contract and return the Earnest Money to Buyer on receipt of Seller’s authorization.

**J.1.b. To Seller.** If Seller terminates this contract in accordance with any of Seller’s rights to terminate, then unless Buyer delivers notice of Buyer’s objection to [Title Company/Escrow Agent]’s release of the Earnest Money to Seller within five days after Seller delivers Seller’s termination notice to Buyer and [Title Company/Escrow Agent], [Title Company/Escrow Agent] is authorized, without any further authorization from Buyer, to pay and deliver the Earnest Money to Seller and to record the termination of contract. [Title Company/Escrow Agent] will record the termination of contract and pay the Earnest Money to Seller on receipt of Buyer’s authorization.

**J.2. Duties after Termination.** If this contract is terminated, Buyer will promptly return to Seller all of Seller’s Records in Buyer’s possession or control. After return of the documents and copies, neither party will have further duties or obligations to the other under this contract, except for those obligations that cannot be or were not performed before termination of this contract or that expressly survive termination of this contract.

**K. Closing**

**K.1. Closing.** This transaction will close at [Title Company/Escrow Agent]’s offices at the Closing Date and Closing Time. At Closing, the following will occur:

**K.1.a. Closing Documents.** The parties will execute and deliver the Closing Documents.

**K.1.b. Payment of Purchase Price.** Buyer will deliver the Purchase Price and other amounts that Buyer is obligated to pay under this contract to [Title Company/Escrow Agent]
in funds acceptable to [Title Company/Escrow Agent]. The Earnest Money will be applied to the Purchase Price.

K.1.c. Disbursement of Funds; Recording; Copies. [Title Company/Escrow Agent] will be instructed to disburse the Purchase Price and other funds in accordance with this contract, record the deed and the other Closing Documents directed to be recorded, and distribute documents and copies in accordance with the parties’ written instructions.


K.1.e. Possession. Seller will deliver possession of the Groundwater Rights to Buyer, subject to the Permitted Exceptions existing at Closing and any liens and security interests created at Closing to secure financing for the Purchase Price.

K.2. Transaction Costs

K.2.a. Seller’s Costs. Seller will pay [the basic charge for the Title Policy/the cost of providing the Title Information as specified in this contract, if not previously paid by Seller]; one-half of the escrow fee charged by [Title Company/Escrow Agent]; the costs to prepare the Groundwater Rights Warranty Deed and the Easement Agreement and addenda, if required by this contract; the costs to obtain, deliver, and record any releases of liens, lender’s consent, and subordination to Buyer’s easement rights required in connection with the sale; the costs to cure and record the documents to cure Title Objections agreed or required to be cured by Seller and to resolve matters shown in Schedule C of the Title Commitment; [include if applicable: Title Company’s inspection fee to delete from the Title Policy the customary exception for rights of parties in possession;] the costs to obtain the [Survey,] UCC Search[,] and certificates or reports of ad valorem taxes; the costs to deliver copies of the instruments described in paragraph A.5. above and Seller’s Records; any other costs expressly required to be paid by Seller in this contract; and Seller’s attorney’s fees and expenses.
K.2.b. Buyer’s Costs. Buyer will pay one-half of the escrow fee charged by [Title Company/Escrow Agent]; the costs to obtain, deliver, and record all documents other than those to be obtained or recorded at Seller’s expense; [include if applicable: the additional premium for the “survey/area and boundary deletion” in the Title Policy, if the deletion is requested by Buyer, as well as the cost of any other endorsements or modifications of the Title Policy requested by Buyer;] [include if applicable: the costs of work required by Buyer to have the Survey reflect matters other than those required under this contract except changes required for curative purposes;] the costs to obtain financing of the Purchase Price, including the incremental premium costs of the loan title policy and endorsements and deletions required by Buyer’s lender; any other costs expressly required to be paid by Buyer in this contract; and Buyer’s attorney’s fees and expenses.

K.2.c. Taxes, Fees, and Assessments. At Closing, Seller will pay any ad valorem taxes and assessments, including penalties and interest (collectively, “Taxes”), in connection with the Real Property and the Groundwater that are owing for prior calendar years. Seller will pay all Taxes in connection with the Real Property and Groundwater for the current calendar year, if payable at the time of Closing. After Closing, Seller will continue to pay all Taxes due in connection with the Real Property (including the Reserved Groundwater) before delinquency, except that if ad valorem taxes are assessed separately against Buyer’s Groundwater Rights after Closing, Buyer will be responsible for paying such taxes and assessments if Buyer is obligated to pay such taxes under applicable law. After Closing, each party will have the right to protest taxes that the party is responsible for paying, provided that the protesting party does not allow the taxes to become delinquent. If the Real Property has been, or is at any time after Closing, the subject of special valuation and reduced tax assessments pursuant to the provisions of chapter 23, subchapter D, of the Texas Tax Code or under any other provision of law, and additional taxes, penalties, or interest are assessed pursuant to Code section 23.55 or under such other provision of law, Seller will be responsible for the payment of any such taxes, penalties, and interest, including rollback taxes. If Seller fails to pay Taxes for
which Seller is responsible when due, Seller authorizes Buyer to pay Taxes and on such payment to (i) be subrogated to all liens held by the taxing authority against the Real Property as security for the Taxes paid, (ii) have the right to set off amounts paid against amounts owed to Seller, if any, under the terms of the Closing Documents, and (iii) seek reimbursement of amounts paid in accordance with applicable law. Buyer will have the right, but not the obligation, to pay the Taxes. If Buyer pays the Taxes, at Buyer’s request Seller will promptly take the action required by section 32.06 of the Texas Tax Code to authorize a transfer of the tax lien to Buyer.

After Closing, Buyer will be responsible for paying all fees, assessments, taxes, and charges of any kind imposed by the Groundwater Authority, or any successor authority, in connection with Buyer’s use, development, pumping, or transportation of the Groundwater. Buyer will timely pay any taxes assessed by any taxing authority against any equipment or personal property of Buyer located on the Real Property and any fees or costs charged by any Groundwater Conservation District or other regulatory body for Buyer’s development, pumping, transportation, or use of the Groundwater.

These provisions will survive Closing and will be set out in one or more of the Closing Documents.

K.2.d. Proration of Expenses and Income. Except as provided in paragraph K.2.e. above, all items of expense or income arising in connection with the use or operation of the Groundwater will be prorated as of the Closing Date. Seller will pay all bills and expenses that could give rise to a lien against the Real Property or Groundwater at or before Closing.

K.2.e. Brokers’ Commissions. Buyer and Seller each indemnify and agree to defend and hold the other party harmless from any loss, attorney’s fees, and court and other costs arising out of a claim by any person or entity claiming by, through, or under the indemnitor for a broker’s or finder’s fee or commission because of this transaction or this contract,
whether the claimant is disclosed to the indemnitee or not. At Closing, each party will provide the other party with a release of broker’s or appraiser’s liens from all brokers or appraisers for which each party was responsible.

K.3. Issuance of Title Policy. Seller will cause [Title Company/Escrow Agent] to issue the Title Policy, if required, to Buyer as soon as practicable after Closing.

L. Default and Remedies

L.1. Seller’s Default; Remedies before Closing. If Seller fails to perform any of its obligations under this contract, or if any of Seller’s representations are not true and correct as of the Effective Date or on the Closing Date or any of its warranties have been breached ("Seller’s Default"), Buyer may elect either of the following as its sole and exclusive remedy before Closing:

L.1.a. Termination; Liquidated Damages. Buyer may terminate this contract by giving notice to Seller on or before the Closing Date and Closing Time and have the Earnest Money, less the $100 as described above, returned to Buyer. If Seller’s Default occurs after Buyer has incurred costs to investigate the Real Property or Groundwater after the Effective Date and Buyer terminates this contract in accordance with the previous sentence, Seller will also pay to Buyer as liquidated damages the lesser of Buyer’s actual out-of-pocket expenses incurred to investigate the Real Property and Groundwater after the Effective Date ("Buyer’s Expenses") or the amount of Buyer’s Liquidated Damages, within ten days after Seller’s receipt of an invoice from Buyer stating the amount of Buyer’s Expenses accompanied by reasonable evidence of Buyer’s Expenses.

L.1.b. Specific Performance. Unless Seller’s Default relates to the untruth or incorrectness of Seller’s representations for reasons not reasonably within Seller’s control, Buyer may enforce specific performance of Seller’s obligations under this contract, but any such action must be initiated, if at all, within ninety days after the breach or alleged breach of this
contract. If title to the Groundwater Rights is awarded to Buyer, the conveyance will be subject to the matters stated in the [Title Commitment/Title Information].

L.2. Seller’s Default; Remedies after Closing. If Seller’s representations are not true and correct at Closing for reasons reasonably within Seller’s control and Buyer does not become aware of the untruth or incorrectness until after Closing, Buyer will have all the rights and remedies available at law or in equity. If Seller fails to perform any of its obligations under this contract that survive Closing, Buyer will have all rights and remedies available at law or in equity unless otherwise provided by the Closing Documents.

L.3. Buyer’s Default; Remedies before Closing. If Buyer fails to perform any of its obligations under this contract (“Buyer’s Default”), Seller may terminate this contract by giving notice to Buyer on or before Closing and have the Earnest Money paid to Seller. If Buyer’s Default occurs after Seller has incurred costs to perform its obligations under this contract and Seller terminates this contract in accordance with the previous sentence, Buyer will also reimburse Seller for the lesser of Seller’s actual out-of-pocket expenses incurred after the Effective Date to perform its obligations under this contract (“Seller’s Expenses”) or the amount of Seller’s Additional Liquidated Damages, within ten days after Buyer’s receipt of an invoice from Seller stating the amount of Seller’s Expenses accompanied by reasonable evidence of Seller’s Expenses. The foregoing constitute Seller’s sole and exclusive remedies for a default by Buyer before Closing.

L.4. Buyer’s Default; Remedies after Closing. If Buyer fails to perform any of its obligations under this contract that survive Closing, Seller will have all rights and remedies available at law or in equity unless otherwise provided by the Closing Documents.

L.5. Liquidated Damages. The parties agree that just compensation for the harm that would be caused by a default by either party cannot be accurately estimated or would be very difficult to accurately estimate and that the Earnest Money and the amounts provided
above are reasonable forecasts of just compensation to the nondefaulting party for the harm that would be caused by a default.

L.6. Attorney’s Fees. If either party retains an attorney to enforce this contract, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and other costs.

M. Miscellaneous Provisions

M.1. Notices. Any notice required by or permitted under this contract must be in writing. Any notice required by this contract will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this contract. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received, provided that (a) any notice received on a Saturday, Sunday, or national holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or national holiday; and (b) any notice received after 5:00 P.M. local time at the place of delivery on a day that is not a Saturday, Sunday, or national holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or national holiday. Any address for notice may be changed by not less than ten days’ prior written notice given as provided herein. Copies of each notice must be given by one of these methods to the attorney of the party to whom notice is given.

M.2. Entire Agreement. This contract, its exhibits, and any Closing Documents delivered at Closing are the entire agreement of the parties concerning the sale and use of the Groundwater Rights and the use of the Reserved Groundwater and Real Property. There are no representations, warranties, agreements, or promises between the parties pertaining to the Groundwater Rights, Reserved Groundwater, Real Property, sale and use of the Groundwater Rights, or use of the Reserved Groundwater and Real Property, and neither party is relying on
any statements or representations of any agent of the other party, that are not in those documents.

M.3. Amendment. This contract may be amended only by an instrument in writing signed by the parties.

M.4. Prohibition of Assignment. Buyer may not assign this contract or any of Buyer’s rights under it without Seller’s prior written consent, and any attempted assignment is void.

Or

M.4. Assignment. Buyer may assign this contract and Buyer’s rights under it only to an entity in which Buyer possesses, directly or indirectly, the power to direct or cause the direction of its management and policies, whether through the ownership of voting securities or otherwise, and any other assignment is void.

M.5. Survival. The provisions of this contract that expressly survive termination or Closing and other obligations of this contract that cannot be performed before termination of this contract or before Closing survive termination of this contract or Closing, and the legal doctrine of merger does not apply to these matters. If there is any conflict between the Closing Documents and this contract, the Closing Documents control.

M.6. Choice of Law; Venue. This contract is to be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county in which all, or the majority, of the Real Property is located.

M.7. Waiver of Default. It is not a waiver of default if the nondefaulting party fails to declare a default immediately or delays taking any action with respect to the default.
M.8. No Third-Party Beneficiaries. There are no third-party beneficiaries of this contract.

M.9. Severability. If a provision of this contract is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this contract, and this contract is to be construed as if the unenforceable provision is not a part of the contract.

M.10. Ambiguities Not to Be Construed against Party Who Drafted Contract. The rule of construction that ambiguities in a document will be construed against the party who drafted it will not be applied in interpreting this contract.

M.11. No Special Relationship. The parties’ relationship is an ordinary commercial relationship, and the parties do not intend to create the relationship of principal and agent, partners, joint venturers, or any other special relationship.

M.12. Counterparts. If this contract is executed in multiple counterparts, all counterparts taken together constitute this contract. Copies of signatures to this contract are effective as original signatures.

M.13. Confidentiality. The parties will keep confidential this contract, this transaction, and all information learned in the course of this transaction, except to the extent disclosure is required by law or court order, to enable third parties to advise or assist Buyer to investigate the Groundwater Rights and the Real Property, or by either party to close this transaction. Remedies for violations of this provision are limited to injunctions, and no damages or rescission may be sought or recovered as a result of any such violations.

M.14. Binding Effect. This contract binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.
M.15. Waiver of Consumer Rights. BUYER waives its rights under the TEXAS DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT, SECTION 17.41 ET SEQ. OF THE TEXAS BUSINESS AND COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF ITS OWN SELECTION, BUYER VOLUNTARILY CONSENTS TO THIS WAIVER.

Include the following only if the buyer has agreed to waive its rights under the DTPA.

[Name and title of seller]
Date:

[Name and title of buyer]
Date:

[Title Company/Escrow Agent] acknowledges receipt of Earnest Money in the amount of $__________ and a copy of this contract executed by both Buyer and Seller.

[Name of title company/escrow agent]
By
Name:
Title:
Date:
Exhibit A

Description of the Real Property [and Fixtures and Personal Property]

Include legal description of the land.

Include the following if applicable.

The following described fixtures and personal property: [describe fixtures and property].
Exhibit B

Seller’s Representations and Warranties

A. Seller’s Representations to Buyer

Seller represents and warrants to Buyer that the following are true and correct as of the Effective Date and will be true and correct as of the Closing Date:

A.1. Authority. Seller is a [specify type of organization] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[state]] with authority to perform its obligations under this contract. This contract is binding on Seller. This contract is, and all documents required by this contract to be executed and delivered to Buyer at Closing will be, duly authorized, executed, and delivered by Seller.

A.2. Litigation. Seller has not received written notice and has no actual knowledge of any litigation pending or threatened against Seller that might affect the Groundwater Rights, the Real Property, [include if applicable: the fixtures and personal property,] or Seller’s ability to perform its obligations under this contract [include if applicable: , except [specify]].

A.3. Violation of Laws. Seller has not received written notice of violation of any law, ordinance, regulation, or requirements affecting the Real Property, the Groundwater, [include if applicable: the fixtures and personal property,] or Seller’s use of the Real Property [/or] Groundwater [include if applicable: , or fixtures and personal property] [include if applicable: , except [specify]].

A.4. Licenses, Permits, and Approvals. Seller has not received written notice that any license, permit, or approval necessary to use the Real Property [/or] the Groundwater
[include if applicable: , or the fixtures and personal property] in the manner in which it is currently used has expired or will not be renewed on expiration or that any material condition will be imposed in order to use such permit or license or obtain its renewal [include if applicable: , except [specify]].

A.5. Condemnation; Zoning; Land Use; Hazardous Materials. Seller has not received written notice of any condemnation, zoning, or land-use proceedings affecting the Real Property [./or] the Groundwater [include if applicable: , or the fixtures and personal property] or any written inquiries or notices by any governmental authority or third party with respect to condemnation or the presence of hazardous materials affecting the Real Property [./or] the Groundwater [include if applicable: , or the fixtures and personal property] [include if applicable: , except [specify]].

A.6. No Other Obligation to Sell or Restriction against Sale. Seller has not obligated itself to sell all or any portion of the Real Property [./or] the Groundwater [include if applicable: , or the fixtures and personal property] to any person other than Buyer. Seller’s performance of this contract will not cause a breach of any other agreement or obligation to which Seller is a party or to which it is bound [include if applicable: , except [specify]].

A.7. No Liens. On the Closing Date, the Groundwater Rights [include if applicable: and the fixtures and personal property] to be conveyed under the contract will be free and clear of all liens and encumbrances of any nature not arising by, through, or under Buyer except the Permitted Exceptions or liens to which Buyer has given its consent in writing. If an Easement Agreement is executed at Closing, any lien on the surface estate permitted by Buyer will be subordinated to Buyer’s easement rights.

A.8. No Rights of Possession or Use. There are no persons presently in possession of the Real Property [./or] the Groundwater [include if applicable: , or the fixtures and personal property] or having any rights to possession of the Real Property [./or] the Groundwater
[include if applicable: , or the fixtures and personal property] or rights, either present or future, to explore for, use, produce, or withdraw the Groundwater other than Seller [include if applicable: , except [specify]].

A.9. Good Title. Seller has good and indefeasible fee simple title to the Real Property and the Groundwater [include if applicable: , and to the fixtures and personal property,] free and clear of all mortgages, liens, licenses, encumbrances, leases, tenancies, security interests, covenants, conditions, restrictions, rights-of-way, easements, judgments, and other matters affecting title [include if applicable: , except [specify]].

A.10. No Bills or Claims. There will be no unpaid bills or claims in connection with any repair or work performed or material furnished to the Real Property [include if applicable: and the fixtures and personal property] or otherwise relating to the Groundwater for the benefit of Seller as of the Closing Date, and all bills attributable to or affecting the Groundwater or the Real Property [include if applicable: and the fixtures and personal property] will be paid by Seller in full before Closing.

A.11. No Adverse Matters. To the best of Seller’s knowledge, there is no (a) change contemplated in any applicable laws, ordinances, or restrictions, including the rules of the Groundwater Authority; (b) judicial or administrative action threatened or pending against the Real Property, the Groundwater, [include if applicable: the fixtures and personal property,] or Seller; (c) action by adjacent landowners pending or threatened against the Real Property, the Groundwater, [include if applicable: the fixtures and personal property,] or Seller; or (d) natural or artificial condition on the Real Property [./or] the Groundwater [include if applicable: , or relating to the fixtures and personal property] that would have a material adverse effect on the Real Property [./or] the Groundwater [include if applicable: , or the fixtures and personal property].
A.12. **Compliance with Laws.** Seller has at all times complied with and operated in compliance with all applicable federal, state, and local laws, regulations, and ordinances regarding the Real Property [., and the Groundwater [include if applicable: , and the fixtures and personal property,] including rules of the Groundwater Authority. Seller will promptly notify Buyer of any noncompliance notice received by Seller.

A.13. **No Environmental Contamination.** Seller has not caused any environmental contamination of the Real Property or the Groundwater and has no knowledge of the existence of any environmental contamination of the Real Property or the Groundwater.

A.14. **No Hazardous Substances.** No Hazardous Substances are located on the Real Property or in the Groundwater or have been released into the environment or deposited, discharged, placed, or disposed of at, on, under, or near the Real Property or the Groundwater or transported to or from the Real Property [include if applicable: , except for aboveground fuel storage tanks and other substances used by Seller in its routine operation of the Real Property, all of which are used and stored on the Real Property in compliance with all applicable laws, rules, and regulations]. To Seller’s knowledge, no portion of the Real Property is being used or has been used at any previous time for the generation, storage, handling, or disposal of any Hazardous Substances at, on, under, or in the Real Property or Groundwater, or any portion thereof, nor is there any actual or threatened investigation, inquiry, proceeding, litigation, or claim of any kind by any person or governmental authority relating to such matters. “Hazardous Substances” means, but is not limited to, any substance that is or contains (a) any “hazardous substance” as now defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended (42 U.S.C. § 9601 et seq.), or regulations promulgated under CERCLA; (b) any “hazardous waste” as now defined in the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. § 6901 et seq.) or regulations promulgated under RCRA; (c) any substance regulated by the Toxic Substances Control Act (15 U.S.C. § 2601 et seq.); (d) gasoline, diesel fuel, or other petroleum
hydrocarbons; (e) asbestos and asbestos-containing materials in any form, whether friable or nonfriable; (f) polychlorinated biphenyls; (g) radon gas; and (h) any additional substances or materials (whether solid, liquid, or gas) that are classified, defined, or listed as pollutants, hazardous wastes, hazardous substances, hazardous materials, extremely hazardous wastes, regulated substances, toxic substances, or words of similar meaning or regulatory effect under the foregoing statutes or any other present federal, state, or local laws, statutes, ordinances, rules, regulations, and the like or the common law or any other applicable laws relating to the Real Property. “Hazardous Substances” includes, without limitation, any substance the presence of which on the Real Property (a) requires reporting, investigation, or remediation under the statutes cited above or (b) causes or threatens to cause a nuisance on any portion of the Real Property or adjacent property or poses or threatens to pose a hazard to the environment or the health or safety of persons on any portion of the Real Property or adjacent property.

A.15. No Underground Storage Tanks. To the best of Seller’s knowledge and belief, no underground storage tanks are located on the Real Property or were previously located on the Real Property and subsequently removed and filled [include if applicable: , except [specify]].

A.16. Oil, Gas, and Minerals. To the best of Seller’s knowledge, Seller owns all the oil, gas, and other mineral rights beneath the surface of the Real Property [include if applicable: , except [specify]].

A.17. No Other Representations or Warranties. Except as stated above [include if applicable: or in the notices, statements, and certificates set forth in Exhibit D] or in the Closing Documents, Seller makes no representations or warranties with respect to the Real Property [/or] the Groundwater Rights [include if applicable: , or the fixtures and personal property].
B. “As Is, Where Is”

This contract is an arm’s-length agreement between the parties. The purchase price was bargained on the basis of an “AS IS, WHERE IS” transaction and reflects the agreement of the parties that there are no representations or express or implied warranties, except those in this contract and the closing documents.

Seller disclaims all warranties and representations regarding the quantity, quality, or sustainability of groundwater that can be produced from the real property, or the availability now or in the future of permitting necessary for buyer to use the groundwater for any purpose. Seller further disclaims all warranties and representations with respect to the fitness of the groundwater rights and groundwater for any particular use or purpose.

[Include if applicable: Buyer acknowledges that the local groundwater district’s rules and regulations or permitting decisions may limit the volume of groundwater produced from the real property and the purpose or place of its use, as well as the location of any well, its depth, or rate of production.]

Buyer is not relying on any representations, disclosures, or express or implied warranties other than those expressly contained in this contract and the closing documents. Buyer is not relying on any information regarding the groundwater or the real property provided by any person, other than buyer’s own inspection and the representations and warranties contained in this contract and the closing documents.
The provisions of this section B. regarding the Real Property [and] the Groundwater Rights [include if applicable: ], and the fixtures and personal property] [will/will not] be included in the deed [include if applicable: and bill of sale] with appropriate modification of terms as the context requires.

C. Environmental Matters

AFTER CLOSING, BUYER RELEASES SELLER FROM LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY, INCLUDING LIABILITY (1) UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA), THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), THE TEXAS SOLID WASTE DISPOSAL ACT, OR THE TEXAS WATER CODE; OR (2) ARISING AS THE RESULT OF THEORIES OF PRODUCTS LIABILITY AND STRICT LIABILITY, OR UNDER NEW LAWS OR CHANGES TO EXISTING LAWS ENACTED AFTER THE EFFECTIVE DATE THAT WOULD OTHERWISE IMPOSE ON SELLERS IN THIS TYPE OF TRANSACTION NEW LIABILITIES FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY. [Include if applicable: THIS RELEASE APPLIES EVEN WHEN THE ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY RESULT FROM SELLER’S OWN NEGLIGENCE OR THE NEGLIGENCE OF SELLER’S REPRESENTATIVE.]

The provisions of this section C. regarding the Real Property and Groundwater will be included in the Groundwater Rights Warranty Deed [include if applicable: and bill of sale] with appropriate modification of terms as the context requires.

D. Buyer’s Representations to Seller

Buyer represents to Seller that the following are true and correct as of the Effective Date and will be true and correct on the Closing Date:
D.1. Authority. Buyer is a [specify type of organization] duly organized, validly existing, and in good standing under the laws of the state of [Texas/state] with authority to perform its obligations under this contract. This contract is binding on Buyer. This contract is, and all documents required by this contract to be executed and delivered to Seller at Closing will be, duly authorized, executed, and delivered by Buyer.

Include other representations from the buyer to the seller as needed.
Exhibit C

Seller’s Records

To the extent that Seller has possession or control of the following items pertaining to the Real Property or Groundwater [include if applicable: and the fixtures and personal property], Seller will deliver or make the items or complete, legible, and accurate copies of them available to Buyer by the deadline stated in paragraph A.7.:

Select items as agreed by the parties.

Records and Reports

governmental licenses, certificates, permits, and approvals, specifically including

Seller’s Permit

all environmental reports and other information regarding the environmental condition of the Real Property or Groundwater

current tax certificate showing taxes assessed and owed against the Real Property and any tax exemption, special use, or other valuation or exemption applicable to the Real Property

records of regulatory proceedings or violations regarding the Real Property or Groundwater

any survey of all or any portion of the Real Property

abstracts of title relating to the Real Property or Groundwater

other: [specify]

Groundwater

all documents related to the use or condition of Groundwater, including:
water well logs

drilling logs

hydrogeological information and reports

information on the location of existing water wells

information on plugged wells

soil reports

production records

other: [specify]

Leases, Licenses, Agreements, and Encumbrances

all leases, licenses, agreements, and encumbrances (including all amendments and exhibits) affecting title to or use of the Real Property [, or Groundwater [include if applicable: , or the fixtures and personal property] that have not been recorded in the real property records of the county or counties in which the Real Property is located


Exhibit D

Notices, Statements, and Certificates

Certain notices must be contained in the contract and others must be provided as separate notices. Please refer to the statutory requirements for each notice.

The notices, statements, and certificates (arranged by their application to particular transactions) that are listed below are [include as applicable: included in the sales contract [and]/attached for delivery to Buyer], and Buyer acknowledges receipt of the notices, statements, and certificates by executing this contract:

Include one or more of the following paragraphs as applicable and modify section headers and paragraph numbers as appropriate.

A. Consumer Notices

Notice of Cancellation. Notice concerning the purchaser’s three-day right of rescission under a contract to purchase real property if (1) the seller or the seller’s agent solicits the sale at a place other than the seller’s place of business, (2) the purchaser submits the purchase contract to the seller or the seller’s agent at a place other than the seller’s place of business, and (3) the consideration payable under the purchase contract exceeds $100; unless either (1) the purchaser is represented by a licensed attorney, (2) the transaction is negotiated by a licensed real estate broker, or (3) the transaction is negotiated at a place other than the purchaser’s residence by the person who owns the property, as described in chapter 601 of the Texas Business and Commerce Code.

If applicable, attach form 4-4 in this manual to the end of this exhibit D.

And/Or
B. Residential Transaction Notices


If applicable, attach the full text of Tex. Prop. Code § 5.008, with all relevant information filled in, to the end of this exhibit D.

And/Or

B.2. Notice of Membership in Property Owners Association. Notice concerning the sale of single-family residential property that is subject to membership in a property owners association, described in section 5.012 of the Texas Property Code.

If applicable, attach form 23-8 to the end of this exhibit D.

And/Or

B.3. Seller’s Disclosure of Location of Conditions under Surface of Unimproved Real Property. Seller’s disclosure of the location of pipelines under the surface of unimproved property to be used for residential purposes, described in section 5.013 of the Texas Property Code. A seller of unimproved property to be used for residential purposes shall provide the purchaser written notice disclosing the location of any transportation pipeline to the best of the seller’s belief and knowledge as of the date the notice is completed and signed by the seller. If the information required to be disclosed is not known by the seller, the seller shall indicate that fact in the notice. A seller is not required to give this notice if (a) the seller is obligated under the terms of the contract to furnish a title insurance commitment to the buyer before closing and (b) the buyer is entitled to terminate the contract if the buyer’s objections to title as permitted by the contract are not cured by the seller before closing.

No form is provided, because the sales contract portion of this form 16-1 satisfies the provisions for exemption from disclosure.
B.4. Notice of Obligation to Pay Public Improvement District Assessment. Seller’s disclosure that a single-family residential property is located within a public improvement district, described in section 5.014 of the Texas Property Code.

If applicable, attach form 4-5 to the end of this exhibit D.

B.5. Residential Contracts for Deed. Notice regarding the sale of property used or to be used as the purchaser’s residence if the contract does not provide for delivery of a deed from the seller to the purchaser within 180 days after the final execution of the contract.


If applicable, attach form 4-6 to the end of this exhibit D.

B.7. Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards. Lead-based paint warning statement, described in section 745.100 et seq. of title 40 of the Code of Federal Regulations.

If applicable, attach form 4-7 to the end of this exhibit D.

B.9. Notice Regarding Sale Subject to a Recorded Lien. Notice to the purchaser and each lienholder required under Texas Property Code section 5.016 that property being sold will be conveyed subject to a lien.

If applicable, attach form 4-8 to the end of this exhibit D.

And/Or

C. Condominium Transaction Notices


If applicable, attach form 24-8 to the end of this exhibit D.

And/Or

C.2. Condominium Resale Certificate. Resale certificate from the condominium owners association or waiver of resale certificate, described in section 82.157 of the Texas Property Code.

If applicable, attach condominium resale certificate promulgated by the Texas Real Estate Commission, available at https://www.trec.texas.gov/pdf/contracts/32-4.pdf, or form 24-7 (waiver of condominium resale certificate) to the end of this exhibit D.

And/Or

D. All Real Property Transaction Notices

D.2. **Notice to Purchaser Regarding Restrictive Covenants.** Notice of deed restrictions, described in section 212.155 of the Texas Local Government Code.

D.3. **Notice to Purchaser Regarding Coastal Area Property.** Notice regarding real property located adjacent to tidally influenced, submerged lands of Texas, described in section 33.135 of the Texas Natural Resources Code.

D.4. **Notice to Purchaser of Property Seaward of Gulf Intracoastal Waterway.** Notice concerning public easements to the public beach, described in section 61.025 of the Texas Natural Resources Code.

D.5. **Notice Regarding Possible Liability for Additional Taxes.** Notice of additional tax liability for vacant land that has been subject to a special tax appraisal method, described in section 5.010 of the Texas Property Code.
D.6. **Notice Regarding Possible Annexation.** Notice concerning the sale of property located outside the limits of a municipality that may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality, described in section 5.011 of the Texas Property Code.

If applicable, attach form 4-15 to the end of this exhibit D. And/or

D.7. **Notice for Unimproved Property in a Certificated Service Area of a Utility Service Provider.** Notice for property in a certificated service area of a utility service provider, described in section 13.257 of the Texas Water Code.

If applicable, attach form 4-16 to the end of this exhibit D. And/or

D.8. **Utility District Notice.** Notice concerning the bonded indebtedness of, or rates to be charged by, a utility or other special district, described in section 49.452 of the Texas Water Code, with the form of notice to be used being dependent on whether the property (a) is located in whole or in part within the extraterritorial jurisdiction of one or more home-rule municipalities but is not located within the corporate boundaries of a municipality, (b) is located in whole or in part within the corporate boundaries of a municipality, or (c) is not located in whole or in part within the corporate boundaries of a municipality or the extraterritorial jurisdiction of one or more home-rule municipalities.

If applicable, attach form 4-17 to the end of this exhibit D. And/or

D.9. **Notice to Purchaser of Property Located in Certain Annexed Water Districts.** Notice required by section 54.016(h)(4)(A) of the Texas Water Code when property being sold is in a water or sanitary sewer district that entered a contract with a city with a population
of 1.18 million or less under which the city is permitted to set rates in the district after annexation that are different from rates charged other residents of the city.

D.10. Notice to Purchaser that Property Is Located within the Area of the Alignment of a Transportation Project. Notice required under Texas Local Government Code section 232.0033 that all or part of the subdivision in which the property being sold is located is within the area of the alignment of a transportation project as shown in the final environmental decision document that is applicable to a future transportation corridor identified in a contract between the Texas Department of Transportation and a county under Texas Transportation Code section 201.619.

D.11. Certificates of Mold Remediation. Notice pursuant to section 1958.154 of the Texas Occupations Code, titled “Certificate of Mold Remediation; Duty of Property Owner,” requiring a property owner who sells property that has been issued a certificate of mold remediation pursuant to this section to deliver copies to the purchaser of each certificate of mold remediation issued for the property within the preceding five years.

D.12. Notice of Water Level Fluctuations. Notice to purchasers of residential or commercial property adjoining an impoundment of water, including a reservoir or lake, constructed and maintained under Texas Water Code chapter 11, that has storage capacity of at
least 5,000 acre-feet at the impoundment’s normal level, provided pursuant to Texas Property Code section 5.019.

If applicable, attach form 4-20 to the end of this exhibit D.
Exhibit E

Seller’s Permits

Attach seller’s permits issued by the groundwater authority.
Exhibit F

Seller’s Leases and Contracts to Be Terminated

List seller’s leases or other contracts affecting the groundwater rights or real property to be terminated before closing.
Exhibit G

Seller’s Leases and Contracts to Survive Closing

List seller’s leases or other contracts affecting the groundwater rights or real property that will survive closing.
Exhibit H

Groundwater Rights Warranty Deed

Attach groundwater rights warranty deed. See form 16-2 in this chapter.
Exhibit I

Seller Financing Addendum

A. **Promissory Note.** The promissory note ("Note") will be payable by Buyer ("Maker") to the order of Seller ("Payee") at the place designated by Payee. The Note may be prepaid in whole or in part at any time without penalty, premium, or restriction of any kind. Any prepayments are to be applied to the payment of the installments of principal last maturing, and interest will immediately cease on the prepaid principal. The lien securing payment of the Note will be inferior to any lien securing any superior note described in the contract. The Note will be payable as follows:

<table>
<thead>
<tr>
<th>Select one of the following.</th>
</tr>
</thead>
<tbody>
<tr>
<td>In one payment due [number] days after the date of the Note with interest payable [at maturity/monthly/quarterly/annually].</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Or</th>
</tr>
</thead>
</table>

| In [number] installments of $[amount] each [including interest/plus interest] beginning [number] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [date], when the entire balance of the Note will be due and payable. |

<table>
<thead>
<tr>
<th>Or</th>
</tr>
</thead>
</table>

| Interest only in [number] installments for the first [number] year[s] and thereafter in [number] installments of $[amount] each [including interest/plus interest] beginning [number] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [date], when the entire balance of the Note will be due and payable. |

<table>
<thead>
<tr>
<th>Or</th>
</tr>
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</table>

| Other: [specify]. |


B. **Deed of Trust and Security Agreement.** The deed of trust and security agreement ("Deed of Trust") securing the Note will provide for the following:

B.1. **Assumption without Consent.** The Property may be sold, transferred, or conveyed without the consent of Payee, provided any subsequent buyer or transferee assumes in writing for the benefit of Payee the obligation to pay the Note and to perform the covenants and agreements in the Deed of Trust in accordance with the terms of those instruments. No such assumption will release Maker from any liabilities or obligations arising under the Note or Deed of Trust. Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Property.

Or

B.1. **Assumption with Consent.** The Property may be sold, transferred, or conveyed provided that (a) any subsequent buyer assumes in writing for the benefit of Payee the obligation to pay the Note and to perform the covenants and agreements in the Deed of Trust in accordance with the terms of those instruments and (b) Maker or the subsequent buyer obtains prior written consent to such a sale from Payee. Consent will be based on the subsequent buyer’s credit history, with no change in interest rate or terms, and may not be unreasonably withheld, conditioned, or delayed. No such assumption will release Maker from any liabilities or obligations arising under the Note or Deed of Trust. If all or any part of the Property is sold, conveyed, leased for a period longer than three years, leased with an option to purchase, otherwise sold (including by contract for deed), or otherwise transferred or conveyed without prior written consent of Payee, Payee may, at Payee’s sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Any deed under threat or order of condemnation, any conveyance solely between makers, and the passage of title by
reason of death of a maker or by operation of law will not be construed as a sale or conveyance of the Property. [Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Property./The creation of a subordinate lien without the consent of Payee will be construed as a sale or conveyance of the Property, but any subsequent sale under a subordinate lien to which Payee has consented will not be construed as a sale or conveyance of the Property.]

B.1. Prohibition against Assumption. If all or any part of the Property is sold, transferred, or conveyed without the prior written consent of Payee, Payee may, at Payee’s sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Payee has no obligation to consent to any such sale or conveyance of the Property, and Payee is entitled to condition any consent on a change in the interest rate that will thereafter apply to the Note and any other change in the terms of the Note or Deed of Trust that Payee in Payee’s sole discretion deems appropriate. A lease for a period longer than three years, a lease with an option to purchase, or a contract for deed will be deemed to be a sale, transfer, or conveyance of the Property for purposes of this provision. Any deed under threat or order of condemnation, any conveyance solely between makers, and the passage of title by reason of death of a maker or by operation of law will not be construed as a sale or conveyance of the Property. The creation of a subordinate lien without the consent of Payee will be construed as a sale or conveyance of the Property, but any subsequent sale under a subordinate lien to which Payee has consented will not be construed as a sale or conveyance of the Property.

Select one of the following.

B.2. Without Escrow. Maker will furnish to Payee annually, before the taxes become delinquent, copies of tax receipts showing that all taxes on the Property have been
paid. Maker will furnish to Payee annually evidence of current paid-up insurance naming Payee as an insured.

B.2. *With Escrow.* Maker will, in addition to the principal and interest installments, deposit with Payee a pro rata part of the estimated annual ad valorem taxes on the Property and a pro rata part of the estimated annual insurance premiums for the improvements on the Property. These tax and insurance deposits are only estimates and may be insufficient to pay total taxes and insurance premiums. Maker must pay any deficiency within thirty days after notice from Payee. Maker’s failure to pay the deficiency will constitute a default under the Deed of Trust. If any superior lienholder on the Property is collecting escrow payments for taxes and insurance, this paragraph will be inoperative as long as payments are being made to the superior lienholder.

B.3. *Cross-Default.* Any act or occurrence that would constitute a default under the terms of any lien superior to the lien securing the Note will constitute a default under the Deed of Trust securing the Note.

C. *Recourse Provisions.* The Note and Deed of Trust are subject to the following provisions:

*Full Recourse.* Maker will have full recourse liability for repayment of the principal and interest of the Note and the performance of all covenants and agreements of Maker in the Deed of Trust.
No Recourse. Maker will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Maker in the Deed of Trust. The sole remedy of Payee or other holder of the Note in the event of a default by Maker under the Note or Deed of Trust will be to foreclose the liens and security interests granted in the Deed of Trust, and Payee or other holder of the Note will not be entitled to any personal judgment against Maker.

Partial Recourse. Except as set forth below, Maker will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Maker in the Deed of Trust. Except as set forth below, the sole remedy of Payee or other holder of the Note in the event of a default by Maker under the Note or Deed of Trust will be to foreclose the liens and security interests granted in the Deed of Trust, and Payee or other holder of the Note will not be entitled to any personal judgment against Maker. Maker will have full recourse liability for any loss or damage actually suffered or incurred by Payee or other holder of the Note by reason of—

1. taxes, assessments, and charges for labor, materials, or other amounts that if unpaid may create an encumbrance against the Property that accrue before foreclosure;

2. unpaid premiums for insurance required hereunder that accrue before foreclosure;

3. damage to the Property to the extent such damage would be otherwise covered by insurance required hereunder that was not maintained;

4. all rents, issues, profits, and income derived from the Property after a default occurs and not expended for debt service or operating expenses of the Property before foreclosure;
5. tenant security deposits for leases of the Property not forfeited by or refunded to the tenants;

6. any condemnation or insurance proceeds not paid or applied as required in the Deed of Trust;

7. damage to and depreciation of the Property beyond normal wear and tear caused by the negligence of Maker or the failure of Maker to keep the Property in good repair and condition;

8. the return of or reimbursement for personal property taken from the Property by or on behalf of Maker and not replaced with personal property of equal utility and value;

9. damages resulting from fraud or misrepresentation by Maker;

10. damages resulting from breach of any warranty of title by Maker;

11. interest on the Note from the date of default through foreclosure, payment, or settlement of the debt;

12. all interest on the Note during any bankruptcy proceeding of Maker and all reasonable attorney’s fees and expenses incurred as a result of Maker’s bankruptcy; and

13. all attorney’s fees and expenses incurred by Payee to collect any of the foregoing amounts.

Continue with the following.

Buyer/Maker

__________________________________________________________

Seller/Payee

__________________________________________________________
Exhibit J

Easement Agreement

Attach any easement agreement for the surface use of the real property. See form 16-3 in this chapter for a blanket easement agreement for groundwater rights.
Exhibit K

Memorandum of Contract

Attach a memorandum of contract if applicable. See form 16-16 in this chapter.
Exhibit L

Notice of Termination of Contract

Attach a notice of termination of contract if applicable. See form 16-17 in this chapter.
Groundwater Rights Warranty Deed
[For Use If Grantor Owns Both Groundwater and Surface Estate]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

Consideration:

See form 5-6 in this manual for consideration clauses.

Real Property: [describe real property from which the groundwater will be obtained]

Personal Property: All personal property rights relating to the Groundwater, together with the following items of personal property and fixtures: [list items] [include if applicable: and all of Grantor’s right, title, and interest in the [permit title] Permit No. [number], issued and approved by [name of groundwater authority] on [date]].

Groundwater: All of the underground water, percolating water, artesian water, and any other water from any and all depths and reservoirs, formations, depths and horizons beneath
the surface of the Real Property, excluding underflow or flow in a defined subterranean channel.

Groundwater Rights: (1) The Groundwater [include if applicable: save and except the Reserved Groundwater] and the right to test, explore for, drill for, develop, withdraw, capture, or otherwise beneficially use the Groundwater; (2) the right to use the surface of the Real Property for access to and to explore for, develop, treat, produce, and transport the Groundwater; and (3) all permits, licenses, or other governmental authorizations relating to any of the foregoing.

If the conveyance includes personal property, include the defined term from clause 5-9-12.

Reservations from Conveyance:

Select as appropriate.

None

Or

Grantor reserves the right to use the Groundwater in connection with its surface estate in the Real Property for the following purposes only: [state purposes for which the reserved groundwater may be used and any limit on the quantity of the reserved groundwater that the grantor may use including any limit on the number of wells that the grantor may drill or maintain].

To create additional reservations of title, include the appropriate clauses from form 5-7.

Exceptions to Conveyance and Warranty:

State “None” or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.

Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the
Groundwater Rights, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee’s heirs, successors, and assigns forever. Grantor binds Grantor and Grantor’s heirs and successors to warrant and forever defend all and singular the Groundwater Rights to Grantee and Grantee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof [include if applicable: , except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty].

If the conveyance includes personal property, include clause 5-9-13. If appropriate, include additional clauses like those suggested in form 5-9.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

If the deed imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.
Form 16-3

Blanket Easement Agreement for Groundwater Rights
[For Use with Groundwater Rights Warranty Deed (On Site)]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

[Grantor’s Lienholder:]

[Grantor’s Lienholder’s Mailing Address:]

Easement Property: [describe the property subject to the easement, which may be all or part of the real property]

Real Property: [describe the property in which the grantee has groundwater rights or attach field notes as exhibit A]

“Deed” means the Groundwater Rights Deed in which Grantor conveyed the Groundwater Rights to Grantee, recorded in the real property records of the county or counties in which the Real Property is located.
“Facilities” means aboveground, underground, surface or subsurface pipelines, electric transmission and communication lines and conduits, communication towers, pumps, monitor wells, water wells and well sites (whether production wells or test or exploratory wells), water storage tanks, water treatment facilities, pump station facilities, pumping plant facilities, buildings, machinery, equipment, meters, tangible personal property, roads, gates, bridges, culverts, erosion control structures, fences, cattle guards, and all other necessary, desirable, or convenient installations, appurtenances, facilities, and structures related thereto.

“Force Majeure” means act of war, civil disobedience, insurrection, act of terrorism, act of God, strike, prolonged drought, or prolonged or extreme weather conditions, or other event beyond the reasonable control of a party giving rise to a delay in performance that was not foreseeable and that could not have been avoided through the exercise of reasonable care.

“Groundwater” means all of the underground water, percolating water, artesian water, and any other water from any and all depths and reservoirs, formations, depths and horizons beneath the surface of the Real Property, excluding underflow or flow in a defined subterranean channel.

“Groundwater Rights” means the title to the Groundwater and other rights conveyed to Grantee in the Deed.

“Sanitary Control Easement” means an easement around the circumference of a well to prohibit uses that could cause contamination of the groundwater in accordance with the requirement for municipal water supply wells prescribed by the Texas Commission on Environmental Quality (TCEQ) under sections 290.38(73) and 290.41(c) of title 30 of the Texas Administrative Code and as provided in TCEQ Form 20698.

“Surface Water” means any water, flowing or stationary, naturally presenting itself above the top layer of soil, be that top layer of soil a lake or stream bed, whether the source of the water is from runoff, overflow, springs, or seeps.
“Water” means Groundwater or Surface Water.

Easement Purpose: The installation, construction, operation, use, maintenance, repair, modification, removal, replacement, and upgrade of Grantee’s Facilities on, from, and across the Easement Property as may be necessary or desirable in connection with the exploration, monitoring, testing, drilling, extracting, capturing, collection, development, pumping, treatment, withdrawal, production, transmission, transportation, storage, supply, and beneficial use of the Groundwater and other utilization of the Groundwater Rights [include if applicable: , including the transportation of groundwater obtained from other real property].

Consideration: This agreement is executed in connection with the Deed. Consideration paid under the Deed constitutes full consideration for the rights granted under this agreement [include if applicable: , except for payments required by the Surface Damage Payment Addendum].

Reservations and Exceptions from Conveyance: [describe any reservations and exceptions from the conveyance in this instrument]

Exceptions to Warranty: [describe any exceptions to the warranties in this instrument]

Grant of Easement: Grantor, for the Consideration and subject to the Reservations from Conveyance and Exceptions to Warranty, grants, sells, and conveys to Grantee and Grantee’s heirs, successors, and assigns an easement over, on, under, and across the Easement Property for the Easement Purpose, together with (1) a sanitary control easement around each well site sufficient to meet the requirements of law; (2) the right to use roads, driveways, and access ways, and the right of ingress and egress at all times across the [Real Property/Easement Property] for reasonable access to and use of the Easement Property and Grantee’s Facilities for the Easement Purpose; and (3) all and singular the rights and appurtenances thereto in any way belonging (collectively, the “Easement”), to have and
to hold the Easement to Grantee and Grantee’s heirs, successors, and assigns forever. Grantor binds Grantor and Grantor’s heirs, successors, and assigns to warrant and forever defend the title to the Easement in Grantee and Grantee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the Easement or any part thereof, except as to the Reservations from Conveyance and Exceptions to Warranty [include if applicable: , to the extent that such claim arises by, through, or under Grantor, but not otherwise].

Terms and Conditions: The following terms and conditions apply to the Easement granted by this agreement:

1. **Character of Easement.** The Easement is a nonexclusive blanket easement and is irrevocable, subject to the terms of this agreement. The Easement is for the benefit of Grantee and Grantee’s heirs, successors, and assigns who at any time own all or any portion of the Groundwater Rights conveyed to Grantee in the Deed.

2. **Duration of Easement.** The duration of the Easement is perpetual.

3. **Reservation of Rights.** Grantor reserves for Grantor and Grantor’s heirs, successors, and assigns the right to continue to use and enjoy the Easement Property for all purposes that do not interfere with or interrupt the use or enjoyment of the Easement by Grantee for the Easement Purpose, except as limited by the terms of this agreement.

4. **Improvement and Maintenance of Easement Property.** Improvement and maintenance of the Easement Property for the Easement Purpose will be at the sole expense of Grantee, except as otherwise provided by this agreement. Grantee has the right to eliminate any encroachments into the Easement Property. On written request by Grantee, Grantor will execute or join in the execution of easements for drainage, electricity, or utility facilities serving the Easement Property.
5. Use of Water. Grantee will have the Groundwater Rights provided in the Deed. The compensation paid by Grantee under the Deed [include if applicable: and the Surface Damage Payment Addendum] is the only compensation to which Grantor is entitled if Grantee’s exercise of its rights causes a decline in the Surface Water or Groundwater available to Grantor.

6. Taxes. Grantor will be responsible for paying all ad valorem property taxes or assessments assessed against the Easement Property (“Taxes”) before delinquency. If Grantor fails to do so, Grantor authorizes Grantee to pay the Taxes, and on such payment, (a) to be subrogated to all liens held by the taxing authority against the Easement Property as security for the Taxes paid, (b) to have the right to set off amounts paid against amounts owed to Grantor under this agreement, and (c) to seek reimbursement of amounts paid in accordance with applicable law. Grantee will have the right, but not the obligation, to pay the Taxes. If Grantee pays the Taxes, at Grantee’s request Grantor will promptly take the action required by section 32.06 of the Texas Tax Code to authorize a transfer of the tax lien to Grantee. Grantee will timely pay any taxes assessed by any taxing authority against Grantee’s Facilities or easement estate in the Easement Property as well as any fees or costs charged by any Groundwater Conservation District or other regulatory body for Grantee’s development, pumping, transportation, or use of the Groundwater.

7. Addenda. The following [is/are] attached to and [is/are] a part of this agreement:

Select as applicable.

Easement Location Addendum

Surface Damage Payment Addendum

Surface Use Restrictions Addendum
8. Abandonment of Facilities. The occurrence of abandonment is to be determined solely by Grantee or by a court of competent jurisdiction. On abandonment of any easement or portion of an easement granted on the Easement Property for the production or transportation of water, Grantee will have one year in which to remove the Facilities, at Grantee’s option or in accordance with any written agreement regarding removal between Grantor and Grantee, and to restore the site to its approximate original condition to the extent reasonably practicable. If Grantee does not remove the Facilities, Grantor will become the owner of the Facilities, and Grantee will execute and deliver to Grantor all documents reasonably necessary to indicate that the Facilities have been abandoned and that title to the abandoned Facilities and easements and, to the extent owned by Grantee, all communications lines, electric power lines, poles, and appurtenances serving the abandoned Facilities have reverted to Grantor.

9. Cooperation. Grantor will cooperate with Grantee as reasonably necessary to enable Grantee to obtain any consents or permits necessary for Grantee to withdraw or produce the Groundwater, provided that Grantor will not be obligated to incur any costs thereby. Grantor and Grantee will cooperate with one another in the use of the Real Property, the Easement Property, and the Groundwater in order to effectuate the terms of this agreement.

10. Modifications. This Easement Agreement may be modified or terminated by the written agreement of Grantor and Grantee, provided, however, that if the Easement Property is divided into two or more tracts, this agreement may be modified or terminated as to any tract by Grantee and the owner of that portion of the Easement Property at the time the modification or termination is requested, without the requirement for the consent of any owner of any other portion of the Easement Property. Such modification or termination will be binding on and affect only the rights of Grantee and the owner of the portion of the Easement Property who enters into the modification or termination of this agreement with regard to that owner’s tract and will not affect the terms and provisions of this agreement as they apply to any other portion of the Easement Property.
11. *Equitable Rights of Enforcement.* This Easement may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the parties to or those benefited by this agreement, provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies provided by this agreement or available at law or in equity. All rights and remedies provided by this agreement or available at law or in equity are cumulative, not exclusive, and may be exercised successively or concurrently.

12. *Attorney’s Fees.* If any party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and other costs.

13. *Force Majeure.* Any provision in this agreement to the contrary notwithstanding, if a party is delayed in the performance of an obligation under this agreement due to an event of Force Majeure, that party will be given an extension of one day for each day in which the party was unable to perform its obligation due to the event of Force Majeure.

14. *Binding Effect.* This agreement binds and inures to the benefit of the parties and their respective heirs, successors, and assigns. The covenants and conditions stated in this agreement run with the land.

15. *Choice of Law.* This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Easement Property is located.
16. **Counterparts.** This agreement may be executed in any number of counterparts with the same effect as if all signatory parties had signed the same document. All counterparts will be construed together and will constitute one and the same instrument.

17. **Waiver of Default.** It is not a waiver of or consent to default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

18. **Further Assurances.** Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement. At the request of Grantee, Grantor will execute a separate Sanitary Control Easement for each of Grantee’s wells in the form attached as Exhibit B or on another form supplied by Grantee meeting TCEQ requirements.

19. **Indemnity.** Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney’s fees, expenses, or claims attributable to (a) breach or default of any provision of this agreement by the indemnifying party or (b) the negligent acts or omissions of the indemnifying party, its employees, agents, representatives, or persons with whom it contracts for the performance of activities on the Easement Property.

20. **Entire Agreement.** This agreement, all attached exhibits and addenda, and the Deed constitute the entire agreement of the parties concerning the grant of the Easement by Grantor to Grantee. There are no representations, warranties, agreements, or promises pertaining to the grant of the Easement that are not in those documents. All addenda and exhibits to this agreement are incorporated herein.

21. **Legal Construction.** If any provision in this agreement is for any reason unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among
the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. Article and section headings in this agreement are for reference only and are not intended to restrict or define the text of any section. This agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

22. Notices. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein. If the Easement Property is divided into two or more tracts, Grantee will be deemed to have complied with any notice requirement under this agreement if Grantee provides written notice only to the owners of the tracts directly affected by the matter for which notice is being given.

23. Recitals. Any recitals in this agreement are represented by the parties to be accurate and constitute a part of the substantive agreement.

24. Dispute Resolution. If a dispute arises between the parties with regard to the rights or obligations of the parties as set forth in this agreement, the aggrieved party will provide written notice of its complaint or claim to the other party with sufficient specificity to enable the recipient to determine the cause and nature of the complaint. On receipt of the notice, the receiving party will have a reasonable period of time, not to exceed thirty days, in which to respond in writing to the other party. If the parties are not able to resolve the issues to their mutual satisfaction through negotiation within thirty days after the commencement of
negotiations, or within such longer period as the parties may agree on, the parties agree to mediate the matter in good faith before instituting a suit for damages or exercising any right to terminate expressly provided by this agreement.

25. **Time.** Time is of the essence. Unless otherwise specified, all references to “days” mean calendar days. Business days exclude Saturdays, Sundays, and legal public holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or legal public holiday, the date for performance will be the next following regular business day.

26. **Partial Releases.** Grantor and Grantee acknowledge that Grantor may need portions of the Easement Property released from this Blanket Easement from time to time in order to use, sell, or finance portions of the Easement Property. If, before the installation of Facilities by Grantee, Grantor makes a written request for a partial release of any portion of this Blanket Easement to Grantee, Grantee will, within forty-five days after receipt of the request, provide Grantor with written consent to the partial release or with proposed plans showing Grantee’s intended use of the area. If the request is granted, Grantor, at Grantor’s expense, will provide the partial release, in a mutually acceptable form, and the field-note description of the area to be released. Grantee may condition the partial release on Grantor’s conveyance of easement rights to replace those being released. If Grantee fails to respond to Grantor in writing within the required time, Grantee will be deemed to have consented to the partial release and will execute the partial release of the area when presented by Grantor. If Grantee fails to do so in a timely manner, Grantor will have the right to execute the partial release on behalf of Grantee and to record it in the real property records as evidence of the release.
27. **Relocation of Facilities.** After the installation of Facilities by Grantee, Grantor will have the right to require Grantee to execute a partial release of the easement rights granted under this Easement Agreement and to relocate Facilities installed in an easement area if all the following conditions are met: (a) Grantor pays for all surveying and document preparation costs for the area to be released and easements required to be provided by Grantor; (b) Grantor provides a comparable replacement easement to Grantee, at Grantor’s expense, for the easement to be released and all additional easements on Grantor’s or neighboring properties necessary for the operation of Grantee’s relocated Facilities, in form and content reasonably acceptable to Grantee; (c) the proposed relocation will not materially increase the cost of operating Grantee’s Facilities or result in a material adverse change in the efficiency or productivity of Grantee’s Facilities; (d) Grantor pays for the reasonable costs arising from the relocation of Grantee’s Facilities, including, to the extent applicable, site preparation work, making additions or alterations to the Facilities in order to connect them to Grantee’s remaining Facilities, hydrological investigations in connection with determining water quality and quantity, drilling replacement wells, the construction of new roads if necessary to provide reasonable access to the new easement or Facilities, plugging wells in accordance with applicable legal requirements, and the removal of debris; and (e) reimbursement to Grantee for any loss of profits or increase in operating costs during the period in which the relocation of the Facilities occurs and that result from the relocation activities. To initiate the process, Grantor must make written request to Grantee for the relocation, identifying with reasonable particularity the easement or easement areas to be released. Grantee will have a reasonable period of time, not to exceed ninety days, in which to make an initial evaluation and response to Grantor regarding the cost and feasibility of relocating Grantee’s Facilities. If Grantee believes that the proposed relocation will not meet the conditions of (c) above, or that Grantor will not be able to provide suitable replacement easements or is not financially able to pay the costs of relocation, Grantee will notify Grantor of the basis for its determination. If Grantor does not agree with Grantee, Grantor will have the right to pursue dispute resolution
as provided in paragraph 24. above. If the parties are able to reach an agreement on the terms for the relocation, they will commit those terms to writing. Grantee may require Grantor to escrow funds, furnish a letter of credit, or provide other reasonable guarantee of Grantor’s financial ability to perform its obligations as a condition to entering into the relocation agreement.

Continue with the following.

[Name of grantor]

[Name of grantee]

If applicable, include the following consent and subordination or the separate lienholder consent and subordination at form 16-7 in this chapter.

Consent and Subordination by Lienholder

Lienholder, as the holder of [a] lien[s] on the Real Property, consents to the above grant of an Easement, including the terms and conditions of the grant, and Lienholder subordinates its lien[s] to the rights and interests of Grantee, so that a foreclosure of the lien[s] will not extinguish the rights and interests of Grantee.

[Name of lienholder]

Include acknowledgment.
Exhibit A

Real Property

Describe the property in which the grantee has groundwater rights or attach field notes.
Exhibit B

Sanitary Control Easement

[TCEQ Form 20698]

Texas Commission on Environmental Quality

SANITARY CONTROL EASEMENT

DATE:

GRANTOR(S):

GRANTOR’S ADDRESS:

GRANTEE:

GRANTEE’S ADDRESS:

SANITARY CONTROL EASEMENT: Purpose, Restrictions, and Uses of Easement:

1. The purpose of this easement is to protect the water supply of the well described and located below by means of sanitary control.

2. The construction, existence, and/or operation of the following within a 150-foot radius of the well described and located below are prohibited: septic tank or sewage treatment perforated drainfields; areas irrigated by low dosage, low angle spray on-site sewage facilities; absorption beds; evapotranspiration beds; abandoned, inoperative or improperly constructed water wells of any depth; underground petroleum and chemical storage tanks or liquid transmission pipelines; sewage treatment plants; sewage wet wells; sewage pumping stations; drainage ditches which contain industrial waste discharges or wastes from sewage treatment systems; animal feed lots; solid waste disposal sites, landfill and dump sites; lands on which sewage plant or septic tank sludge is applied; lands irrigated by sewage plant efflu-
ent; military facilities; industrial facilities; wood-treatment facilities; liquid petroleum and petrochemical production, storage, and transmission facilities; Class 1, 2, 3, and 4 injection wells; pesticide storage and mixing facilities; and all other constructions or operations that could pollute the groundwater sources of the well that is the subject of this easement. For the purpose of this easement, improperly constructed water wells are those wells which do not meet the surface and subsurface construction standards for a public water supply well.

3. The construction, existence and/or operation of tile or concrete sanitary sewers, sewer appurtenances, septic tanks, storm sewers, cemeteries, and/or the existence of livestock in pastures is specifically prohibited within a 50-foot radius of the water well described and located below.

4. This easement permits the construction of homes or buildings upon the Grantor’s property, and farming and ranching operations, as long as all items in Restrictions Nos. 2 and 3 are recognized and followed.

The Grantor’s property subject to this Easement is described in the documents recorded at: Volume [number], Pages [number] of the real property records of [county] County, Texas.

PROPERTY SUBJECT TO EASEMENT:

All of that area within a 150 foot radius of the water well located [number] feet at a radial of degrees from the [specify] corner of Lot [number], of a Subdivision of Record in Book [number], Page [number] of the County Plat Records, [county] County, Texas.

TERM:

This easement shall run with the land and shall be binding on all parties and persons claiming under the Grantor(s) for a period of two years from the date that this easement is
recorded; after which time, this easement shall be automatically extended until the use of the subject water well as a source of water for public water systems ceases.

ENFORCEMENT:

Enforcement of this easement shall be proceedings at law or in equity against any person or persons violating or attempting to violate the restrictions in this easement, either to restrain the violation or to recover damages.

INVALIDATION:

Invalidation of any one of these restrictions or uses (covenants) by a judgment or court order shall not affect any of the other provisions of this easement, which shall remain in full force and effect.

FOR GOOD AND VALUABLE CONSIDERATION, the receipt and sufficiency of which are hereby acknowledged, the Grantor does hereby grant and convey to Grantee and to its successors and assigns the sanitary control easement described in this easement.

[Name of grantor]
Form 16-4

Easement Location Addendum

Date:

Grantor:

Grantee:

Easement Agreement:

Easement Property:

Real Property:

Easement Location Period:

This Easement Location Addendum modifies the Easement Agreement. Terms defined in the Easement Agreement have the same meaning in this Addendum. The terms of the Easement Agreement that are not modified by this Addendum remain in effect.

Although the Easement Agreement initially grants a blanket Easement over the Easement Property, it is the intention of the parties that the easement location be restricted to (1) the areas to be occupied by Grantee’s Facilities, including roads to be constructed by Grantee, and (2) roads, driveways, and access ways to the Easement Property and Grantee’s Facilities.

At least [number] days before the expiration of the Easement Location Period, Grantee will provide Grantor with a map or sketch showing the areas to be occupied by Grantee’s Facilities, which may include areas to be used immediately and those reserved for future expansion. Grantor may request changes in location of any of the Facilities within [number]
days after Grantor’s receipt of Grantee’s proposal. Grantee will accommodate any requested change that does not materially increase Grantee’s construction or operation costs or adversely affect the use or efficiency of Grantee’s Facilities. Grantee, at its expense, will provide a field-note description of the area to be occupied by its Facilities at least [number] days before the expiration of the Easement Location Period, and the parties will execute and record an amendment to the Easement Agreement that identifies the Easement Property as (1) the area or areas described by field notes to be occupied by Grantee’s Facilities, together with any additional area needed as a sanitary control site around each well in order to meet the requirements of law for the protection of water produced from the well, and (2) roads, driveways, and access ways over the [Real Property/Easement Property] to access the Easement Property and Grantee’s Facilities. The amendment may restrict the types of uses allowed in each identified easement location. [Include if applicable: The amendment will also provide Grantee with the right to use reasonable portions of the Real Property adjacent to or in the vicinity of the Easement Property as needed for construction staging areas, parking, and storing vehicles and equipment during construction or maintenance activities.]

Grantee’s easement rights in the areas to be occupied by its Facilities are exclusive. Grantee’s easement rights in roads, driveways, and access ways are nonexclusive. [Include if applicable: After Grantee has [identified the areas to be occupied by its Facilities/provided field notes for the areas to be occupied by its Facilities], paragraph 26. of the Easement Agreement will no longer apply.]

If Grantee fails to identify the location of its Facilities and to provide a field-note description of the area or areas to be occupied by its Facilities as provided in this Addendum, and the failure is not cured through the dispute resolution procedure set out in the Easement Agreement, Grantor may terminate the Easement Agreement as to any Easement Property on which Grantee has not installed Facilities or provided a field-note description by giving
Grantee written notice of termination. Grantee authorizes Grantor to execute and record a release evidencing that termination.

__________________________________________________________________________________________________________________________ ...

__________________________________________________________________________________________________________________________ ...

[Name of grantor]

__________________________________________________________________________________________________________________________ ...

[Name of grantee]

Include acknowledgment.
Surface Damage Payment Addendum

Date:

Grantor:

Grantee:

Easement Property:

Real Property:

Easement Agreement:

This Surface Damage Payment Addendum modifies the Easement Agreement. Terms defined in the Easement Agreement have the same meaning in this Addendum. The terms of the Easement Agreement that are not modified by this Addendum remain in effect.

1. **Damage Payments.** Grantee agrees to pay Grantor, in addition to any other consideration paid for the Easement, the following amounts as damages for use of the Easement Property:

<table>
<thead>
<tr>
<th>Item for Which Payment Is Due</th>
<th>Amount of Payment Due</th>
<th>Time Payment Due</th>
</tr>
</thead>
<tbody>
<tr>
<td>Water well location other than test well or monitoring wells (on area not larger than 1 acre), compensation will be $[amount] for each additional acre occupied</td>
<td>$[amount] per location</td>
<td>Before drilling or construction</td>
</tr>
</tbody>
</table>

The following are examples of possible damage provisions.
### Form 16-5  Surface Damage Payment Addendum

<table>
<thead>
<tr>
<th>Item Description</th>
<th>Amount Type</th>
<th>Before Constructing Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sanitary Control Easement</td>
<td>$[amount] per location</td>
<td>Before drilling or construction</td>
</tr>
<tr>
<td>Pumping plant sites, including tank batteries and related Facilities (on area not larger than [number] acres), compensation will be $[amount] for each additional acre occupied; if water wells and pumping plant sites are installed at the same location, Grantee will pay separate damages for each</td>
<td>$[amount] per location</td>
<td>Before construction</td>
</tr>
<tr>
<td>Aboveground pipeline appurtenances, including tank batteries if not on well site or pumping plant site (except for signs required by law) (on area not larger than [number] acres), compensation will be $[amount] for each additional acre occupied</td>
<td>$[amount] per location except $[amount] per air valves</td>
<td>Before construction</td>
</tr>
<tr>
<td>Use of existing roads on Real Property</td>
<td>$[amount] per [rod/linear foot]</td>
<td>Before construction of Facilities</td>
</tr>
<tr>
<td>Pipelines (underground)</td>
<td>$[amount] per [rod/linear foot]</td>
<td>Before beginning of ditching for pipelines</td>
</tr>
<tr>
<td>New roads constructed by or on behalf of Grantee</td>
<td>$[amount] per [rod/linear foot]</td>
<td>Before beginning construction of road</td>
</tr>
<tr>
<td>Electric or communications lines placed on Real Property</td>
<td>$[amount] per [rod/linear foot]</td>
<td>Before construction of Facilities</td>
</tr>
<tr>
<td>Fences—removal</td>
<td>$[amount] per [rod/linear foot]</td>
<td>Before beginning construction</td>
</tr>
<tr>
<td>Fences—new</td>
<td>$[amount] per [rod/linear foot]</td>
<td>Before beginning construction</td>
</tr>
</tbody>
</table>
2.  *Injury to Grantor’s Property.*  Grantee will be liable and will promptly provide reasonable compensation to Grantor for any damage to Grantor’s improvements, livestock, or real or personal property caused by the negligence of Grantee, its employees, agents, invitees, representatives, or contractors while performing services or acts on the Real Property. The amount of damages will be determined in accordance with the provisions of paragraph 24. of the Easement Agreement.

3.  *Injury to Grantee’s Property.*  Grantor will be liable and will compensate Grantee for any damage to Grantee’s Facilities or real or personal property caused by the negligence of Grantor, its employees, agents, invitees, representatives, or contractors. The amount of damages will be determined in accordance with the provisions of paragraph 24. of the Easement Agreement.

4.  *Interest.*  Amounts owing under this agreement that are not paid when due will accrue interest at the highest interest rate allowed by applicable law.

[Name of grantor]

[Name of grantee]

Include acknowledgment.
Form 16-6

Surface Use Restrictions Addendum

Date:

Grantor:

Grantee:

Real Property:

Easement Property:

Facilities Construction Period:

Easement Agreement:

“Residence Unit” means a residential structure, together with barns, sheds, and associated outbuildings.

“Hazardous Substances” means, but is not limited to, any substance that is or contains (1) any “hazardous substance” as defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended (42 U.S.C. § 9601 et seq.), or regulations promulgated under CERCLA; (2) any “hazardous waste” as now defined in the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. § 6901 et seq.) or regulations promulgated under RCRA; (3) any substance regulated by the Toxic Substances Control Act (15 U.S.C. § 2601 et seq.); (4) gasoline, diesel fuel, or other petroleum hydrocarbons; (5) asbestos and asbestos-containing materials in any form, whether friable or nonfriable; (6) polychlorinated biphenyls; (7) radon gas; and (8) any additional substances or materials (whether solid, liquid, or gas) that are classified, defined, or listed as pollutants, hazardous wastes, hazardous substances, hazardous materials, extremely hazardous
wastes, regulated substances, toxic substances, or words of similar meaning or regulatory effect under the foregoing statutes or any other present federal, state, or local laws, statutes, ordinances, rules, regulations, and the like or the common law or any other applicable laws relating to the Real Property. “Hazardous Substances” includes, without limitation, any substance the presence of which on the Real Property (1) requires reporting, investigation, or remediation under the statutes cited above or (2) causes or threatens to cause a nuisance on any portion of the Real Property or adjacent property or poses or threatens to pose a hazard to the environment or the health or safety of persons on any portion of the Real Property or adjacent property.

This Surface Use Restrictions Addendum modifies the Easement Agreement. Terms defined in the Easement Agreement have the same meaning in this Addendum. The terms of the Easement Agreement that are not modified by this Addendum remain in effect.

The following are samples of possible surface use restrictions.

1. Grantee agrees that it will—

   a. provide Grantor with a set of its plans for the Facilities at least sixty days before the commencement of initial construction of the Facilities;

   b. provide Grantor with at least thirty days’ notice before the commencement of the initial construction of its Facilities;

   c. complete initial construction of its Facilities before the expiration of the Facilities Construction Period;

   d. construct, maintain, and operate all Facilities in a good and workmanlike manner, in good working order, and in accordance with all applicable laws and the terms of the Easement Agreement;
e. remove from the Easement Property and properly dispose of all trash and debris caused by Grantee, including any fencing, brush, and trees taken down by Grantee and unused materials, parts, tools, and equipment after construction or maintenance;

f. use existing roads on the Easement Property when feasible for ingress and egress;

g. provide Grantor, on request, with reasonable access to or copies of Grantee’s records relating to Grantee’s Facilities on the Easement Property, including permits, well logs, test results, and the location of underground Facilities;

h. restore and revegetate any area disturbed by Grantee in connection with its activities on the Easement Property to approximately the condition existing immediately before the commencement of the activity;

i. promptly repair, remove, or replace any damaged or destroyed Facility;

j. require its employees, agents, representatives, and contractors to comply with the provisions of this Addendum;

k. pay its proportionate share for upkeep and maintenance of roads used by Grantor and Grantee;

l. promptly repair any damage to roads caused by Grantee, its employees, agents, representatives, or contractors;

m. comply with any reasonable rules established by Grantor for the use of the Easement Property during Grantee’s activities;

n. conduct its operations on the Easement Property in accordance with all applicable laws;
o. comply with the Construction Provisions set out below; and

p. comply with all rules and regulations of any governmental entity, including a local groundwater conservation district, with jurisdiction over the Real Property.

2. Grantee will not—

a. own or use in any manner any Surface Water located on the Easement Property not pumped from Grantee’s Facilities;

b. construct a well within [number] feet of any Residence Unit existing on the Easement Property on the date of the Easement Agreement, or within [number] feet of any Residence Unit constructed on the Easement Property after the date of the Easement Agreement, or within [number] feet of an existing groundwater well, without the written consent of Grantor;

c. hunt or fish [include if applicable: or carry or allow possession of any firearms, explosives, or incendiary devices] on the Real Property;

d. extract or mine any caliche or gravel from the Real Property for building or road construction without a written agreement with Grantor;

e. store vehicles on the Easement Property, except in permitted staging areas when construction activities are in progress;

f. store any equipment or materials on the Easement Property that Grantee does not intend to use within the next six months for construction or maintenance on the Easement Property;
g. obstruct Grantor’s access to its buildings, equipment, crops, or livestock or unreasonably interfere with Grantor’s use of or operations on the Easement Property;

h. cause or permit contamination of the Easement Property or the Groundwater by Hazardous Substances;

i. cut or damage trees on the Easement Property, unless reasonably necessary for Grantee’s use of the Easement; or

j. construct a well or produce groundwater without first securing all necessary authorizations, including permits from any local groundwater conservation district with jurisdiction.

3. Grantor agrees that it will—

a. include in any mineral lease or any grant or reservation of mineral rights or interests, and any amendment to an existing mineral lease or reservation, a provision prohibiting the grantee from using Groundwater from the Real Property for any purpose other than drilling, completion, recompletion, reworking, remediation, and revegetation and from injecting or disposing of saltwater on the Real Property;

b. require its employees, invitees, agents, representatives, grantees, assigns, and contractors to comply with the provisions of this Addendum;

c. conduct its activities and operations on the Easement Property in accordance with applicable laws;

d. promptly repair any damage caused by Grantor to roads used by Grantee, its employees, invitees, agents, representatives, or contractors; and
e. pay its proportionate share for upkeep and maintenance of roads used by
Grantor and Grantee.

4. Grantor will not—

a. create Groundwater-fed or -maintained lakes or ponds on the Easement Property, other than reasonable livestock drinking tanks or ponds;

b. cause or permit contamination of the Easement Property or the Groundwater by Hazardous Substances;

c. construct or permit construction by a third party of any improvements or utilities within \([\text{number}]\) feet of the Easement Property without Grantee’s prior written consent; or

d. contract for or allow the use of Groundwater by any third party without Grantee’s prior written consent.

5. Construction Provisions. Unless otherwise agreed to by the parties in writing:

a. Any new roads built by Grantee will not be wider, on average, than \([\text{number}]\) feet.

b. Grantee will construct new roads to its Facilities with a top course of crushed caliche covering the entire length and width. Roads constructed by Grantee for access to monitoring wells or for temporary use may be constructed to lesser standards agreed on by the parties.

c. Pipeline easements that are not blanket easements will be no greater than \([\text{number}]\) feet in width on each side of the center line of the pipeline.
d. If the Easement Property is not a blanket easement, Grantee will have the right to use reasonable portions of the Real Property adjacent to or in the vicinity of the Easement Property as needed for construction staging areas, parking, and storing vehicles and equipment during construction or maintenance activities.

e. All pipelines and underground Facilities will be buried to a depth of at least [number] inches below the surface of the ground.

f. Grantee will use reasonable efforts to construct and maintain its Facilities in a manner that does not cause or contribute to erosion of the Easement Property or damage to Grantor’s livestock.

g. Grantee will restore any fencing that it temporarily removes for the purpose of constructing improvements and will take reasonable measures to contain livestock while the fencing is down or being restored.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of grantor]

[Name of grantee]

Include acknowledgment.
Lienholder Consent and Subordination to Easement Agreement

Date:

Holder of Note and Lien:

Holder’s Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

Note and Lien Are Described in the Following Documents: [include recording information]

Easement Holder:

Easement Holder’s Mailing Address:

Easement Agreement: The Easement Agreement dated [date], executed by Borrower to the Easement Holder recorded in [recording data] of the real property records of [county] County, Texas.

Real Property:

For value received, Holder of Note and Lien hereby consents to the Easement Agreement. Holder of Note and Lien subordinates the lien referenced above and all liens held by it
regardless of how created or evidenced to the rights and interests of the Easement Holder and its successors and assigns. Foreclosure of the lien or liens will not extinguish the Easement.

[Name of lienholder]

By:

[Name of representative]

[Title]

Include acknowledgment.
Form 16-8

Partial Release of Lien
[Water Rights On-Site Production]

Date:

Holder of Note and Lien:

Holder’s Mailing Address:

Owner of Groundwater Rights:

Owner’s Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

Note and Lien Are Described in the Following Documents: [include recording information]

“Groundwater” means all of the underground water, percolating water, artesian water, and any other water from any and all depths and reservoirs, formations, depths and horizons beneath the surface of the Real Property, excluding underflow or flow in a defined subterranean channel.

“Reserved Groundwater” means the right of the Borrower to use Groundwater in, on, and under the Real Property as more fully set out and described in the Groundwater Rights
Warranty Deed from Borrower to Owner of Groundwater Rights of even date, recorded in the county or counties where the Real Property is located.

“Real Property” means the following: [describe real property].

“Property to Be Released from Lien” means all the Groundwater now or in the future located in, on, or under the Real Property, excepting and excluding the Reserved Groundwater, together with all associated rights related to the Groundwater, including but not limited to the right to capture, explore for, drill for, develop, withdraw, produce, transport, or otherwise beneficially use the Groundwater; the nonexclusive right to use as much of the surface of the Real Property as is reasonably necessary for the exercise of the associated rights, including the right of ingress and egress; and all permits, licenses, or other governmental authorizations relating to any of the foregoing, including rights under any permit issued by the applicable governmental authority.

For value received, Holder of Note and Lien releases only the Property to Be Released from Lien and from all liens held by Holder of Note and Lien, without regard to how they were created or evidenced.

When the context requires, singular nouns and pronouns include the plural.

[Name of lienholder]

By:

[Name of representative]

[Title]

Include acknowledgment.
Form 16-9

Groundwater Rights Sales Contract
[For Sale of Permitted Groundwater Rights for Off-Site Production]

This contract to buy and sell groundwater rights is between Seller and Buyer as identified below and is effective on the date (“Effective Date”) of the last of the signatures by Seller and Buyer as parties to this contract and by [Title Company/Escrow Agent] to acknowledge receipt of the Earnest Money. Buyer must deliver the Earnest Money to [Title Company/Escrow Agent] and obtain a signature acknowledging receipt of the Earnest Money before the Earnest Money Deadline provided in paragraph A.1. below for this contract to be effective. If the Earnest Money is paid by check and payment on presentation is refused, Buyer is in default.

Seller: [include the names of all persons owning the groundwater]

Address:

Phone:

E-mail:

Type of entity:

Seller’s Attorney:

Law firm:

Address:

Phone:

E-mail:
Seller’s Broker:

Brokerage firm:

Address:

Phone:

E-mail:

Buyer:

Address:

Phone:

E-mail:

Type of entity:

Buyer’s Attorney:

Law firm:

Address:

Phone:

E-mail:

Buyer’s Broker:

Brokerage firm:

Address:
Phone:

E-mail:

[Title Company/Escrow Agent]: [identify title company, or if title insurance will not be obtained, identify person who will act as escrow agent]

Address:

Phone:

E-mail:

[Underwriter:]

Groundwater Authority: [list any groundwater conservation districts or other groundwater authority with jurisdiction over the real property]

Seller’s Permit: [describe and provide all of seller’s permits, e.g., [permit title] Permit No. [number], issued and approved by [name of groundwater authority] on [date].]

Earnest Money: $[amount]

Real Property: The Real Property described in Exhibit A.

Groundwater Rights: Seller’s legal title and perpetual right to withdraw up to [number] acre-feet per year of Groundwater from the [name] Aquifer permitted [irrigation/industrial/[and/or] municipal] groundwater (the “Groundwater”) relating to the Real Property. The Groundwater Rights include all of the real and personal property rights, appurtenances, hereditaments, licenses, and contracts, if any, related to or pertaining to the Groundwater, including Permit[s] No[s]. [number[s]] [include if recorded: ], recorded in Volume [number], Page [number], of the Official Public Records of [county] County,
Texas] (the “Permit”), as amended or modified, as applicable, insofar as it pertains to the Groundwater Rights, including, but not limited to—

1. all of the real and personal property rights, appurtenances, authorities, licenses, consents, and contracts, if any, relating to or pertaining to the Groundwater, which will also include all common-law property rights in and to the Groundwater as well as those rights or interests that now or in the future may be useful or necessary to withdraw or otherwise beneficially use the Groundwater Rights (the “Appurtenant Rights”);

2. all permit rights (including the right in and to the Permit that relates to the Groundwater Rights) allowing for possession, withdrawal, or use of the Groundwater Rights (the “Permit Rights”); and

3. all other rights to withdraw and beneficially use the Groundwater, Appurtenant Rights, Permit, or Permit Rights, together with all modifications, amendments, renewals, extensions, or successor or substitute permits relating to any of the above-described items.

Purchase Price:

$[amount], which is determined on the basis of $[amount] per acre-foot of Groundwater.

Cash portion:

Seller-financed portion (principal amount of note):

Interest rate:

Maturity date:
Payment schedule:

See exhibit E for additional terms and conditions.

Buyer’s Liquidated Damages: $[amount]

Seller’s Additional Liquidated Damages: $[amount]

Title Information: If Seller is not required to provide a Title Commitment and Title Policy, Seller will have the obligation to provide to Buyer, at Seller’s expense, the Title Information as defined in paragraph F.3. below. Buyer may have the Title Information reviewed and obtain a written opinion of title by an attorney selected by Buyer, at [Seller/Buyer]’s expense.

Title Documents: The Permit and instruments affecting title to the Groundwater and the Real Property referenced in the [Title Commitment/Title Information] and UCC Search are to be provided as part of Seller’s Records.

A. Deadlines and Other Dates

All deadlines in this contract expire at 5:00 P.M. local time where the Real Property is located. If a deadline falls on a Saturday, Sunday, or national holiday, the deadline will be extended to the next day that is not a Saturday, Sunday, or national holiday. A national holiday is a holiday designated by the federal government. Time is of the essence.

A.1. Earnest Money Deadline: [date]

A.2. Delivery of Title Commitment: [[date]/[number] days after the Effective Date]

A.2. Delivery of Title Information: [[date]/[number] days after the Effective Date]
A.3. Delivery of UCC Search: [[date]/[number] days after the Effective Date]

A.4. Delivery of legible copies of the Title Documents: [[date]/[number] days after the Effective Date]

A.5. Delivery of Title Objections: [[date]/[number] days after delivery of the last of the [Title Commitment/Title Information], UCC Search, and legible copies of the Title Documents]

A.6. Delivery of Seller’s records as specified in Exhibit C: [[date]/[number] days after the Effective Date]

A.7. End of Inspection Period: [[date]/[number] days after the Effective Date]

A.8. Closing Date: [[date]/[number] days after the End of the Inspection Period]

A.9. Closing Time: [time]

B. Closing Documents

B.1. At Closing, Seller will deliver the following items:

Include all applicable items.

Select one of the following.

Groundwater General Warranty Deed [include if applicable: with Vendor’s Lien]

Or

Groundwater Special Warranty Deed [include if applicable: with Vendor’s Lien]
Release of Lien

Partial Release of Lien as to Groundwater Rights

Assignment of Seller’s Permit or transfer form promulgated or approved by relevant groundwater authority

IRS Nonforeign Person Affidavit

Evidence of Seller’s authority to close this transaction

Notices, statements, and certificates as specified in Exhibit D

Assignment of Leases

Tenant Estoppel Certificate

Affidavit of Debts and Liens [include if applicable: and Indemnity]

B.2. At Closing, Buyer will deliver the following items:

Include all applicable items.

Balance of Purchase Price

Evidence of Buyer’s authority to close this transaction

Deceptive Trade Practices Act waiver

Seller-financing documents

Promissory Note

Deed of Trust
Security Agreement

Financing Statement

Loan Documents required by third-party lender

Releases of any leases, contracts, or other legal interests affecting the Groundwater agreed to be terminated before or at Closing

The documents listed in this section B. are collectively known as the “Closing Documents.” The Closing Documents for which forms exist in the current edition of the Texas Real Estate Forms Manual (State Bar of Texas) will be prepared using those forms.

C. Exhibits

The following are attached to and are a part of this contract:

Exhibit A—Description of the Real Property

Exhibit B—Seller’s Representations and Warranties

Exhibit C—Seller’s Records

Exhibit D—Notices, Statements, and Certificates

[Include if applicable: Exhibit E—Seller Financing Addendum]

[Include if applicable: Exhibit F—Memorandum of Contract]

[Include if applicable: Exhibit G—Notice of Termination of Contract]
D. **Purchase and Sale of Groundwater Rights**

Seller agrees to sell and convey the Groundwater Rights to Buyer, and Buyer agrees to buy and pay Seller for the Groundwater Rights. The promises by Buyer and Seller stated in this contract are the consideration for the formation of this contract.

E. **Interest on Earnest Money**

Buyer may direct [Title Company/Escrow Agent] to invest the Earnest Money in an interest-bearing account in a federally insured financial institution by giving notice to [Title Company/Escrow Agent] and satisfying [Title Company/Escrow Agent]’s requirements for investing the Earnest Money in an interest-bearing account. Any interest earned on the Earnest Money will become part of the Earnest Money.

F. **Title**

F.1. **Review of Title.** The following statutory notice is provided to Buyer on behalf of the real estate licensees, if any, involved in this transaction: Buyer is advised that it should either have the abstract covering the Real Property examined by an attorney of Buyer’s own selection or be furnished with or obtain a policy of title insurance.

F.2. **Title Commitment; Title Policy.** “Title Commitment” means a Commitment for Issuance of an Owner Policy of Title Insurance by Title Company, as agent for Underwriter, or directly by Underwriter, stating the condition of title to the Groundwater Rights and the Real Property. The effective date stated in the Title Commitment must be after the Effective Date of this contract. “Title Policy” means an Owner Policy of Title Insurance issued by Title Company, as agent for Underwriter, or directly by Underwriter, in conformity with the last Title Commitment delivered to and approved by Buyer.
F.3. Title Information. “Title Information” means an abstract of title prepared by a title insurance company or an abstract company licensed by the Texas State Board of Insurance, covering the period from the first conveyance of title to the Real Property out of the sovereignty to the Effective Date, and containing complete and legible copies of all the deeds, easements, liens, and other documents affecting title to the Real Property and the Groundwater Rights.

F.4. UCC Search. “UCC Search” means written reports stating the instruments that are on file in the Texas secretary of state’s UCC records, the UCC records of any other appropriate state, and the UCC records in the jurisdiction in which the Seller is organized, showing as debtor Seller and all other owners of the Real Property and Groundwater Rights [include if applicable: and fixtures and personal property] during the five years before the Effective Date of this contract.

F.5. Delivery of [Title Commitment/Title Information], UCC Search, and Title Documents. Seller must deliver the [Title Commitment/Title Information] to Buyer and Buyer’s attorney by the deadline stated in paragraph A.2. above; the UCC Search by the deadline stated in paragraph A.3.; and legible copies of the Title Documents by the deadline stated in paragraph A.4.

F.6. Title Objections. Buyer has until the deadline stated in paragraph A.5. above (“Title Objection Deadline”) to review the [Title Commitment/Title Information], UCC Search, and legible copies of the Title Documents, notify Seller of Buyer’s objections to any of them, and request any additional information needed to evidence Seller’s title to the Real Property and the Groundwater Rights (“Title Objections”). Buyer will be deemed to have approved all matters reflected by the [Title Commitment/Title Information], Title Documents,
and UCC Search to which Buyer has made no Title Objection by the Title Objection Deadline. The matters that Buyer either approves or is deemed to have approved are “Permitted Exceptions.” If Buyer notifies Seller of any Title Objections, Seller has five days from receipt of Buyer’s notice to notify Buyer whether Seller agrees to cure the Title Objections before Closing (“Cure Notice”). If Seller does not timely give its Cure Notice or timely gives its Cure Notice but does not agree to cure all the Title Objections before Closing, Buyer may, within five days after the deadline for the giving of Seller’s Cure Notice, notify Seller that either this contract is terminated or Buyer will proceed to close, subject to Seller’s obligations to resolve the items [listed in Schedule C of the Title Commitment/listed in the Title Information], remove all liquidated liens, remove all exceptions that arise by, through, or under Seller after the Effective Date, and cure only the Title Objections that Seller has agreed to cure in the Cure Notice. At or before Closing, Seller must resolve the items that are [listed in Schedule C of the Title Commitment/listed in the Title Information], remove all liquidated liens, remove all exceptions that arise by, through, or under Seller after the Effective Date of this contract, and cure the Title Objections that Seller has agreed to cure.

G. Inspection Period

G.1. Review of Seller’s Records. Seller, at Seller’s expense, will deliver to Buyer copies of Seller’s Records specified in Exhibit C, or otherwise make those records available for Buyer’s review, by the deadline stated in paragraph A.6. above.

G.2. Adequacy of Seller’s Permit. Buyer will have the right to determine whether the Permit, on transfer to Buyer, will be adequate for Buyer’s intended use of the Groundwater Rights, whether an alternative permit will be required, and the requirements of the Groundwater Authority for the transfer of Permit. Seller will cooperate with Buyer at all times in obtaining any information and forms required from the Groundwater Authority. On Buyer’s request, Seller, at Seller’s expense, will execute and transmit to the Groundwater Authority all necessary applications, forms, and documentation required for the transfer of Seller’s Permit.
to Buyer, provided that the transfer will not be effective until Closing. Seller will not take any action before or after Closing to oppose the transfer of Seller’s Permit to Buyer, the issuance of an amendment to Seller’s Permit, or other permitting sought by Buyer to enable Buyer to use the Groundwater for Buyer’s Intended Use of the Groundwater.

G.3. **Buyer’s Right to Terminate.** Buyer may terminate this contract for any reason by notifying Seller before the end of the Inspection Period.

G.4. **Buyer’s Indemnity and Release of Seller**

G.4.a. **Indemnity.** Buyer will indemnify, defend, and hold Seller harmless from any loss, attorney’s fees, expenses, or claims arising out of Buyer’s investigation of the Groundwater Rights and Real Property. The obligations of Buyer under this provision will survive termination of this contract and Closing.

G.4.b. **Release.** Buyer releases Seller and those persons acting on Seller’s behalf from all claims and causes of action (including claims for attorney’s fees and court and other costs) resulting from Buyer’s investigation of the Groundwater and Real Property.

G.5. **Appraisal of Groundwater.** Buyer has the right to have an appraisal performed of the Groundwater Rights, the Real Property, and Seller’s Permits. The cost of the appraisal [will be paid at Closing by [Buyer/Seller]/will be shared at Closing by Buyer and Seller].

H. **Representations and Warranties**

The parties’ representations stated in Exhibit B are true and correct as of the Effective Date and must be true and correct on the Closing Date. Seller will promptly notify Buyer if Seller becomes aware that any of the representations are not true and correct.

I. **Condition of the Property until Closing; Cooperation; No Recording of Contract**
I.1. *Maintenance and Operation.* Until Closing, Seller will (a) maintain the Real Property [include if applicable: , the personal property and fixtures.] and the Groundwater Rights as they existed on the Effective Date, except for reasonable wear and tear and casualty damage; (b) use the Real Property and the Groundwater Rights in the same manner as they were used on the Effective Date; and (c) comply with all contracts, laws, and governmental regulations affecting the Real Property and the Groundwater Rights. Until the end of the Inspection Period, Seller will not grant or convey any easement, lease, license, or other right affecting the Real Property or the Groundwater Rights. After the end of the Inspection Period, Seller may not enter into, amend, or terminate any contract that affects the Groundwater Rights or the Real Property without first obtaining Buyer’s written consent.

I.2. *Condemnation.* Seller will notify Buyer promptly after Seller receives notice that any part of the Real Property or Groundwater Rights has been or is threatened to be condemned or otherwise taken by a governmental or quasi-governmental authority. Buyer may terminate this contract if the condemnation would materially affect Buyer’s intended use of the Groundwater Rights by giving notice to Seller within fifteen days after receipt of Seller’s notice to Buyer (or before Closing if Seller’s notice is received less than fifteen days before Closing). The condemnation will be deemed to materially affect Buyer’s intended use of the Groundwater Rights if [specify reason, e.g., the condemnation would result in Buyer’s not being able to produce more than [number] acre-feet of Groundwater]. If Buyer does not terminate this contract, (a) Buyer and Seller will each have the right to appear and defend their respective interests in the Groundwater Rights in the condemnation proceedings; (b) any award in condemnation will be assigned to Buyer to the extent necessary to compensate Buyer for the loss of or reduction in the Groundwater Rights; (c) if the taking occurs before Closing, the description of the Real Property or Groundwater Rights will be revised to delete the portion taken; and (d) no change in the Purchase Price will be made.
I.3. **Claims; Hearings.** Seller will notify Buyer promptly after Seller receives notice of any claim or administrative hearing that is threatened, filed, or initiated before Closing that involves or directly affects the Groundwater Rights.

I.4. **Cooperation.** Seller will cooperate with Buyer (a) before and after Closing to transfer the applications, permits, and licenses held by Seller and used in the production of the Groundwater and to obtain any consents necessary for Buyer to withdraw or produce the Groundwater; (b) before Closing, with any reasonable evaluation, inspection, or study of the Real Property or the Groundwater; and (c) in all other matters related to, or arising out of or in connection with, this contract.

I.5. **Casualty or Other Loss or Damage.** Until Closing has been completed and funded, Seller will bear the risk of any damage, casualty, or other loss to the Real Property or Groundwater. If any damage, casualty, or other loss results in a material adverse change in the quality, quantity, or usability of the Groundwater, Buyer will have the right to terminate this contract.

I.6. **Memorandum of Contract; Termination of Contract; No Recording of Contract.** At the request of Buyer, Seller will execute a memorandum of this contract, in a mutually acceptable form, to be recorded in the real property records of [county] County, Texas. At the time the memorandum is signed, Buyer and Seller will also sign a termination of contract in recordable form and deposit it into escrow with [Title Company/Escrow Agent]. The parties authorize [Title Company/Escrow Agent] to record the termination of contract as provided in section J. below. Neither Buyer nor Seller may file this contract in the real property records of any county. If either party records this contract, the other party may terminate this contract and record a notice of termination.

J. **Termination**

J.1. **Disposition of Earnest Money after Termination**
J.1.a.  To Buyer.  If Buyer terminates this contract in accordance with any of Buyer’s rights to terminate, then unless Seller delivers notice of Seller’s objection to [Title Company/Escrow Agent]’s release of the Earnest Money to Buyer within five days after Buyer delivers Buyer’s termination notice to Seller and [Title Company/Escrow Agent], [Title Company/Escrow Agent] is authorized without any further authorization from Seller, to deliver the Earnest Money to Buyer, less $100, which will be paid to Seller as consideration for the right granted by Seller to Buyer to terminate this contract. [Title Company/Escrow Agent] will record the termination of contract and return the Earnest Money to Buyer on receipt of Seller’s authorization.

J.1.b.  To Seller.  If Seller terminates this contract in accordance with any of Seller’s rights to terminate, then unless Buyer delivers notice of Buyer’s objection to [Title Company/Escrow Agent]’s release of the Earnest Money to Seller within five days after Seller delivers Seller’s termination notice to Buyer and [Title Company/Escrow Agent], [Title Company/Escrow Agent] is authorized, without any further authorization from Buyer, to pay and deliver the Earnest Money to Seller and to record the termination of contract. [Title Company/Escrow Agent] will record the termination of contract and pay the Earnest Money to Seller on receipt of Buyer’s authorization.

J.2.  Duties after Termination.  If this contract is terminated, Buyer will promptly return to Seller all of Seller’s Records in Buyer’s possession or control. After return of the documents and copies, neither party will have further duties or obligations to the other under this contract, except for those obligations that cannot be or were not performed before termination of this contract or that expressly survive termination of this contract.

K.  Closing

K.1.  Closing.  This transaction will close at [Title Company/Escrow Agent]’s offices at the Closing Date and Closing Time. At Closing, the following will occur:
K.1.a. Closing Documents. The parties will execute and deliver the Closing Documents.

K.1.b. Payment of Purchase Price. Buyer will deliver the Purchase Price and other amounts that Buyer is obligated to pay under this contract to [Title Company/Escrow Agent] in funds acceptable to [Title Company/Escrow Agent]. The Earnest Money will be applied to the Purchase Price.

K.1.c. Disbursement of Funds; Recording; Copies. [Title Company/Escrow Agent] will be instructed to disburse the Purchase Price and other funds in accordance with this contract, record the Groundwater Deed and the other Closing Documents directed to be recorded, and distribute documents and copies in accordance with the parties’ written instructions.


K.1.e. Possession. Seller will deliver possession of the Groundwater Rights to Buyer, subject to the Permitted Exceptions existing at Closing and any liens and security interests created at Closing to secure financing for the Purchase Price.

K.2. Transaction Costs

K.2.a. Seller’s Costs. Seller will pay [the basic charge for the Title Policy/the cost of providing the Title Information as specified in this contract, if not previously paid by Seller]; one-half of the escrow fee charged by [Title Company/Escrow Agent]; the costs to prepare the Groundwater Rights Deed; the costs to obtain, deliver, and record any releases of liens or lender’s consent; the costs to cure and record the documents to cure Title Objections agreed or required to be cured by Seller and to resolve matters [shown in Schedule C of the Title Commitment/raised in the Title Information]; the costs to obtain the UCC Search and certificates or reports of ad valorem taxes; the costs to deliver copies of the instruments described in para-
graph A.4. above; any other costs expressly required to be paid by Seller in this contract; and Seller’s attorney’s fees and expenses.

**K.2.b. Buyer’s Costs.** Buyer will pay one-half of the escrow fee charged by [Title Company/Escrow Agent]; the costs to obtain, deliver, and record all documents other than those to be obtained or recorded at Seller’s expense; the costs to obtain financing of the Purchase Price, including the incremental premium costs of the loan title policy and endorsements and deletions required by Buyer’s lender, if applicable; any other costs expressly required to be paid by Buyer in this contract; and Buyer’s attorney’s fees and expenses.

**K.2.c. Taxes, Fees, and Assessments.** At Closing, Seller will pay any ad valorem taxes and assessments, including penalties and interest (collectively, “Taxes”), in connection with the Real Property and the Groundwater Rights that are owing for prior calendar years. Seller will pay all Taxes in connection with the Real Property and Groundwater Rights for the current calendar year, if payable at the time of Closing. After Closing, Seller will continue to pay all Taxes due in connection with the Real Property before delinquency, except that if ad valorem taxes, if any, are assessed separately against Buyer’s Groundwater Rights after Closing, Buyer will be responsible for paying such taxes and assessments if Buyer is obligated to pay such taxes under applicable law. After Closing, each party will have the right to protest taxes that the party is responsible for paying, provided that the protesting party does not allow the taxes to become delinquent.

After Closing, Buyer will be responsible for paying all fees, assessments, taxes, and charges of any kind imposed by the Groundwater Rights Authority, or any successor authority, in connection with the Groundwater Rights.

These provisions will survive Closing and will be set out in one or more of the Closing Documents.
K.2.d. Income and Expenses. Except as provided in paragraph K.2.c. above, all items of expense, including fees paid to any Groundwater Authority, or income arising in connection with the use or operation of the Groundwater Rights will be prorated as of the Closing Date. Seller will pay all bills and expenses that could give rise to a lien against the Real Property or Groundwater Rights at or before Closing.

K.2.e. Postclosing Adjustments. If errors in the prorations made at Closing are identified within ninety days after Closing, Seller and Buyer will make postclosing adjustments to correct the errors within fifteen days of receipt of notice of errors.

K.2.f. Brokers’ Commissions. Buyer and Seller each indemnify and agree to defend and hold the other party harmless from any loss, attorney’s fees, and court and other costs arising out of a claim by any person or entity claiming by, through, or under the indemnitor for a broker’s or finder’s fee or commission because of this transaction or this contract, whether the claimant is disclosed to the indemnitee or not. At Closing, each party will provide the other party with a release of broker’s or appraiser’s liens from all brokers or appraisers for which each party was responsible.

K.3. Issuance of Title Policy. Seller will cause [Title Company/Escrow Agent] to issue the Title Policy, if required, to Buyer as soon as practicable after Closing.

L. Default and Remedies

L.1. Seller’s Default; Remedies before Closing. If Seller fails to perform any of its obligations under this contract, or if any of Seller’s representations are not true and correct as of the Effective Date or on the Closing Date or any of Seller’s warranties have been breached (“Seller’s Default”), Buyer may elect either of the following as its sole and exclusive remedy before Closing:
**L.1.a. Termination; Liquidated Damages.** Buyer may terminate this contract by giving notice to Seller on or before the Closing Date and Closing Time and have the Earnest Money, less the $100 as described above, returned to Buyer. If Seller’s Default occurs after Buyer has incurred costs to investigate the Real Property and Groundwater Rights after the Effective Date and Buyer terminates this contract in accordance with the previous sentence, Seller will also pay to Buyer as liquidated damages the lesser of Buyer’s actual out-of-pocket expenses incurred to investigate the Real Property and Groundwater Rights after the Effective Date (“Buyer’s Expenses”) or the amount of Buyer’s Liquidated Damages, within ten days after Seller’s receipt of an invoice from Buyer stating the amount of Buyer’s Expenses accompanied by reasonable evidence of Buyer’s Expenses.

**L.1.b. Specific Performance.** Unless Seller’s Default relates to the untruth or incorrectness of Seller’s representations for reasons not reasonably within Seller’s control, Buyer may enforce specific performance of Seller’s obligations under this contract, but any such action must be initiated, if at all, within ninety days after the breach or alleged breach of this contract. If title to the Groundwater Rights is awarded to Buyer, the conveyance will be subject to the matters stated in the [Title Commitment/Title Information].

**L.2. Seller’s Default; Remedies after Closing.** If Seller’s representations are not true and correct at Closing for reasons reasonably within Seller’s control and Buyer does not become aware of the untruth or incorrectness until after Closing, Buyer will have all the rights and remedies available at law or in equity. If Seller fails to perform any of its obligations under this contract that survive Closing, Buyer will have all rights and remedies available at law or in equity unless otherwise provided by the Closing Documents.

**L.3. Buyer’s Default; Remedies before Closing.** If Buyer fails to perform any of its obligations under this contract (“Buyer’s Default”), Seller may elect either of the following as its sole and exclusive remedy before Closing:
L.3.a. Termination; Liquidated Damages. Seller may terminate this contract by giving notice to Buyer on or before Closing and have the Earnest Money paid to Seller. If Buyer’s Default occurs after Seller has incurred costs to perform its obligations under this contract and Seller terminates this contract in accordance with the previous sentence, Buyer will also reimburse Seller for the lesser of Seller’s actual out-of-pocket expenses incurred after the Effective Date to perform its obligations under this contract ("Seller’s Expenses") or the amount of Seller’s Additional Liquidated Damages, within ten days after Buyer’s receipt of an invoice from Seller stating the amount of Seller’s Expenses accompanied by reasonable evidence of Seller’s Expenses.

L.3.b. Specific Performance. Seller may enforce specific performance of Buyer’s obligations under this contract. If title to the Groundwater Rights is awarded to Buyer, the conveyance will be subject to the matters stated in the [Title Commitment/Title Information].

L.4. Buyer’s Default; Remedies after Closing. If Buyer fails to perform any of its obligations under this contract that survive Closing, Seller will have all rights and remedies available at law or in equity unless otherwise provided by the Closing Documents.

L.5. Liquidated Damages. The parties agree that just compensation for the harm that would be caused by a default by either party cannot be accurately estimated or would be very difficult to accurately estimate and that the Earnest Money and the amounts provided above are reasonable forecasts of just compensation to the nondefaulting party for the harm that would be caused by a default.

L.6. Attorney’s Fees. If either party retains an attorney to enforce this contract, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and other costs.

M. Miscellaneous Provisions
M.1. **Notices.** Any notice required by or permitted under this contract must be in writing. Any notice required by this contract will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this contract. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received, provided that (a) any notice received on a Saturday, Sunday, or national holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or national holiday; and (b) any notice received after 5:00 P.M. local time at the place of delivery on a day that is not a Saturday, Sunday, or national holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or national holiday. Any address for notice may be changed by not less than ten days’ prior written notice given as provided herein. Copies of each notice must be given by one of these methods to the attorney of the party to whom notice is given.

M.2. **Entire Agreement.** This contract, its exhibits, and any Closing Documents delivered at Closing are the entire agreement of the parties concerning the sale and use of the Groundwater Rights and the use of the Real Property. There are no representations, warranties, agreements, or promises between the parties pertaining to the Groundwater Rights and Real Property, sale and use of the Groundwater Rights, or use of the Real Property, and neither party is relying on any statements or representations of any agent of the other party, that are not in those documents.

M.3. **Amendment.** This contract may be amended only by an instrument in writing signed by the parties.
M.4. **Prohibition of Assignment.** Buyer may not assign this contract or any of Buyer’s rights under it without Seller’s prior written consent, and any attempted assignment is void.

M.4. **Assignment.** Buyer may assign this contract and Buyer’s rights under it only to an entity in which Buyer possesses, directly or indirectly, the power to direct or cause the direction of its management and policies, whether through the ownership of voting securities or otherwise, and any other assignment is void.

M.5. **Survival.** The provisions of this contract that expressly survive termination or Closing and other obligations of this contract that cannot be performed before termination of this contract or before Closing survive termination of this contract or Closing, and the legal doctrine of merger does not apply to these matters. If there is any conflict between the Closing Documents and this contract, the Closing Documents control.

M.6. **Choice of Law; Venue.** This contract is to be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county in which the Real Property out of which the Permit is derived is located.

M.7. **Waiver of Default.** It is not a waiver of default if the nondefaulting party fails to declare a default immediately or delays taking any action with respect to the default.

M.8. **No Third-Party Beneficiaries.** There are no third-party beneficiaries of this contract.

M.9. **Severability.** If a provision of this contract is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the
unenforceability does not affect any other provision of this contract, and this contract is to be construed as if the unenforceable provision is not a part of the contract.

M.10. Ambiguities Not to Be Construed against Party Who Drafted Contract. The rule of construction that ambiguities in a document will be construed against the party who drafted it will not be applied in interpreting this contract.

M.11. No Special Relationship. The parties’ relationship is an ordinary commercial relationship, and the parties do not intend to create the relationship of principal and agent, partners, joint venturers, or any other special relationship.

M.12. Counterparts. If this contract is executed in multiple counterparts, all counterparts taken together constitute this contract. Copies of signatures to this contract are effective as original signatures.

M.13. Confidentiality. The parties will keep confidential this contract, this transaction, and all information learned in the course of this transaction, except to the extent disclosure is required by law or court order, to enable third parties to advise or assist Buyer to investigate the Groundwater Rights and the Real Property, or by either party to close this transaction. Remedies for violations of this provision are limited to injunctions and no damages or rescission may be sought or recovered as a result of any such violations.

M.14. Binding Effect. This contract binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

Include the following only if the buyer has agreed to waive its rights under the DTPA.

M.15. Waiver of Consumer Rights. BUYER WAIVES ITS RIGHTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES–CONSUMER PROTECTION ACT, SECTION 17.41 ET SEQ. OF THE TEXAS BUSINESS AND COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS
AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF ITS OWN SELECTION,
BUYER VOLUNTARILY CONSENTS TO THIS WAIVER.

[Name and title of seller]
Date:

[Name and title of buyer]
Date:

[Title Company/Escrow Agent] acknowledges receipt of Earnest Money in the amount of $___________ and a copy of this contract executed by both Buyer and Seller.

[Name of title company/escrow agent]
By ______________________________
Name:
Title:
Date:
Exhibit A

Description of the Real Property

Include legal description of the land.
Exhibit B

Seller’s Representations and Warranties

A. Seller’s Representations to Buyer

Seller represents and warrants to Buyer that the following are true and correct as of the Effective Date and will be true and correct as of the Closing Date:

A.1. Authority. Seller is a [specify type of organization] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[state]] with authority to perform its obligations under this contract.

A.2. Litigation. Seller has not received written notice and has no actual knowledge of any litigation pending or threatened against Seller that might affect the Groundwater Rights, the Real Property, or Seller’s ability to perform its obligations under this contract [include if applicable: , except [specify]].

A.3. Violation of Laws. Seller has not received written notice of violation of any law, ordinance, regulation, or requirements affecting the Real Property, the Groundwater Rights, or Seller’s use of the Real Property or Groundwater Rights [include if applicable: , except [specify]].

A.4. Licenses, Permits, and Approvals. Seller has not received written notice that any license, permit, or approval necessary to use the Groundwater Rights in the manner in which they are currently used has expired or will not be renewed on expiration or that any material condition will be imposed in order to use such permit or license or obtain its renewal [include if applicable: , except [specify]].
A.5. **Condemnation; Zoning; Land Use; Hazardous Materials.** Seller has not received written notice of any condemnation, zoning, or land-use proceedings affecting the Real Property or the Groundwater Rights or any written inquiries or notices by any governmental authority or third party with respect to condemnation or the presence of hazardous materials affecting the Real Property or the Groundwater Rights [include if applicable: , except [specify]].

A.6. **No Other Obligation to Sell or Restriction against Sale.** Seller has not obligated itself to sell all or any portion of the Real Property or the Groundwater Rights to any person other than Buyer. Seller’s performance of this contract will not cause a breach of any other agreement or obligation to which Seller is a party or to which it is bound [include if applicable: , except [specify]].

A.7. **No Liens.** On the Closing Date, the Groundwater Rights to be conveyed under the contract will be free and clear of all liens and encumbrances of any nature not arising by, through, or under Buyer except the Permitted Exceptions or liens to which Buyer has given its consent in writing.

A.8. **No Rights of Possession or Use.** There are no persons presently in possession of the Real Property or the Groundwater or having any rights to possession of the Real Property or the Groundwater or rights, either present or future, to explore for, use, produce, or withdraw the Groundwater other than Seller [include if applicable: , except [specify]].

A.9. **Good Title.** Seller has good and indefeasible fee simple title to the Real Property and the Groundwater Rights, free and clear of all mortgages, liens, licenses, encumbrances, leases, tenancies, security interests, covenants, conditions, restrictions, rights-of-way, easements, judgments, and other matters affecting title [include if applicable: , except [specify]].
A.10. No Bills or Claims. There will be no unpaid bills or claims in connection with any repair or work performed or material furnished to the Real Property or otherwise relating to the Groundwater Rights for the benefit of Seller as of the Closing Date, and all bills attributable to or affecting the Groundwater Rights and the Real Property will be paid by Seller in full before Closing.

A.11. No Adverse Matters. To the best of Seller’s knowledge, there is no (a) change contemplated in any applicable laws, ordinances, or restrictions, including the rules of the Groundwater Authority; (b) judicial or administrative action threatened or pending against the Real Property, the Groundwater Rights, or Seller; or (c) action by adjacent landowners pending or threatened against the Real Property, the Groundwater Rights, or Seller.

A.12. Compliance with Laws. Seller has at all times complied with and operated in compliance with all applicable federal, state, and local laws, regulations, and ordinances regarding the Real Property and the Groundwater Rights, including rules of the Groundwater Authority. Seller will promptly notify Buyer of any noncompliance notice received by Seller.

B. “As Is, Where Is”

This contract is an arm’s-length agreement between the parties. The purchase price was bargained on the basis of an “AS IS, WHERE IS” transaction and reflects the agreement of the parties that there are no representations or express or implied warranties, except those in this contract and the closing documents.

Seller disclaims all warranties and representations regarding the quantity, quality, or reliability of the groundwater or the availability now or in the future of amendments to the permit necessary for Buyer to use the groundwater for any purpose. Seller further disclaims all warranties and representations with respect to the fitness of the groundwater for any particular use.
Include if applicable: Buyer acknowledges that the local groundwater district’s rules and regulations or permitting decisions may limit the volume of groundwater produced from the real property and the purpose or place of its use, as well as the location of any well, its depth, or rate of production.

Buyer is not relying on any representations, disclosures, or express or implied warranties other than those expressly contained in this contract and the closing documents. Buyer is not relying on any information regarding the groundwater or the real property provided by any person, other than Buyer’s own inspection and the representations and warranties contained in this contract and the closing documents.

The provisions of this section B. regarding the groundwater rights [will/will not] be included in the groundwater rights warranty deed with appropriate modification of terms as the context requires.

C. Buyer’s Representations to Seller

Buyer represents to Seller that the following are true and correct as of the Effective Date and will be true and correct on the Closing Date:

C.1. Authority. Buyer is a [specify type of organization] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[state]] with authority to perform its obligations under this contract. This contract is binding on Buyer. This contract is, and all documents required by this contract to be executed and delivered to Seller at Closing will be, duly authorized, executed, and delivered by Buyer.

Include other representations from the buyer to the seller as needed.
Exhibit C

Seller’s Records

To the extent that Seller has possession or control of the following items pertaining to the Real Property or Groundwater Rights, Seller will deliver or make the items or complete, legible, and accurate copies of them available to Buyer by the deadline stated in paragraph A.6.:

Records and Reports

governmental licenses, certificates, permits, and approvals, specifically including Seller’s Permit and any other information related to the Permit, including but not limited to a copy of Seller’s application for the Permit
current tax certificate showing taxes assessed and owed against the Real Property and any tax exemption, special use, or other valuation or exemption applicable to the Real Property
records of regulatory proceedings or violations regarding the Real Property or Groundwater Rights
any survey of all or any portion of the Real Property
abstracts of title or prior title policies relating to the Real Property or Groundwater Rights
groundwater production records
other: [specify]

Leases, Licenses, Agreements, and Encumbrances
all leases, licenses, agreements, and encumbrances (including all amendments and exhibits) affecting title to or use of the Real Property or Groundwater Rights that have not been recorded in the real property records of the county or counties in which the Real Property is located
Exhibit D

Notices, Statements, and Certificates

Certain notices must be contained in the contract and others must be provided as separate notices. Please refer to the statutory requirements for each notice.

The notices, statements, and certificates (arranged by their application to particular transactions) that are listed below are [include as applicable: included in the sales contract/ [and] attached for delivery to Buyer], and Buyer acknowledges receipt of the notices, statements, and certificates by executing this contract:

Include one or more of the following paragraphs as applicable and modify section headers and paragraph numbers as appropriate.

A. Consumer Notices

Notice of Cancellation. Notice concerning the purchaser’s three-day right of rescission under a contract to purchase real property if (1) the seller or the seller’s agent solicits the sale at a place other than the seller’s place of business; (2) the purchaser submits the purchase contract to the seller or the seller’s agent at a place other than the seller’s place of business; and (3) the consideration payable under the purchase contract exceeds $100; unless either (1) the purchaser is represented by a licensed attorney; (2) the transaction is negotiated by a licensed real estate broker; or (3) the transaction is negotiated at a place other than the purchaser’s residence by the person who owns the property, as described in chapter 601 of the Texas Business and Commerce Code.

If applicable, attach form 4-4 in this manual to the end of this exhibit D.
B. Residential Transaction Notices


If applicable, attach the full text of Tex. Prop. Code § 5.008, with all relevant information filled in, to the end of this exhibit D.

And/Or

B.2. Notice of Membership in Property Owners Association. Notice concerning the sale of single-family residential property that is subject to membership in a property owners association, described in section 5.012 of the Texas Property Code.

If applicable, attach form 23-8 to the end of this exhibit D.

And/Or

B.3. Seller’s Disclosure of Location of Conditions under Surface of Unimproved Real Property. Seller’s disclosure of the location of pipelines under the surface of unimproved property to be used for residential purposes, described in section 5.013 of the Texas Property Code. A seller of unimproved property to be used for residential purposes shall provide the purchaser written notice disclosing the location of any transportation pipeline to the best of the seller’s belief and knowledge as of the date the notice is completed and signed by the seller. If the information required to be disclosed is not known by the seller, the seller shall indicate that fact in the notice. A seller is not required to give this notice if (a) the seller is obligated under the terms of the contract to furnish a title insurance commitment to the buyer before closing and (b) the buyer is entitled to terminate the contract if the buyer’s objections to title as permitted by the contract are not cured by the seller before closing.

No form is provided, because the sales contract portion of this form 16-9 satisfies the provisions for exemption from disclosure.
B.4. **Notice of Obligation to Pay Public Improvement District Assessment.** Seller’s disclosure that a single-family residential property is located within a public improvement district, described in section 5.014 of the Texas Property Code.

And/Or

If applicable, attach form 4-5 to the end of this exhibit D.

And/Or

B.5. **Residential Contracts for Deed.** Notice regarding the sale of property used or to be used as the purchaser’s residence if the contract does not provide for delivery of a deed from the seller to the purchaser within 180 days after the final execution of the contract.


And/Or

B.6. **Notice Regarding Insulation to Buyer of New Home.** Notice concerning insulation to be installed in a new home, described in section 460.16 of title 16 of the Code of Federal Regulations.

And/Or

If applicable, attach form 4-6 to the end of this exhibit D.

And/Or

B.7. **Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards.** Lead-based paint warning statement, described in section 745.100 et seq. of title 40 of the Code of Federal Regulations.

And/Or

If applicable, attach form 4-7 to the end of this exhibit D.

And/Or

B.9. Notice Regarding Sale Subject to a Recorded Lien. Notice to the purchaser and each lienholder required under Texas Property Code section 5.016 that property being sold will be conveyed subject to a lien.

C. Condominium Transaction Notices


C.2. Condominium Resale Certificate. Resale certificate from the condominium owners association or waiver of resale certificate, described in section 82.157 of the Texas Property Code.

D. All Real Property Transaction Notices


D.3. Notice to Purchaser Regarding Coastal Area Property. Notice regarding real property located adjacent to tidally influenced, submerged lands of Texas, described in section 33.135 of the Texas Natural Resources Code.


D.5. Notice Regarding Possible Liability for Additional Taxes. Notice of additional tax liability for vacant land that has been subject to a special tax appraisal method, described in section 5.010 of the Texas Property Code.
D.6. **Notice Regarding Possible Annexation.** Notice concerning the sale of property located outside the limits of a municipality that may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality, described in section 5.011 of the Texas Property Code.

If applicable, attach form 4-15 to the end of this exhibit D.

And/Or

D.7. **Notice for Unimproved Property in a Certificated Service Area of a Utility Service Provider.** Notice for property in a certificated service area of a utility service provider, described in section 13.257 of the Texas Water Code.

If applicable, attach form 4-16 to the end of this exhibit D.

And/Or

D.8. **Utility District Notice.** Notice concerning the bonded indebtedness of, or rates to be charged by, a utility or other special district, described in section 49.452 of the Texas Water Code, with the form of notice to be used being dependent on whether the property (a) is located in whole or in part within the extraterritorial jurisdiction of one or more home-rule municipalities but is not located within the corporate boundaries of a municipality, (b) is located in whole or in part within the corporate boundaries of a municipality, or (c) is not located in whole or in part within the corporate boundaries of a municipality or the extraterritorial jurisdiction of one or more home-rule municipalities.

If applicable, attach form 4-17 to the end of this exhibit D.

And/Or

D.9. **Notice to Purchaser of Property Located in Certain Annexed Water Districts.** Notice required by section 54.016(h)(4)(A) of the Texas Water Code when property being sold is in a water or sanitary sewer district that entered a contract with a city with a
population of 1.18 million or less under which the city is permitted to set rates in the district after annexation that are different from rates charged other residents of the city.

If applicable, attach form 4-18 to the end of this exhibit D.

D.10. Notice to Purchaser that Property Is Located within the Area of the Alignment of a Transportation Project. Notice required under Texas Local Government Code section 232.0033 that all or part of the subdivision in which the property being sold is located is within the area of the alignment of a transportation project as shown in the final environmental decision document that is applicable to a future transportation corridor identified in a contract between the Texas Department of Transportation and a county under Texas Transportation Code section 201.619.

If applicable, attach form 4-19 to the end of this exhibit D.

D.11. Certificates of Mold Remediation. Notice pursuant to section 1958.154 of the Texas Occupations Code, titled “Certificate of Mold Remediation; Duty of Property Owner,” requiring a property owner who sells property that has been issued a certificate of mold remediation pursuant to this section to deliver copies to the purchaser of each certificate of mold remediation issued for the property within the preceding five years.

D.12. Notice of Water Level Fluctuations. Notice to purchasers of residential or commercial property adjoining an impoundment of water, including a reservoir or lake, constructed and maintained under Texas Water Code chapter 11, that has storage capacity of at least 5,000 acre-feet at the impoundment’s normal level, provided pursuant to Texas Property Code section 5.019.
If applicable, attach form 4-20 to the end of this exhibit D.
A. **Promissory Note.** The promissory note (“Note”) will be payable by Buyer (“Maker”) to the order of Seller (“Payee”) at the place designated by Payee. The Note may be prepaid in whole or in part at any time without penalty, premium, or restriction of any kind. Any prepayments are to be applied to the payment of the installments of principal last maturing, and interest will immediately cease on the prepaid principal. The lien securing payment of the Note will be inferior to any lien securing any superior note described in the contract. The Note will be payable as follows:

- In one payment due [number] days after the date of the Note with interest payable [at maturity/monthly/quarterly/annually].

- In [number] installments of $[amount] each [including interest/plus interest] beginning [number] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [date], when the entire balance of the Note will be due and payable.

- Interest only in [number] installments for the first [number] year[s] and thereafter in [number] installments of $[amount] each [including interest/plus interest] beginning [number] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [date], when the entire balance of the Note will be due and payable.

- Other: [specify].
B. **Deed of Trust and Security Agreement.** The deed of trust and security agreement ("Deed of Trust") securing the Note will provide for the following:

**B.1. Assumption without Consent.** The Property may be sold, transferred, or conveyed without the consent of Payee, provided any subsequent buyer or transferee assumes in writing for the benefit of Payee the obligation to pay the Note and to perform the covenants and agreements in the Deed of Trust in accordance with the terms of those instruments. No such assumption will release Maker from any liabilities or obligations arising under the Note or Deed of Trust. Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Property.

Or

**B.1. Assumption with Consent.** The Property may be sold, transferred, or conveyed provided that (a) any subsequent buyer assumes in writing for the benefit of Payee the obligation to pay the Note and to perform the covenants and agreements in the Deed of Trust in accordance with the terms of those instruments and (b) Maker or the subsequent buyer obtains prior written consent to such a sale from Payee. Consent will be based on the subsequent buyer’s credit history, with no change in interest rate or terms, and may not be unreasonably withheld, conditioned, or delayed. No such assumption will release Maker from any liabilities or obligations arising under the Note or Deed of Trust. If all or any part of the Property is sold, conveyed, leased for a period longer than three years, leased with an option to purchase, otherwise sold (including by contract for deed), or otherwise transferred or conveyed without prior written consent of Payee, Payee may, at Payee’s sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Any deed under threat or order of condemnation, any conveyance solely between makers, and the passage of title by
reason of death of a maker or by operation of law will not be construed as a sale or conveyance of the Property. [Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Property. The creation of a subordinate lien without the consent of Payee will be construed as a sale or conveyance of the Property, but any subsequent sale under a subordinate lien to which Payee has consented will not be construed as a sale or conveyance of the Property.]

B.1. Prohibition against Assumption. If all or any part of the Property is sold, transferred, or conveyed without the prior written consent of Payee, Payee may, at Payee’s sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Payee has no obligation to consent to any such sale or conveyance of the Property, and Payee is entitled to condition any consent on a change in the interest rate that will thereafter apply to the Note and any other change in the terms of the Note or Deed of Trust that Payee in Payee’s sole discretion deems appropriate. A lease for a period longer than three years, a lease with an option to purchase, or a contract for deed will be deemed to be a sale, transfer, or conveyance of the Property for purposes of this provision. Any deed under threat or order of condemnation, any conveyance solely between makers, and the passage of title by reason of death of a maker or by operation of law will not be construed as a sale or conveyance of the Property. The creation of a subordinate lien without the consent of Payee will be construed as a sale or conveyance of the Property, but any subsequent sale under a subordinate lien to which Payee has consented will not be construed as a sale or conveyance of the Property.

B.2. Cross-Default. Any act or occurrence that would constitute a default under the terms of any lien superior to the lien securing the Note will constitute a default under the Deed of Trust securing the Note.
C. **Recourse Provisions.** The Note and Deed of Trust are subject to the following provisions:

Select one of the following.

*Full Recourse.* Maker will have full recourse liability for repayment of the principal and interest of the Note and the performance of all covenants and agreements of Maker in the Deed of Trust.

Or

*No Recourse.* Maker will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Maker in the Deed of Trust. The sole remedy of Payee or other holder of the Note in the event of a default by Maker under the Note or Deed of Trust will be to foreclose the liens and security interests granted in the Deed of Trust, and Payee or other holder of the Note will not be entitled to any personal judgment against Maker.

Continue with the following.

----------------

Buyer/Maker

----------------

Seller/Payee
Exhibit F

Memorandum of Contract

Attach a memorandum of contract if applicable. See form 16-16 in this chapter.
Exhibit G

Notice of Termination of Contract

Attach a notice of termination of contract if applicable. See form 16-17 in this chapter.
Groundwater Rights Warranty Deed
[For Sale of Permitted Groundwater Rights for Off-Site Production]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

Groundwater Authority: [list any groundwater conservation districts or other groundwater authority with jurisdiction over the real property]

Consideration:

See form 5-6 in this manual for consideration clauses.

Real Property: [describe real property from which groundwater rights will be obtained]

Groundwater Rights: Seller’s perpetual right to withdraw up to [number] acre-feet per year of [name] Aquifer permitted [irrigation/industrial/[and/or] municipal] groundwater (the “Groundwater”) relating to the Real Property. The Groundwater Rights include all of the real and personal property rights, appurtenances, hereditaments, licenses, and contracts, if any, related to or pertaining to the Groundwater, including Permit[s] No[s]. [number[s]] [include if recorded: , recorded in Volume [number], Page [number], of the Offi-
cial Public Records of [county] County, Texas] (the “Permit”), as amended or modified, as applicable, insofar as it pertains to the Groundwater Rights, including, but not limited to—

1. all of the real and personal property rights, appurtenances, authorities, licenses, consents, and contracts, if any, relating to or pertaining to the Groundwater, which will also include all common-law property rights in and to the Groundwater as well as those rights or interests that now or in the future may be useful or necessary to withdraw or otherwise beneficially use the Groundwater Rights (the “Appurtenant Rights”);

2. all permit rights (including the right in and to the Permit that relates to the Groundwater Rights) allowing for possession, withdrawal, or use of the Groundwater Rights (the “Permit Rights”); and

3. all other rights to withdraw and beneficially use the Groundwater, Appurtenant Rights, Permit, or Permit Rights, together with all modifications, amendments, renewals, extensions, or successor or substitute permits relating to any of the above-described items.

Reservations from Conveyance:

1. Notwithstanding anything herein contained to the contrary, it is understood and agreed that Grantee or its successors or assigns will not enter upon or use the surface of the Real Property for conducting any surface or drilling operations related to the Groundwater Rights.

2. Any beneficial use of the Groundwater Rights from the Real Property will be by way of transfer of the permitted withdrawal rights to a withdrawal point on other lands.

To create additional reservations of title, include the appropriate clauses from form 5-7.

Exceptions to Conveyance and Warranty:
1. Any existing limitations, restrictions, applicable rules, or other conditions now in effect or that may be adopted or imposed by the Groundwater Authority, including but not limited to the limitations and conditions to the rights to withdraw and beneficially use Groundwater Rights as recited in the Permit.

2. Any physical aspect of the water including but not limited to: availability, existence, utility, recoverability, source, quality, condition, potability, chemistry, or other characteristics of water, if any, lying on, under, or over the land or lands or that may be produced or used from the land or lands.

3. Lack of a right of access.

4. All groundwater rights from any formations or aquifers under the Real Property other than the [indicate aquifer or groundwater rights formation] formation. This conveyance is limited to Groundwater Rights from the [indicate aquifer or groundwater rights formation] formation.

5. Any subsequent decrease in the amount of water available for withdrawal under the Permit or the portion conveyed to Grantee that is the result of any pro rata reduction applied to all holders of Permits for withdrawal of Groundwater Rights by the Groundwater Authority or any governmental entity with authority to restrict Groundwater Rights withdrawals.

Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Groundwater Rights, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee’s heirs, successors, and assigns forever. Grantor binds Grantor and Grantor’s heirs and successors to warrant and forever defend all and singular the Groundwater Rights to Grantee and Grantee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any
part thereof, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.

Groundwater Authority fees on the use of the Groundwater Rights, if any, before the date of this Deed will be paid by Grantor; subsequent Groundwater Authority fees for the Groundwater Rights or Permit are the responsibility of Grantee.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

If the deed imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.
Form 16-11

Partial Release of Lien
[Water Rights Off-Site Production]

Date:

Holders of Note and Lien:

Holders’ Mailing Address:

Owning of Groundwater Rights:

Owner’s Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

Note and Lien Are Described in the Following Documents: [include recording information]

Real Property: [describe real property from which groundwater rights will be obtained]

Groundwater Rights: Seller’s perpetual right to withdraw up to [number] acre-feet per year of [name] Aquifer permitted [irrigation/industrial/[and/or] municipal] groundwater (the “Groundwater”) relating to the Real Property. The Groundwater Rights include all of the real and personal property rights, appurtenances, hereditaments, licenses, and contracts, if any, related to or pertaining to the Groundwater, including Permit[s] No[s]. [num-
[Name of lienholder]
Partial Release of Lien [Off-Site Production]

By: ________________________________________________________________________________________________________________________________________________________________________

[Name of representative]

[Title]

Include acknowledgment.
[Date]

[Name and address of groundwater authority]

Re: Application for Transfer of Ownership of [permit title] Permit No. [number] (the “Permit”)

[Salutation]

I am the current owner of the groundwater rights in the land located within the [name of groundwater authority] (the “Groundwater Authority”) and the owner of the Permit. I have entered into a contract with [name of buyer] (“Buyer”) to sell Buyer my entire ownership interest in the water rights that are the subject of the Permit. By this letter, I am requesting that the Groundwater Authority transfer the Permit to reflect Buyer’s purchase of my ownership interest, with the express condition that the transfer be “effective on the date of closing of Buyer’s purchase of the ownership interest in the water rights that are the subject of the permit referenced above.” I understand that following closing Buyer will provide to the Groundwater Authority appropriate documentation of the purchase.

Because Buyer is requiring issuance of a satisfactory permit from the Groundwater Authority in connection with closing, I request your prompt attention to this matter. If you have questions or require additional information regarding this application, please [describe contact information, e.g., call my office at [telephone number]].

[Name of grantor], Permittee
Affidavit of Debts and Liens [and Indemnity]

Date:

Contract of Sale

Date:

Seller:

Buyer:

Property:

Permit No.:  [include specific reference to all surface water permits and groundwater permits associated with the property]

Affiant:

Lender:

Title Insurance Provider

Agent:

Underwriter:

Commitment for Title Insurance

GF#:

Issuance Date [and Time]:

Include the following if applicable.
Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. Affiant is [Seller/[the president/an authorized partner/a general partner/[describe other representative capacity] of Seller]] and authorized to make this affidavit [on behalf of Seller].

2. Seller is the owner of [an undivided interest in] the Property [include if applicable: together with the other persons identified above as Seller] and Permit No. [number].

3. Seller has performed its obligations under the Contract by [include as applicable: providing Buyer with copies of or access to all records required to be furnished to Buyer/ terminating all lease, service, or maintenance agreements required to be terminated/obtaining the release of all liens, security instruments, and encumbrances required to be released/ [describe other obligations]].

4. Seller has not granted any rights or interests in the Property during the pendency of the Contract, and there are no leases, contracts to sell the Property, or parties in possession of the Property [include if applicable: , except [specify]].

5. Seller has made no improvements to the Property that have not been fully paid for or that could give rise to any mechanic’s and materialman’s liens or adverse claims [include if applicable: , except [specify]].

6. Seller has not received notice of any adverse claim, violation of applicable law, notice of default, notice of intent to condemn, or threatened lawsuit or proceeding that could
adversely affect the Property or Buyer’s rights in the Property or Permit No. [number]
[include if applicable: , except [specify]].

7. There are no unpaid debts, judgments, liens, or obligations affecting the Property
[include if applicable: , except [specify]].

8. Seller has paid all fees and filed all reports required by the [Texas Commission on
Environmental Quality/[name of applicable groundwater authority]], and there are no out-
standing deficiencies or violations related to Permit No. [number].

9. Affiant acknowledges that this affidavit is made to induce Buyer to purchase the
Property [include as applicable: [and/,,] Lender to make a loan to Buyer secured by the
Property/[and/,,] Title Insurance Provider to insure title to the Property subject only to the
exceptions shown in Schedule B of the Commitment for Title Insurance/[and] Closer to close
this transaction].

[Include the following if applicable.]

10. The representations and warranties set out in the Contract are still true and correct
[include if applicable: , except [specify]].

[Include the following if applicable.]

11. The indemnification obligations set out in the Contract are hereby acknowledged
and confirmed.

[Continue with the following.]

__________________________________________________________
[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _________________ by [name of affiant].
For valuable consideration, [Affiant/Seller] indemnifies and agrees to defend and hold Buyer [and [Lender/Title Insurance Provider/Closer]] harmless from all losses, damages, judgments, and expenses, including attorney’s fees and court and other costs, that Buyer [and [Lender/Title Insurance Provider/Closer]] suffer[s], incur[s] or pay[s] because any part of this Affidavit is not true or completely correct.

[Name of affiant or seller]
Form 16-14

Assignment and Assumption of Lease
[Water Rights]

Date:

Assignor:

Assignor’s Mailing Address:

Assignee:

Assignee’s Mailing Address:

[Real Property:]

Water Rights:

Lease

Date:

Lessor:

Lessor’s Address:

Lessee:

Lessee’s Address:

Amendments:

Consideration:

Assignor is conveying the Water Rights to Assignee by warranty deed dated this date.
Assignor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty in the warranty deed, to the extent they affect the Lease, assigns to Assignee all of Assignor’s right, title, and interest in and to the Lease. Assignor binds Assignor and Assignor’s heirs and successors to warrant and forever defend all and singular Lessor’s interest in the Lease to Assignee and Assignee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof [include if applicable: when the claim is by, through, or under Assignor but not otherwise], except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty in the warranty deed, to the extent they affect the Lease.

Assignee assumes and agrees to perform Lessor’s obligations under the Lease arising after this date. The obligation to repay security and prepaid rental deposits to Lessee under the Lease is limited to the amount of cash delivered or credited by Assignor to Assignee with respect to security and prepaid rental deposits. Assignee will indemnify, defend, and hold Assignor harmless from any loss, attorney’s fees, expenses, or claims arising out of or related to Assignee’s failure to perform any of the obligations of Lessor under the Lease after this date.

Assignor will indemnify, defend, and hold Assignee harmless from any loss, attorney’s fees, expenses, or claims arising out of or related to Assignor’s failure to perform any of the obligations of Lessor under the Lease before this date.

When the context requires, singular nouns and pronouns include the plural.

[Name of assignor]

[Name of assignee]
Include acknowledgments. Attach exhibits.
Lessee Estoppel Certificate
[Water Rights]

Date:

Lease

Date:

Lessor:

Lessee:

Water Rights:

Amendments:

Addressee:

Lessee certifies to Addressee that—

1. Lessee has accepted and is in possession of the Water Rights.

2. All requirements under the Lease required to be performed through the date of this certificate have been completed to the satisfaction of Lessee.

3. Neither Lessor nor Lessee is in default in the performance of the Lease.

4. The current rent is [amount] dollars ($[amount]) per [term] payable [describe due date, e.g., on the first of the month], and has been paid through [date]. The next payment is due on [date]. No rent under the Lease has been paid more than thirty days in advance of its due date.
5. The Lease term ends on [date], and Lessee has no right or option to purchase all or any part of the Water Rights.

6. Lessee has not paid a security or other deposit with respect to the Lease except as follows: [describe].

7. Lessee has not given Lessor written notice of any dispute between Lessor and Lessee, and Lessee has no knowledge of any event that, with the giving of notice, the passage of time, or both, would constitute a default by Lessor under the Lease.

8. Lessee has not assigned the Lease in whole or in part.

9. The Lease is valid, enforceable, and unmodified except for the Amendments.

10. Lessee understands that Addressee is relying on the representations in this certificate.

11. Lessee will give Addressee written notice of any default by Lessor under the Lease that would entitle Lessee to terminate the Lease and sixty days in which to cure the default before taking action to terminate the Lease.

12. Lessee has notice that Lessor’s interest in the Lease, the rents, and all other sums due in connection with the Lease have been or will be assigned to Addressee as security for a loan. The loan documents authorize Addressee to obtain rents directly from Lessee if Lessor defaults on the loan, and Lessee agrees that it will pay the rent directly to Addressee on receipt of a written request by Addressee.
13. In the event that Addressee succeeds to the interest of Lessor or any successor to Lessor, then Lessee hereby agrees to attorn to and accept Addressee and to recognize Addressee as its Lessor under the Lease for the remaining term and at Lessor’s request will sign and deliver an attornment agreement to Lessor.

[Name of lessee]
By ________________________________
Memorandum of Contract

Date:


Date:

Seller:

Buyer:

Description of Water Rights:

This Memorandum of Contract is given to evidence Buyer’s right to acquire the Water Rights pursuant to the terms of the Contract. Buyer and Seller will execute a notice of termination of the Contract if the Contract is terminated before completion of the sale.

Buyer:

[Name of buyer]

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name].

Notary Public, State of Texas
Form 16-16

Memorandum of Contract

Seller:

[Name of seller]

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name].

Notary Public, State of Texas

After recording, return to:

[Name and address]
Notice of Termination of Contract [Water Rights] Form 16-17

Date:


Date:

Seller:

Buyer:

Description of Water Rights:

This Notice of Termination of Contract is given to evidence the termination of the Contract, which is more fully described in that Memorandum of Contract recorded under Document No. [number] in the Official Public Records of [county] County, Texas.

Seller and Buyer hereby agree that the Contract was terminated before completion of the sale, and Seller is the owner of the Water Rights free from any claims by Buyer.

Buyer:

[Name of buyer]

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name].
Notice of Termination of Contract [Water Rights]

Notary Public, State of Texas

Seller:

[Name of seller]

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name].

Notary Public, State of Texas

After recording, return to:
[name and address]
Form 16-18

This form is for the sale of surface water rights when water rights have already been severed from the land or when water rights are to be severed from the land to which they are appurtenant. The form should be modified as appropriate.

Surface Water Rights Sales Contract
Permit/Certificate of Adjudication No[s].

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

This contract to buy and sell surface water rights is between Seller and Buyer as identified below and is effective on the date (“Effective Date”) of the last of the signatures by Seller and Buyer as parties to this contract and by [Title Company/Escrow Agent] to acknowledge receipt of the [Initial] Earnest Money. Buyer must deliver the [Initial] Earnest Money and obtain a signature acknowledging receipt of the [Initial] Earnest Money before the [Initial] Earnest Money Deadline provided in paragraph A.1. below for this contract to be effective. If the Earnest Money is paid by check and payment on presentation is refused, Buyer is in default.

Seller:

Address:

Phone:

E-mail:

Type of entity:

Seller’s Attorney:
Law firm:

Address:

Phone:

E-mail:

Buyer:

Address:

Phone:

E-mail:

Type of entity:

Buyer’s Attorney:

Law firm:

Address:

Phone:

E-mail:

Include the following if applicable.

Surveyor:

Survey Category:

Continue with the following.
[Title Company/Escrow Agent]: [identify title company, or if title insurance will not be obtained, identify person who will act as escrow agent]

Address:

Phone:

E-mail:

[Underwriter:]

Water [Authority/Authorities]: The Texas Commission on Environmental Quality (TCEQ) and [list any other applicable agencies or governmental bodies or authorities having jurisdiction over the administration of the water rights, e.g., a watermaster or other river or basin water authority]

Seller’s Permit/Certificate of Adjudication No[s].: [list all permits and certificates of adjudication, including numbers, that are the subject of the sale and attach copies of each together with all amendments thereto as exhibit A]

Appurtenant Land: [provide legal description of any land to which the water rights are appurtenant or attach field notes as exhibit B]

Buyer’s Intended Use of Water Rights:

Water Rights: Seller’s Permit/Certificate of Adjudication No[s]. [number[s]]

Select one of the following.

All right, title, and interest in and to Permit/Certificate No. [number] as amended, dated [date], issued by the TCEQ to [name of seller], concerning the right to appropriate surface waters of the state of Texas in the [identify water body] for [purpose, e.g., irrigation, municipal, industrial, recreational purposes] (the “Permit/Certificate”).
The following portion of the Water Rights: [specify portion being sold, such as number of acre-feet authorized to be diverted]

[Include if applicable: These Water Rights are currently appurtenant to the Appurtenant Land, but will be amended to change the [include as applicable: place of use/place of appropriation/purpose of use/point of diversion/[other provision for which amendment of the current certificate is sought]] from [describe place of use, place of appropriation, purpose of use, point of diversion, or other provision in the current certificate for which amendment is sought, as applicable] to [describe place of use, place of appropriation, purpose of use, point of diversion, or other amendment to the water right sought by buyer] [include if applicable: and to sever the Water Rights from the Appurtenant Land in the Permit/Certificate to make the water rights appurtenant to the land described on Exhibit [exhibit number/letter] attached to this contract].

Include the following if the water rights are within the Rio Grande and are allocated on an account basis, and attach the TCEQ Rio Grande Water Division Monthly Report statements for the applicable period as an exhibit at the end of this contract.

Seller’s Current Year Water Allocation: The amount of water allocated to Seller by the Rio Grande Watermaster for the year beginning January 1, [year], and ending December 31, [year], as more fully described in Exhibit [exhibit number/letter]. The Seller’s Water Rights being sold and conveyed to Buyer will include [all/[describe portion]] of the Seller’s Current Year Water Allocation.

Include the following if the water rights are subject to a watermaster program.

Water Rights Assessments: The amount assessed by the TCEQ for the watermaster program for the period beginning January 1, [year], and ending December 31 of the year in which the sale closes. Seller shall pay all Water Rights Assessments when due for the period
during which Seller owns the Water Rights and shall provide proof of payment at or prior to closing. Seller shall escrow any amounts necessary to pay for assessments that will be billed or become payable after closing, attributable to Seller’s ownership of the Water Rights prior to closing. This provision shall survive closing.

Earnest Money: $[amount]

[Initial Earnest Money:]

[Additional Earnest Money:]

Depending on the anticipated time for obtaining TCEQ approval, the parties may want to provide for more than one additional earnest money deposit. If there is more than one additional earnest money deposit, the parties should specify whether and the extent to which (1) each is refundable or non-refundable, coordinating with section J. of this contract, and (2) to be applied to the purchase price under paragraph K.2.b.

Independent Consideration: $[amount] of the Earnest Money constitutes Independent Consideration given for Buyer’s right to terminate during the Inspection Period under paragraph G.2. The Independent Consideration will be applied to the Purchase Price at closing, but [will/will not] be returned to Buyer if Buyer terminates this contract during the Inspection Period.

Purchase Price

Cash portion:

Seller-financed portion (principal amount of note):

Interest rate:

Maturity date:
Payment schedule:

See exhibit F for additional terms and conditions.

Third-party-financed portion:

Total purchase price:

Buyer’s Liquidated Damages: $[amount]

Seller’s Additional Liquidated Damages: $[amount]

[Title Commitment/Title Information]: If no Title Commitment is required, Seller will have the obligation to provide to Buyer, at [Buyer/Seller]’s expense, the Title Information as defined in paragraph F.2. below.

Title Documents: Seller’s [Certificate of Adjudication/[specify other water authority document]] and instruments affecting title to the Water Rights and the Real Property referenced in the [Title Commitment/Title Information] [and as otherwise provided as part of Seller’s Records].

County for Performance:

A. Deadlines and Other Dates

All deadlines in this contract expire at 5:00 P.M. local time where the point of diversion of the Water Rights is located. If a deadline falls on a Saturday, Sunday, or national holiday, the deadline will be extended to the next day that is not a Saturday, Sunday, or national holiday. A national holiday is a holiday designated by the federal government. Time is of the essence.

A.1. [Initial] Earnest Money Deadline: [date]
A.2. Delivery of Seller’s records as specified in Exhibit D: [[date]/[number] days after the Effective Date]

Select one of the following.

A.3. Delivery of Title Commitment to [Water Rights [and/or Appurtenant Land]]: [[date]/[number] days after the Effective Date]

Or

Include the following if applicable.

A.3. Delivery of Title Information: [[date]/[number] days after the Effective Date]

A.4. Delivery of Survey: [[date]/[number] days after the Effective Date]

Select one of the following.

A.5. Delivery of written documents from lienholder(s) consenting to transfer of [include if applicable: and modifications to] Water Rights and agreement to release lien on Water Rights or land to which Water Rights are appurtenant, or from other adverse claims to Seller’s title to Water Rights: [[date]/[number] days after the Effective Date]

Or

A.5. Delivery of Seller’s Affidavit of No Liens or Adverse Claims to Water Rights or to Appurtenant Land: [[date]/[number] days after the Effective Date]

Continue with the following.

A.6. End of Inspection Period: [[date]/[number] days after receipt of the [Title Commitment/Title Information]] [include if applicable: and Survey]

A.7. Delivery of Water Rights Conveyance (Conditional) [include if applicable: with Vendor’s Lien] and other documents necessary to accomplish application for transfer of Water Rights: [[date]/[number] days after the Effective Date]
A.8. Filing of TCEQ Application: [number] days after Delivery of Title Conveyance of Water Rights (Conditional)

A.9. Delivery of Additional [Refundable/Nonrefundable] Earnest Money: [At the Conditional Closing in paragraph A.7./[[date]/[number] days after the Effective Date]]

If there is more than one additional earnest money deposit, the parties should specify whether and the extent to which (1) each is refundable or nonrefundable, coordinating with section J. of this contract, and (2) to be applied to the purchase price under paragraph K.2.b.

A.10. Delivery of [Title Policy/Opinion of Counsel]: At Final Closing

A.11. Final Closing: [number] days after issuance of TCEQ Approval [Letter/Order] [and other water authority approvals] and receipt thereof by [Title Company/Escrow Agent]

B. Closing Documents

B.1. Conditional Closing Documents

B.1.a. At the Conditional Closing on the deadline stated in paragraph A.7., Seller will deliver the following items:

Water Rights Conveyance (Conditional) [include if applicable: with Vendor’s Lien], to be delivered through [Title Company/Escrow Agent]

Documents necessary to accomplish application for transfer of Water Rights from Seller to Buyer, including documents necessary to request from applicable Water [Authority/Authorities] approval of any modifications to Permit/Certificate of Adjudication

IRS Nonforeign Person Affidavit

Select one of the following.
Written documents from lienholder(s) consenting to transfer of Water Rights and modifications to Permit/Certificate sought by Buyer from any Water [Authority/Authorities] and agreeing to release lien(s) on Water Rights and/or the land to which Water Rights are appurtenant, or from any other adverse claims to Seller’s title to Water Rights on Final Closing

Or

Seller’s Affidavit of No Liens or Adverse Claims to Water Rights or to Appurtenant Land

Continue with the following.

[Title Policy/Opinion of Counsel]

Evidence of Seller’s authority to close this transaction

B.1.b. At the Conditional Closing on the deadline stated in paragraph A.7., Buyer will deliver the following items:

Additional [Refundable/Nonrefundable] Earnest Money deposit

Evidence of Buyer’s authority to close this transaction

B.2. Final Closing Documents

B.2.a. At Final Closing, Seller will deliver the following items:

Conveyance of Water Rights (Unconditional) [include if applicable: with Vendor’s Lien], to be delivered through [Title Company/Escrow Agent]

Include the following if applicable.

Transfer of Existing Water Allocations, if any, pertaining to Water Rights
Include the following if applicable.

[Release of Lien on Water Rights from lienholder(s) holding a lien on Water Rights or the Appurtenant Land or from other adverse claims to Seller’s title to Water Rights/Seller’s Affidavit of No Liens or Adverse Claims, dated as of the date of Closing]

Continue with the following.

B.2.b. At Final Closing, Buyer will deliver the following items:

Balance of Purchase Price

Evidence of Buyer’s authority to close this transaction

Seller-financing documents

Promissory Note

Deed of Trust

The documents listed in section B.1. are collectively known as the “Conditional Closing Documents.” The documents listed in section B.2. are collectively known as the “Final Closing Documents.” Unless otherwise agreed by the parties before Closing, the Water Rights Conveyance [include if applicable: , note, and water rights deed of trust (with security agreement, financing statement, and assignment of leases and rents)] will be prepared using the printed forms contained in the current edition of the Texas Real Estate Forms Manual (State Bar of Texas).

C. Exhibits

The following are attached to and are a part of this contract:

Exhibit A—Copy of Permit/Certificate of Adjudication and any amendments
D. Purchase and Sale of Water Rights

The parties acknowledge that the essence of this transaction is that the TCEQ [and [name of water [authority/authorities]]] approve the change of ownership, [include as applicable: place of use/purpose of use/point of diversion] of the Water Rights. The parties therefore agree that subject to necessary proceedings before and approval of the TCEQ [and [name of water [authority/authorities]]], Seller agrees to sell and convey the Water Rights to Buyer and Buyer agrees to buy and pay Seller for the Water Rights. The promises by Buyer and Seller stated in this contract are the consideration for the formation of this contract.

The parties further acknowledge that Buyer is purchasing the Water Rights of Seller as a right separate and apart from the Appurtenant Land and that no interest in such land is intended to be sold, transferred, or conveyed to Buyer.
E. Interest on Earnest Money

Buyer may direct [Title Company/Escrow Agent] to invest the Earnest Money in an interest-bearing account in a federally insured financial institution by giving notice to [Title Company/Escrow Agent] and satisfying [Title Company/Escrow Agent]’s requirements for investing the Earnest Money in an interest-bearing account. Any interest earned on the Earnest Money will become part of the Earnest Money.

F. Title [and Survey]


F.2. Title Commitment; Title Policy. “Title Commitment” means a Commitment for Issuance of an Owner Policy of Title Insurance by Title Company, as agent for Underwriter, stating the condition of title to the Water Rights and any Appurtenant Land. The “effective date” stated in the Title Commitment must be after the Effective Date of this contract. “Title Policy” means an Owner Policy of Title Insurance issued by Title Company, as agent for Underwriter, in conformity with the last Title Commitment delivered to and approved by Buyer.

F.2. Title Information. “Title Information” means an abstract of title prepared by a title insurance company or an abstract company licensed by the Texas State Board of Insurance, covering the period from the first conveyance of title to the Water Rights and any Appurtenant Land out of the sovereignty to the Effective Date, and containing complete and legible copies of all of the deeds, easements, liens, and other documents affecting title to the Water Rights and any Appurtenant Land.
F.3. **Delivery of Seller’s Records; [Title Commitment/Title Information]; Consent to Transfer and Agreement to Release; Water Rights Conveyance (Conditional).** Seller must deliver Seller’s Records to Buyer by the deadline stated in paragraph A.2.; any [Title Commitment/Title Information] to Buyer by the deadline stated in paragraph A.3.; the [written documents from lienholder(s)/Seller’s Affidavit of No Liens] described in paragraph A.5. by the deadline stated in paragraph A.5.; the Water Rights Conveyance (Conditional) by the deadline stated in paragraph A.7.; and the [Opinion of Counsel/Title Policy] by the deadline stated in paragraph A.10.

F.4. **Survey.** “Survey” means an on-the-ground, staked plat of survey and metes-and-bounds description of the Land, prepared by Surveyor or another surveyor satisfactory to Title Company, dated after the Effective Date, and certified to comply with the current standards and specifications as published by the Texas Society of Professional Surveyors for the Survey Category.

F.5. **Delivery of Survey.** [Seller must deliver to Buyer/Buyer must order for delivery] the Survey by the deadline stated in paragraph A.4.

G. **Inspection Period**

G.1. **Title Search.** “Title Search” means a search of appropriate records or reports stating the condition of the title to the Water Rights and to any Appurtenant Land.

G.2. **Buyer’s Right to Terminate.** Buyer may conduct a Title Search during the Inspection Period at [Buyer/Seller]’s cost. Buyer may terminate this contract for any reason by notifying Seller before the end of the Inspection Period.
G.3. **Title Objections.** Buyer has until the End of Inspection Period in paragraph A.6. above to review the [Title Commitment/Title Information] [include if applicable: , Survey,] and legible copies of the Title Documents, notify Seller of Buyer’s objections to any of them, and request any additional information needed to evidence Seller’s title to the Water Rights [include if applicable: and Appurtenant Land] (“Title Objections”). Buyer will be deemed to have approved all matters reflected by the [Title Commitment/Title Information] [include if applicable: , Survey,] and Title Documents to which Buyer has made no Title Objection by the end of the Inspection Period. The matters that Buyer either approves or is deemed to have approved are “Permitted Exceptions.” If Buyer notifies Seller of any Title Objections, Seller has five days from receipt of Buyer’s notice to notify Buyer whether Seller agrees to cure the Title Objections before Closing (“Cure Notice”). If Seller does not timely give its Cure Notice or timely gives its Cure Notice but does not agree to cure all the Title Objections before Closing, Buyer may, within five days after the deadline for the giving of Seller’s Cure Notice, notify Seller that either this contract is terminated or Buyer will proceed to close, subject to Seller’s obligations to resolve the items listed in Schedule C of the [Title Commitment/Title Information], remove the liquidated liens, remove all exceptions that arise by, through, or under Seller after the Effective Date, and cure only the Title Objections that Seller has agreed to cure in the Cure Notice. At or before Closing, Seller must resolve the items that are listed in Schedule C of the [Title Commitment/Title Information], remove all liquidated liens, remove all exceptions that arise by, through, or under Seller after the Effective Date of this contract, and cure the Title Objections that Seller has agreed to cure.

H. **Representations and Warranties**

The parties’ representations stated in Exhibit C are true and correct as of the Effective Date and must be true and correct on the Closing Date. Seller will promptly notify Buyer if Seller becomes aware that any of the representations are not true or correct.
I. Water Rights Conveyance (Conditional); Application for Approval; Cooperation; Condition of Water Rights until Final Closing; Memorandum/No Recording of Contract

I.1. Conditional Conveyance. By the deadline stated in paragraph A.7., Seller will execute and deliver to Buyer (a) a Water Rights Conveyance (in form and substance acceptable to Buyer and the TCEQ and containing warranty of title) and (b) such other applications or documents as may be required to transfer the Water Rights, including all documents required to pursue governmental approval proceedings; provided, however, that Seller’s conveyance of the Water Rights shall be deemed conditional until the Final Closing Date (i.e., such time as the TCEQ has issued an Amendment to Certificate of Adjudication No. [number] or other appropriate order or orders approving the transfer of water rights [include if applicable: and the approval of any other Water [Authority/Authorities]], and Buyer has paid the balance of the Purchase Price).

I.2. Application for TCEQ Approval; Additional Earnest Money. Seller hereby authorizes Buyer to file an application with the TCEQ and all other required governmental and Water Authorities for approval of the transfer of ownership [include if applicable: and [include as applicable: change of place/purpose of use/point of diversion], as designated by Buyer] for the Water Rights (the “Governmental Proceedings”). Buyer must file the application(s) for such Governmental Proceedings by the deadline stated in paragraph A.8. [Buyer/Seller] will bear the expenses of the Application(s), including the expenses of any public hearings or proceedings before the TCEQ and all other required Water Authorities, and any required filing and recording fees; provided, however, that Buyer will bear any expenses incurred by Buyer to place Buyer in a position to accept the transfer of the Water Rights. Buyer will initiate and pursue the Governmental Proceedings, and Seller will cooperate with Buyer to procure approval of the transfer of Water Rights by the deadline stated in paragraph A.9., provided, however, that failure to procure governmental approval or delay in Govern-
mental Proceedings beyond the deadline stated in paragraph A.9. not attributable to the conduct of either of the parties to this contract will not be grounds for termination of this contract.

I.3. Maintenance and Use. Until closing, Seller will (a) maintain the Water Rights as they exist on the Effective Date, except to the extent otherwise required by the TCEQ or any governmental or water rights authority or order of a court of competent jurisdiction; (b) use the Water Rights in the same manner as they were used on the Effective Date; and (c) comply with all permit conditions and applicable contracts and governmental regulations affecting the Water Rights. Until the end of the Inspection Period, Seller will not enter into, amend, or terminate any contract that affects the Water Rights other than in the ordinary course of using the Water Rights and will promptly give notice to Buyer of each new, amended, or terminated contract, including a copy of the contract, in sufficient time so that Buyer may consider the new information before the end of the Inspection Period. If Seller’s notice is given within three days before the end of the Inspection Period, the Inspection Period will be extended for three days. After the end of the Inspection Period, Buyer may terminate this contract if Seller enters into, amends, or terminates any contract that affects the Water Rights without first obtaining Buyer’s written consent.

I.4. Condemnation. Seller will notify Buyer promptly after Seller receives notice that any part of the Water Rights has been or is threatened to be condemned or otherwise taken by a governmental or quasi-governmental authority. Buyer may terminate this contract if the condemnation would materially affect Buyer’s Intended Use of Water Rights by giving notice to Seller within fifteen days after receipt of Seller’s notice to Buyer (or before Final Closing if Seller’s notice is received less than fifteen days before Final Closing). The condemnation will be deemed to materially affect Buyer’s Intended Use of Water Rights if [specify reason, e.g., the condemnation would result in Buyer’s not being able to divert more than [number] acre-feet of water; would have an adverse effect on quality or availability of water]. If Buyer does not terminate this contract, (a) Buyer and Seller will each have the right to
appear and defend their respective interests in the Water Rights in the condemnation proceedings, (b) any award in condemnation will be assigned to Buyer to the extent necessary to compensate Buyer for the loss of or reduction in the Water Rights, and (c) if the taking occurs before Closing, the description of the Water Rights will be revised to delete the portion taken.

I.5. **Claims; Hearings.** Seller will notify Buyer promptly after Seller receives notice of any claim or administrative hearing that is threatened, filed, or initiated before Closing that affects the Water Rights.

I.6. **Memorandum of Contract; Termination of Contract; No Recording of Contract.** At the request of Buyer, Seller will execute a memorandum of this contract, in a mutually acceptable form, to be recorded in the real property records of [county] County, Texas. At the time the memorandum is signed, Buyer and Seller will also sign a termination of contract in recordable form (“Termination of Contract”) and deposit it into escrow with [Title Company/Escrow Agent]. The parties authorize [Title Company/Escrow Agent] to record the Termination of Contract as provided in section J. below. Neither Buyer nor Seller may file this contract in the real property records of any county. If either party records this contract, the other party may terminate this contract and record a notice of termination.

J. **Conditions of Contract Termination**

If there is more than one additional earnest money deposit, the parties should specify which deposits are refundable and which are nonrefundable.

J.1. **Termination on Failure to Obtain TCEQ Order of Approval.** If, through no fault of Seller or Buyer, the TCEQ does not issue (a) an amendment to the Certificate of Adjudication or other permit for the Water Rights or (b) its other final approval [letter/order] of the transfer of Water Rights to Buyer as provided herein, then [Title Company/Escrow Agent] will return (a) to Seller the Title Conveyance of Water Rights and (b) to Buyer the [Earnest Money/Additional Earnest Money], and the parties will cancel all portions of the transaction.
set forth in this contract by appropriate legal means. In such event, neither party will have any further obligation to the other, and the parties agree to sign such instruments and take such actions as are required to place the parties in the position each was in with respect to the Water Rights before entering into this contract. [Title Company/Escrow Agent] will record the Termination of Contract on receipt of Seller’s authorization to return the Earnest Money.

J.2. Disposition of Earnest Money after Other Termination

J.2.a. To Buyer. If Buyer terminates this contract in accordance with any of Buyer’s rights to terminate, then unless Seller delivers notice of Seller’s objection to [Title Company/Escrow Agent]’s release of the Earnest Money to Buyer within five days after Buyer delivers Buyer’s termination notice to Seller and [Title Company/Escrow Agent], [Title Company/Escrow Agent] is authorized, without any further authorization from Seller, to deliver the Earnest Money to Buyer. [Title Company/Escrow Agent] will record the Termination of Contract on receipt of Seller’s authorization to return the Earnest Money.

J.2.b. To Seller. If Seller terminates this contract in accordance with any of Seller’s rights to terminate, then unless Buyer delivers notice of Buyer’s objection to [Title Company/Escrow Agent]’s release of the Earnest Money to Seller within five days after Seller delivers Seller’s termination notice to Buyer and [Title Company/Escrow Agent], [Title Company/Escrow Agent] is authorized, without any further authorization from Buyer, to pay and deliver the Earnest Money to Seller. [Title Company/Escrow Agent] will record the Termination of Contract on receipt of Buyer’s authorization to pay the Earnest Money.

J.3. Duties after Termination. If this contract is terminated, Buyer will promptly return to Seller all documents relating to the Water Rights that Seller has delivered to Buyer and all copies that Buyer has made of the documents. After return of the documents and copies, neither party will have further duties or obligations to the other under this contract, except for those obligations that cannot be or were not performed before termination of this contract.
K. Final Closing

K.1. Date of Final Closing. Within the number of days stated in paragraph A.11. following (a) issuance of TCEQ and/or other final Water Authority approval order(s) and (b) notice thereof to Buyer, Buyer will deliver to [Title Company/Escrow Agent] the balance of the Purchase Price and any additional expenses attributable to Buyer under this section of this contract.

K.2. Final Closing. This transaction will close at [Title Company/Escrow Agent]’s offices at the Final Closing. At Closing, the following will occur:

K.2.a. Final Closing Documents. The parties will execute and deliver the Final Closing Documents.

K.2.b. Payment of Purchase Price. Buyer will deliver the Purchase Price and other amounts that Buyer is obligated to pay under this contract to [Title Company/Escrow Agent] in funds acceptable to [Title Company/Escrow Agent]. The [Earnest Money/Additional Earnest Money] will be applied to the Purchase Price.

K.2.c. Disbursement of Funds; Recording; Copies. [Title Company/Escrow Agent] will be instructed to disburse the Purchase Price and other funds in accordance with this contract, record the deed and the other Final Closing Documents directed to be recorded, and distribute documents and copies in accordance with the parties’ written instructions.


K.3. Transaction Costs

K.3.a. Seller’s Costs. Seller will pay (i) one-half of the escrow fee charged by [Title Company/Escrow Agent]; (ii) the costs to prepare the Title Conveyance to Water Rights; (iii)
the costs to obtain, deliver, and record releases of all liens to be released at Closing and of [obtaining documents from lienholders consenting to the transfer or modification of Water Rights or other adverse claims to Seller’s title to Water Rights/Seller’s Affidavit of No Liens or Adverse Claims to Water Rights or to Appurtenant Land]; (iv) the costs to deliver copies of the instruments described in paragraph A.2.; [and] (v) Seller’s attorney’s fees and expenses [include as applicable: ; (vi) the basic charge for the Title Policy/Title Information; (vii) the charge for the Opinion of Counsel; (viii) the charge for proceedings before the TCEQ and/or other Water Authority, including the expenses of any public hearings or proceedings before the TCEQ, and required filing and recording fees; (ix) the charge for the Survey [; and] include any additional charges]].

K.3.b. Buyer’s Costs. Buyer will pay (i) one-half of the escrow fee charged by [Title Company/Escrow Agent]; (ii) the costs to obtain, deliver, and record all documents other than those to be recorded at Seller’s expense; (iii) the costs to obtain financing of the Purchase Price, including the incremental premium costs of the mortgagee’s title policies and endorsements and deletions required by Buyer’s lender; (iv) the costs incurred for Buyer to place itself in a position to accept the transfer of the Water Rights; [and] (v) Buyer’s attorney’s fees and expenses [include as applicable: ; (vi) the basic charge for the Title Policy; (vii) the charge for the Opinion of Counsel; (viii) the charge for proceedings before the TCEQ and/or other Water Authority, including the expenses of any public hearings or proceedings before the TCEQ, and required filing and recording fees; (ix) the charge for the Survey [; and] include any additional charges]].

K.3.c. Postclosing Adjustments. If errors in the prorations made at closing are identified within ninety days after Closing, Seller and Buyer will make postclosing adjustments to correct the errors within fifteen days of receipt of notice of the errors.

K.3.d. Brokers’ Commissions. Buyer and Seller each indemnify and agree to defend and hold the other party harmless from any loss, attorney’s fees, and court and other costs
arising out of a claim by any person or entity claiming by, through, or under the indemnitor for a broker’s or finder’s fee or commission because of this transaction or this contract, whether the claimant is disclosed to the indemnitee or not. At Closing, each party will provide the other party with a release of broker’s or appraiser’s liens from all brokers or appraisers for which each party was responsible.

Include the following if applicable.

K.4. Issuance of Title Policy. Seller will cause Title Company to issue the Title Policy to Buyer at Final Closing.

Continue with the following.

L. Default and Remedies

L.1. Seller’s Default. If Seller fails to perform any of its obligations under this contract, or if any of Seller’s representations is not true and correct as of the Effective Date or on the Final Closing (“Seller’s Default”), Buyer may elect either of the following as its sole and exclusive remedy:

L.1.a. Termination; Liquidated Damages. Buyer may terminate this contract by giving notice to Seller on or before the Final Closing and have the Earnest Money, less the Independent Consideration as described above, returned to Buyer. Unless Seller’s Default relates to the untruth or incorrectness of Seller’s representations for reasons not reasonably within Seller’s control, if Seller’s Default occurs after Buyer has incurred costs to investigate the Water Rights after the Effective Date and Buyer terminates this contract in accordance with the previous sentence, Seller will also pay to Buyer as liquidated damages the lesser of Buyer’s actual out-of-pocket expenses incurred to investigate the Water Rights after the Effective Date (“Buyer’s Expenses”) or the amount of Buyer’s Liquidated Damages, within ten days after Seller’s receipt of an invoice from Buyer stating the amount of Buyer’s Expenses accompanied by reasonable evidence of Buyer’s Expenses.
L.1.b. **Specific Performance.** Unless Seller’s Default relates to (i) the untruth or incorrectness of Seller’s representations for reasons not reasonably within Seller’s control, (ii) a defect in Seller’s title to the Water Rights, or (iii) the failure of the TCEQ or other water rights authority to approve the transfer of the Water Rights (unless such failure is due to the acts of Seller), Buyer may enforce specific performance of Seller’s obligations under this contract, but any such action must be initiated, if at all, within ninety days after the breach or alleged breach of this contract. If title to the Water Rights is awarded to Buyer, the conveyance will be subject to the matters stated in any Title Commitment.

L.2. **Buyer’s Default.** If Buyer fails to perform any of its obligations under this contract ("Buyer’s Default"), Seller may terminate this contract by giving notice to Buyer on or before the Final Closing and have the Earnest Money paid to Seller. If Buyer’s Default occurs after Seller has incurred costs to perform its obligations under this contract and Seller terminates this contract in accordance with the previous sentence, Buyer will also reimburse Seller for the lesser of Seller’s actual out-of-pocket expenses incurred to perform its obligations under this contract ("Seller’s Expenses") or the amount of Seller’s Additional Liquidated Damages, within ten days after Buyer’s receipt of an invoice from Seller stating the amount of Seller’s Expenses accompanied by reasonable evidence of Seller’s Expenses. The foregoing constitute Seller’s sole and exclusive remedies for a default by Buyer before closing.

L.3. **Liquidated Damages.** The parties agree that just compensation for the harm that would be caused by a default by either party cannot be accurately estimated or would be very difficult to accurately estimate and that the Earnest Money and the amounts provided above are reasonable forecasts of just compensation to the nondefaulting party for the harm that would be caused by a default.
L.4. *Attorney’s Fees.* If either party retains an attorney to enforce this contract, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and other costs.

M. *Miscellaneous Provisions*

M.1. *Notices.* Any notice required by or permitted under this contract must be in writing. Any notice required by this contract will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this contract. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received, provided that (a) any notice received on a Saturday, Sunday, or national holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or national holiday; and (b) any notice received after 5:00 P.M. local time at the place of delivery on a day that is not a Saturday, Sunday, or national holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or national holiday. Any address for notice may be changed by not less than ten days’ prior written notice given as provided herein. Copies of each notice must be given by one of these methods to the attorney of the party to whom notice is given.

M.2. *Entire Agreement.* This contract, its exhibits, and any documents delivered at Closing are the entire agreement of the parties concerning the sale of the Water Rights. There are no representations, warranties, agreements, or promises between the parties pertaining to the Water Rights or the sale of the Water Rights, and neither party is relying on any statements or representations of any agent of the other party, that are not in those documents.

M.3. *Amendment.* This contract may be amended only by an instrument in writing signed by the parties.
M.4. Prohibition of Assignment. Buyer may not assign this contract or any of Buyer’s rights under it without Seller’s prior written consent, and any attempted assignment is void.

M.4. Assignment. Buyer may assign this contract and Buyer’s rights under it only to an entity in which Buyer possesses, directly or indirectly, the power to direct or cause the direction of its management and policies, whether through the ownership of voting securities or otherwise, and any other assignment is void. No such assignment will relieve Buyer of its obligations under this contract, and Buyer and the assignee will be jointly and severally liable for the performance of such obligations after any such assignment.

M.5. Survival. The obligations of this contract that cannot be performed before termination of this contract or before Closing survive termination of this contract or Closing, and the legal doctrine of merger does not apply to these matters. If there is any conflict between the Final Closing Documents and this contract, the Final Closing Documents control.

M.6. Choice of Law; Venue. This contract is to be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the County for Performance.

M.7. Waiver of Default. It is not a waiver of default if the nondefaulting party fails to declare a default immediately or delays taking any action with respect to the default.

M.8. No Third-Party Beneficiaries. There are no third-party beneficiaries of this contract.
M.9. **Severability.** If a provision of this contract is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this contract, and this contract is to be construed as if the unenforceable provision is not a part of the contract.

M.10. **Ambiguities Not to Be Construed against Party Who Drafted Contract.** The rule of construction that ambiguities in a document will be construed against the party who drafted it will not be applied in interpreting this contract.

M.11. **No Special Relationship.** The parties’ relationship is an ordinary commercial relationship, and they do not intend to create the relationship of principal and agent, partnership, joint venture, or any other special relationship.

M.12. **Counterparts.** If this contract is executed in multiple counterparts, all counterparts taken together constitute this contract. Copies of signatures to this contract are effective as original signatures.

M.13. **Confidentiality.** The parties will keep confidential this contract, this transaction, and all information learned in the course of this transaction, except to the extent disclosure is required by law or court order or to enable third parties to advise or assist Buyer to investigate the Water Rights or either party to close this transaction. Remedies for violations of this provision are limited to injunctions, and no damages or rescission may be sought or recovered as a result of any such violations.

M.14. **Binding Effect.** This contract binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

Include the following only if the buyer has agreed to waive its rights under the DTPA.
M.15. Waiver of Consumer Rights. BUYER WAIVES ITS RIGHTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES–CONSUMER PROTECTION ACT, SECTION 17.41 ET SEQ. OF THE TEXAS BUSINESS AND COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF ITS OWN SELECTION, BUYER VOLUNTARILY CONSENTS TO THIS WAIVER.

[Name and title of seller]
Date:

[Name and title of buyer]
Date:

[Title Company/Escrow Agent] acknowledges receipt of Earnest Money in the amount of $___________ and a copy of this contract executed by both Buyer and Seller.

[Name of title company/escrow agent]
By ______________________________
Name: ______________________________
Title: ______________________________
Date: ______________________________
Exhibit A

Copies of Permit/Certificate of Adjudication No.

Attach all permits and certificates of adjudication including numbers and all amendments that are the subject of this sale.
Exhibit B

Description of the Appurtenant Land

Include legal description of the land to which water rights are appurtenant or attach field notes.
Exhibit C

Representations; Environmental Matters [: Severance of Water Rights]

A. Seller’s Representations to Buyer

Seller represents to Buyer that the following are true and correct as of the Effective Date and will be true and correct on the Final Closing:

If the seller is an individual or is acting in a representative capacity, some of the items should be modified.

A.1. Authority. Seller is a [specify type of organization] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[state]] with authority to convey the Water Rights to Buyer. This contract is, and all documents required by this contract to be executed and delivered to Buyer at Closing will be, duly authorized, executed, and delivered by Seller.

A.2. Litigation. Seller has not received written notice and has no actual knowledge of any litigation pending or threatened against Seller that might affect the Water Rights or Seller’s ability to perform its obligations under this contract [include if applicable: , except: [specify]].

A.3. Violation of Laws. Seller has not received written notice of violation of any law, ordinance, regulation, or requirements affecting the Water Rights or Seller’s use of the Water Rights [include if applicable: , except: [specify]].

A.4. Licenses, Permits, and Approvals. Seller has not received written notice that any license, permit, or approval necessary to use the Water Rights in the manner in which they are currently used has expired or will not be renewed on expiration or that any material condition will be imposed in order to obtain their renewal [include if applicable: , except: [specify]].
A.5. Condemnation; Zoning; Land Use; Hazardous Materials. Seller has not received written notice of any condemnation, zoning, or land-use proceedings affecting the Water Rights or any written inquiries or notices by any governmental authority or third party with respect to the presence of hazardous materials affecting the Water Rights [include if applicable: , except: [specify]].

A.6. No Other Obligation to Sell Water Rights or Restriction against Selling Water Rights. Except for granting a security interest in the Water Rights, Seller has not obligated itself to sell the Water Rights to any party other than Buyer. Seller’s performance of this contract will not cause a breach of any other agreement or obligation to which Seller is a party or to which it is bound.

A.7. No Liens. On the Final Closing, the Water Rights will be free and clear of all liens and encumbrances of any nature not arising by, through, or under Buyer except the Permitted Exceptions or liens to which Buyer has given its consent.

A.8. Good Title. Seller has good and indefeasible fee simple title to the Water Rights, free and clear of all mortgages, liens, licenses, encumbrances, leases, tenancies, security interests, covenants, conditions, restrictions, rights-of-way, easements, judgments, and other matters affecting title [include if applicable: , except: [specify]].

A.9. No Bills or Claims. There will be no unpaid bills or claims in connection with any repair or work performed or material furnished or otherwise relating to the Water Rights for the benefit of Seller as of the date of Closing, and all bills attributable to or affecting the Water Rights will be paid by Seller in full before Closing.

A.10. No Adverse Matters. To Seller’s knowledge, there is no (a) change contemplated in any applicable laws, ordinances, or restrictions, including the rules of the Water Authority; (b) judicial or administrative action threatened or pending against the Water Rights or Seller; (c) action [include if applicable: by landowners adjacent to the Appurtenant Land]
pending or threatened against the Water Rights or Seller; or (d) natural or artificial conditions relating to the Water Rights [include if applicable: or relating to the Appurtenant Land] that would have a material adverse effect on the Water Rights [include if applicable: and Appurtenant Land].

A.11. Compliance with Laws. To Seller’s knowledge, Seller has at all times complied with and operated in compliance with all applicable federal, state, and local laws, regulations, and ordinances regarding the Water Rights [include if applicable: and the Appurtenant Land], including rules of any applicable Water Authority. Seller will promptly notify Buyer of any noncompliance notice received by Seller.

A.12. No Other Representation. Except as stated above or in the notices, statements, and certificates set forth in Exhibit E, Seller makes no representation with respect to the Water Rights.

A.13. No Warranty. Seller has made no warranty other than the warranty of title in connection with this contract.

A.14. Severance of Water Rights. The Water Rights that Seller agrees to convey herein are appurtenant to land in [county] County, Texas, and those Water Rights have not heretofore been severed from the land.

B. “As Is, Where Is”

This contract is an arm’s-length agreement between the parties. The purchase price was bargained on the basis of an “AS IS, WHERE IS” transaction and reflects the agreement of the parties that there are no representations or
express or implied warranties, except those in this contract and the closing documents.

seller disclaims all warranties and representations regarding the quantity or quality of the water available pursuant to the water rights or its reliability for any particular use or purpose.

buyer is not relying on any representations, disclosures, or express or implied warranties other than those expressly contained in this contract and the closing documents. buyer is not relying on any information regarding the water rights or permit/certificate provided by any person other than buyer’s own inspection and the representations and warranties contained in this contract and the closing documents.

c. environmental matters

after closing, buyer releases seller from liability for environmental problems affecting the property, including liability (1) under the comprehensive environmental response, compensation, and liability act (cercla), the resource conservation and recovery act (rcra), the texas solid waste disposal act, or the texas water code; or (2) arising as the result of theories of products liability and strict liability, or under new laws or changes to existing laws enacted after the effective date that would otherwise impose on sellers in this type of transaction new liabilities for environmental problems affecting the property. [include if applicable: this release applies even when the environmental problems affecting the property result from seller’s own negligence or the negligence of seller’s representative.]
The provisions of this section C. regarding the Water Rights will be included in the Title Conveyance of Water Rights with appropriate modification of terms as the context requires.

D. Buyer’s Representations to Seller

Buyer represents to Seller that the following are true and correct as of the Effective Date and will be true and correct on the Closing Date:

If the buyer is an individual or is acting in a representative capacity, some of the items should be modified.

D.1. Authority. Buyer is a [specify type of organization] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[(state] with authority to perform its obligations under this contract. This contract is binding on Buyer. This contract is, and all documents required by this contract to be executed and delivered to Seller at Closing will be, duly authorized, executed, and delivered by Buyer.

Include other representations from the buyer to the seller as needed.
Exhibit D

Seller’s Records

To the extent that Seller has possession of the following items pertaining to the Water Rights, Seller will deliver or make the items or copies of them available to Buyer by the deadline stated in paragraph A.8.:

Governmental

governmental licenses, certificates, permits, and approvals, specifically including

   Seller’s Permit or Certificate of Adjudication to the Water Rights

environmental reports

records of regulatory proceedings or violations

annual water use reports filed with TCEQ, and its predecessor agencies related to the Water Rights

   Watermaster reports, if any, related to the Water Rights

other: [specify]

Financial

books and records for the Water Rights

other: [specify]

Leases

   Leases

   renewal options

   security deposit
current tenant or landlord defaults

estoppel letters and/or subordination agreements

other: [specify]
Exhibit E

Notices, Statements, and Certificates

Certain notices must be contained in the contract and others must be provided as separate notices. Please refer to the statutory requirements for each notice.

The notices, statements, and certificates (arranged by their application to particular transactions) that are listed below are [include as applicable: included in the sales contract/and] attached for delivery to Buyer], and Buyer acknowledges receipt of the notices, statements, and certificates by executing this contract:

Include one or more of the following paragraphs as applicable and modify section headers and paragraph numbers as appropriate.

A. Consumer Notices

Notice of Cancellation. Notice concerning the purchaser’s three-day right of rescission under a contract to purchase real property if (1) the seller or the seller’s agent solicits the sale at a place other than the seller’s place of business; (2) the purchaser submits the purchase contract to the seller or the seller’s agent at a place other than the seller’s place of business; and (3) the consideration payable under the purchase contract exceeds $100; unless either (1) the purchaser is represented by a licensed attorney; (2) the transaction is negotiated by a licensed real estate broker; or (3) the transaction is negotiated at a place other than the purchaser’s residence by the person who owns the property, as described in chapter 601 of the Texas Business and Commerce Code.
B. Residential Transaction Notices


If applicable, attach the full text of Tex. Prop. Code § 5.008, with all relevant information filled in, to the end of this exhibit E.

And/Or

B.2. Notice of Membership in Property Owners Association. Notice concerning the sale of single-family residential property that is subject to membership in a property owners association, described in section 5.012 of the Texas Property Code.

If applicable, attach form 23-8 to the end of this exhibit E.

And/Or

B.3. Seller’s Disclosure of Location of Conditions under Surface of Unimproved Real Property. Seller’s disclosure of the location of pipelines under the surface of unimproved property to be used for residential purposes, described in section 5.013 of the Texas Property Code. A seller of unimproved property to be used for residential purposes shall provide the purchaser written notice disclosing the location of any transportation pipeline to the best of the seller’s belief and knowledge as of the date the notice is completed and signed by the seller. If the information required to be disclosed is not known by the seller, the seller shall indicate that fact in the notice. A seller is not required to give this notice if (a) the seller is obligated under the terms of the contract to furnish a title insurance commitment to the buyer before closing and (b) the buyer is entitled to terminate the contract if the buyer’s objections to title as permitted by the contract are not cured by the seller before closing.

No form is provided, because the sales contract portion of this form 16-18 satisfies the provisions for exemption from disclosure.
B.4. **Notice of Obligation to Pay Public Improvement District Assessment.** Seller’s disclosure that a single-family residential property is located within a public improvement district, described in section 5.014 of the Texas Property Code.

> If applicable, attach form 4-5 to the end of this exhibit E.

B.5. **Residential Contracts for Deed.** Notice regarding the sale of property used or to be used as the purchaser’s residence if the contract does not provide for delivery of a deed from the seller to the purchaser within 180 days after the final execution of the contract.


B.6. **Notice Regarding Insulation to Buyer of New Home.** Notice concerning insulation to be installed in a new home, described in section 460.16 of title 16 of the Code of Federal Regulations.

> If applicable, attach form 4-6 to the end of this exhibit E.

B.7. **Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards.** Lead-based paint warning statement, described in section 745.100 et seq. of title 40 of the Code of Federal Regulations.

> If applicable, attach form 4-7 to the end of this exhibit E.

B.9. Notice Regarding Sale Subject to a Recorded Lien. Notice to the purchaser and each lienholder required under Texas Property Code section 5.016 that property being sold will be conveyed subject to a lien.

C. Condominium Transaction Notices


C.2. Condominium Resale Certificate. Resale certificate from the condominium owners association or waiver of resale certificate, described in section 82.157 of the Texas Property Code.

D. All Real Property Transaction Notices

D.2. **Notice to Purchaser Regarding Restrictive Covenants.** Notice of deed restrictions, described in section 212.155 of the Texas Local Government Code.

D.3. **Notice to Purchaser Regarding Coastal Area Property.** Notice regarding real property located adjacent to tidally influenced, submerged lands of Texas, described in section 33.135 of the Texas Natural Resources Code.

D.4. **Notice to Purchaser of Property Seaward of Gulf Intracoastal Waterway.** Notice concerning public easements to the public beach, described in section 61.025 of the Texas Natural Resources Code.

D.5. **Notice Regarding Possible Liability for Additional Taxes.** Notice of additional tax liability for vacant land that has been subject to a special tax appraisal method, described in section 5.010 of the Texas Property Code.

If applicable, attach form 4-10 to the end of this exhibit E.

And/Or

If applicable, attach form 4-11 to the end of this exhibit E.

And/Or

If applicable, attach form 4-12 to the end of this exhibit E.

And/Or

If applicable, attach form 4-13 to the end of this exhibit E.

And/Or

If applicable, attach form 4-14 to the end of this exhibit E.
D.6. **Notice Regarding Possible Annexation.** Notice concerning the sale of property located outside the limits of a municipality that may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality, described in section 5.011 of the Texas Property Code.

If applicable, attach form 4-15 to the end of this exhibit E.

And/Or

D.7. **Notice for Unimproved Property in a Certificated Service Area of a Utility Service Provider.** Notice for property in a certificated service area of a utility service provider, described in section 13.257 of the Texas Water Code.

If applicable, attach form 4-16 to the end of this exhibit E.

And/Or

D.8. **Utility District Notice.** Notice concerning the bonded indebtedness of, or rates to be charged by, a utility or other special district, described in section 49.452 of the Texas Water Code, with the form of notice to be used being dependent on whether the property (a) is located in whole or in part within the extraterritorial jurisdiction of one or more home-rule municipalities but is not located within the corporate boundaries of a municipality, (b) is located in whole or in part within the corporate boundaries of a municipality, or (c) is not located in whole or in part within the corporate boundaries of a municipality or the extraterritorial jurisdiction of one or more home-rule municipalities.

If applicable, attach form 4-17 to the end of this exhibit E.

And/Or

D.9. **Notice to Purchaser of Property Located in Certain Annexed Water Districts.** Notice required by section 54.016(h)(4)(A) of the Texas Water Code when property being sold is in a water or sanitary sewer district that entered a contract with a city with a population
of 1.18 million or less under which the city is permitted to set rates in the district after annexation that are different from rates charged other residents of the city.

If applicable, attach form 4-18 to the end of this exhibit E.

And/Or

D.10. Notice to Purchaser that Property Is Located within the Area of the Alignment of a Transportation Project. Notice required under Texas Local Government Code section 232.0033 that all or part of the subdivision in which the property being sold is located is within the area of the alignment of a transportation project as shown in the final environmental decision document that is applicable to a future transportation corridor identified in a contract between the Texas Department of Transportation and a county under Texas Transportation Code section 201.619.

If applicable, attach form 4-19 to the end of this exhibit E.

And/Or

D.11. Certificates of Mold Remediation. Notice pursuant to section 1958.154 of the Texas Occupations Code, titled “Certificate of Mold Remediation; Duty of Property Owner,” requiring a property owner who sells property that has been issued a certificate of mold remediation pursuant to this section to deliver copies to the purchaser of each certificate of mold remediation issued for the property within the preceding five years.

And/Or

D.12. Notice of Water Level Fluctuations. Notice to purchasers of residential or commercial property adjoining an impoundment of water, including a reservoir or lake, constructed and maintained under Texas Water Code chapter 11, that has storage capacity of at least 5,000 acre-feet at the impoundment’s normal level, provided pursuant to Texas Property Code section 5.019.
If applicable, attach form 4-20 to the end of this exhibit E.
Exhibit F

Seller Financing Addendum

A. **Promissory Note.** The promissory note ("Note") will be payable by Buyer ("Maker") to the order of Seller ("Payee") at the place designated by Payee. The Note may be prepaid in whole or in part at any time without penalty, premium, or restriction of any kind. Any prepayments are to be applied to the payment of the installments of principal last maturing, and interest will immediately cease on the prepaid principal. The lien securing payment of the Note will be inferior to any lien securing any superior note described in the contract. The Note will be payable as follows:

Select one of the following.

In one payment due [number] days after the date of the Note with interest payable [at maturity/monthly/quarterly/annually].

Or

In [number] installments of $[amount] each [including interest/plus interest] beginning [number] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [date], when the entire balance of the Note will be due and payable.

Or

Interest only in [number] installments for the first [number] year[s] and thereafter in [number] installments of $[amount] each [including interest/plus interest] beginning [number] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [date], when the entire balance of the Note will be due and payable.

Or

Other: [specify].
B. **Deed of Trust.** The deed of trust ("Deed of Trust") securing the Note will provide for the following:

**B.1. Assumption without Consent.** The Water Rights may be sold, transferred, or conveyed without the consent of Payee, provided any subsequent buyer or transferee assumes in writing for the benefit of Payee the obligation to pay the Note and to perform the covenants and agreements in the Deed of Trust in accordance with the terms of those instruments. No such assumption will release Maker from any liabilities or obligations arising under the Note or Deed of Trust. Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Water Rights.

**B.1. Assumption with Consent.** The Water Rights may be sold, transferred, or conveyed provided that (a) any subsequent buyer assumes in writing for the benefit of Payee the obligation to pay the Note and to perform the covenants and agreements in the Deed of Trust in accordance with the terms of those instruments and (b) Maker or the subsequent buyer obtains prior written consent to such a sale from Payee. Consent will be based on the subsequent buyer’s credit history, with no change in interest rate or terms, and may not be unreasonably withheld, conditioned, or delayed. No such assumption will release Maker from any liabilities or obligations arising under the Note or Deed of Trust. If all or any part of the Water Rights is sold, conveyed, leased for a period longer than three years, leased with an option to purchase, otherwise sold (including by contract for deed), or otherwise transferred or conveyed without prior written consent of Payee, Payee may, at Payee’s sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Any deed under threat or order of condemnation, any conveyance solely between makers, and
the passage of title by reason of death of a maker or by operation of law will not be construed as a sale or conveyance of the Water Rights. [Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Water Rights./The creation of a subordinate lien without the consent of Payee will be construed as a sale or conveyance of the Water Rights, but any subsequent sale under a subordinate lien to which Payee has consented will not be construed as a sale or conveyance of the Water Rights.]

**B.1. Prohibition against Assumption.** If all or any part of the Water Rights is sold, transferred, or conveyed without the prior written consent of Payee, Payee may, at Payee’s sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Payee has no obligation to consent to any such sale or conveyance of the Water Rights, and Payee is entitled to condition any consent on a change in the interest rate that will thereafter apply to the Note and any other change in the terms of the Note or Deed of Trust that Payee in Payee’s sole discretion deems appropriate. A lease for a period longer than three years, a lease with an option to purchase, or a contract for deed will be deemed to be a sale, transfer, or conveyance of the Water Rights for purposes of this provision. Any deed under threat or order of condemnation, any conveyance solely between makers, and the passage of title by reason of death of a maker or by operation of law will not be construed as a sale or conveyance of the Water Rights. The creation of a subordinate lien without the consent of Payee will be construed as a sale or conveyance of the Water Rights, but any subsequent sale under a subordinate lien to which Payee has consented will not be construed as a sale or conveyance of the Water Rights.

**B.2. Cross-Default.** Any act or occurrence that would constitute a default under the terms of any lien superior to the lien securing the Note will constitute a default under the Deed of Trust securing the Note.
C. Recourse Provisions. The Note and Deed of Trust are subject to the following provisions:

**Full Recourse.** Maker will have full recourse liability for repayment of the principal and interest of the Note and the performance of all covenants and agreements of Maker in the Deed of Trust.

**No Recourse.** Maker will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Maker in the Deed of Trust. The sole remedy of Payee or other holder of the Note in the event of a default by Maker under the Note or Deed of Trust will be to foreclose the liens and security interests granted in the Deed of Trust, and Payee or other holder of the Note will not be entitled to any personal judgment against Maker.

**Partial Recourse.** Except as set forth below, Maker will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Maker in the Deed of Trust. Except as set forth below, the sole remedy of Payee or other holder of the Note in the event of a default by Maker under the Note or Deed of Trust will be to foreclose the liens and security interests granted in the Deed of Trust, and Payee or other holder of the Note will not be entitled to any personal judgment against Maker. Maker will have full recourse liability for any loss or damage actually suffered or incurred by Payee or other holder of the Note by reason of—

1. taxes, assessments, and charges for labor, materials, or other amounts that if unpaid may create an encumbrance against the Water Rights that accrue before foreclosure;
2. all rents, issues, profits, and income derived from the Water Rights after a default occurs and not expended for debt service or operating expenses of the Water Rights before foreclosure;

3. tenant security deposits for leases of the Water Rights not forfeited by or refunded to the tenants;

4. any condemnation or insurance proceeds not paid or applied as required in the Deed of Trust;

5. damages resulting from fraud or misrepresentation by Maker;

6. damages resulting from breach of any warranty of title by Maker;

7. interest on the Note from the date of default through foreclosure, payment, or settlement of the debt;

8. all interest on the Note during any bankruptcy proceeding of Maker and all reasonable attorney’s fees and expenses incurred as a result of Maker’s bankruptcy; and

9. all attorney’s fees and expenses incurred by Payee to collect any of the foregoing amounts.
Exhibit G

Memorandum of Contract

Attach a memorandum of contract if applicable. See form 16-16 in this chapter.
Exhibit H

Notice of Termination of Contract

Attach a notice of termination of contract if applicable. See form 16-17 in this chapter.
Surface Water Rights Conveyance—Conditional
Permit/Certificate of Adjudication No[s].

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

Consideration:

See form 5-6 in this manual for consideration clauses.

Water Rights: [include appropriate description[s], which may be found in the subject permit[s], and certificate[s] of adjudication. It is advisable to attach a copy or copies of the applicable permit[s] or certificate[s] of adjudication as an exhibit.]

Include the following if the water rights are within the Rio Grande and are allocated on an account basis.

Grantor’s Current Year Water Allocation: The amount of water allocated to Grantor by the Rio Grande Watermaster for the year beginning January 1, [year], and ending December 31, [year], as more fully described in the TCEQ Rio Grande Water Division Monthly Report statements for the applicable period. The Grantor’s Water Rights being conveyed...
to Grantee include [all/[describe portion]] of the Grantor’s Current Year Water Allocation.

Severed Appurtenant Property (property from which surface water rights are severed in this conveyance upon satisfaction of Condition): [include legal description or state “None” as applicable]

A description of the land to which the water rights are appurtenant and from which they are being severed in the conveyance assists title examination of the land and any appurtenant water rights. With respect to irrigation rights involving a change in the place of use, the water rights will become appurtenant to other land; however, that other land is not to be described in this conditional conveyance to avoid confusion and is unnecessary if the TCEQ does not approve the transaction or the change in place of use.

Reservations from Conveyance: [state “None” or describe any reservations from conveyance in this instrument; see form 5-7 for examples]

Exceptions to Conveyance and Warranty: [state “None” or describe any exceptions to conveyance and warranty in this instrument; see form 5-8 for examples]

Condition: Approval by the Texas Commission on Environmental Quality (TCEQ) [include if applicable: and [other water [authority/authorities]] of the change of [include as applicable: [ownership/place of use/purpose of use/point of diversion] of the Water Rights]].

Include the following if water rights are irrigation rights appurtenant to land and the land is not also being conveyed by the grantor.

Grantor does hereby expressly sever the Water Rights here conveyed from the Severed Appurtenant Property on satisfaction of the Condition.
Subject to the Condition, Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Water Rights, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee’s heirs, successors, and assigns forever. Grantor binds Grantor and Grantor’s heirs and successors to warrant and forever defend all and singular the Water Rights to Grantee and Grantee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from and Exceptions to Conveyance and Warranty.

If the conveyance includes personal property, include clause 5-9-13. If appropriate, include additional clauses like those suggested in form 5-9.

The parties agree that once the TCEQ [include if applicable: and [other water [authority/authorities]]] approve[s] the transfer, and Grantee pays any remaining consideration for the transfer, in accordance with the terms of the contract between Grantor and Grantee, this conveyance will become absolute. Grantor hereby authorizes the Texas Commission on Environmental Quality, or its successor, and any such other governmental body or authority that has jurisdiction over the Water Rights ("Water Authority") to make such changes in the records as are necessary to accomplish the conveyance and transfer of the Water Rights. Grantor agrees to execute such other instruments as shall be necessary and required by the TCEQ and other Water Authority.

Continue with the following.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]
If the deed imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.
Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

Consideration:

See form 5-6 in this manual for consideration clauses.

Water Rights: [include appropriate description[s], which may be found in the subject permit[s], and certificate[s] of adjudication. It is advisable to attach a copy or copies of the applicable permit[s] or certificate[s] of adjudication as an exhibit.]

Include the following if the water rights are within the Rio Grande and are allocated on an account basis.

Grantor’s Current Year Water Allocation: The amount of water allocated to Grantor by the Rio Grande Watermaster for the year beginning January 1, [year], and ending December 31, [year], as more fully described in the TCEQ Rio Grande Water Division Monthly Report statements for the applicable period. The Grantor’s Water Rights being sold and
conveyed to Grantee include [all/[describe portion]] of the Grantor’s Current Year Water Allocation.

Severed Property (property from which surface water rights are severed in this conveyance):

[include legal description or state “None” as applicable]

A description of the land to which the water rights are appurtenant and from which they are being severed in the conveyance assists title examination of the land and any appurtenant water rights.

Include the following if the TCEQ has approved the transfer and an amendment changing the place of use with respect to irrigation water rights.

Appurtenant Property (property to which Water Rights attach in this conveyance): [include legal description]

Reservations from Conveyance: [state “None” or describe any reservations from conveyance in this instrument; see form 5-7 for examples]

Exceptions to Conveyance and Warranty: [state “None” or describe any exceptions to conveyance and warranty in this instrument; see form 5-8 for examples]

Include the following if water rights are irrigation rights appurtenant to land and the land to which the water rights are appurtenant prior to the conveyance is not also being conveyed to the grantee.

Grantor does hereby expressly sever the Water Rights here conveyed from the Severed Appurtenant Property.

Continue with the following.
Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Water Rights, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee’s heirs, successors, and assigns forever. Grantor binds Grantor and Grantor’s heirs and successors to warrant and forever defend all and singular the Water Rights to Grantee and Grantee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from and Exceptions to Conveyance and Warranty.

If the conveyance includes personal property, include clause 5-9-13. If appropriate, include additional clauses like those suggested in form 5-9.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

If the deed imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.
Deed of Trust and Security Agreement
[Water Rights]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Terms

Date:

Grantor:

If the deed of trust is to be filed as a financing statement and if the grantor is an organization, the deed of trust should also indicate the type of organization, the jurisdiction of the organization, and an organizational identification number.

Grantor’s Mailing Address:

Trustee[s]:

Trustee’s Mailing Address[es]:

Lender:

Lender’s Mailing Address:

Obligation

Note

Date:

Original principal amount:
Borrower: 

Lender: 

Maturity date: 

Other Debt: [include optional clauses from form 8-6 in this manual or describe other debt]

Property: [include description[s] of each applicable category of property]

1. Water Rights: [include appropriate description[s] (same as in the security agreement, form 16-22), which may be found in the subject permit[s], certificate[s] of adjudication, deed[s], easement[s], or other document[s] of conveyance].

2. Permits and Certificates of Adjudication (“Permits/Certificates” whether one or more): [describe, e.g., All Permits and Certificates of Adjudication pertaining to the Water Rights, now existing or hereafter acquired, including those identified below, and all amendments, replacements, and modifications thereto].

3. The following equipment, fixtures, and personal property used in connection with the Water Rights: [describe].

4. All easements and other rights appurtenant to, or used in connection with, the Water Rights, whether now existing or hereafter acquired [include if applicable: , including that Easement Agreement for Groundwater Rights dated [date], executed by [name] as grantor and Grantor as Grantee, recorded under Document No. [number] in the Official Public Records of [county] County, Texas].
5. All agreements for the sale of water derived from the Water Rights, whether now existing or hereafter executed, and the proceeds thereof.

6. All agreements for the lease of any portion of the Water Rights, whether now existing or hereafter executed, and all rents and proceeds thereof.

7. [Describe other property as applicable.]

Include the following if applicable.

Appurtenant Land Conveyed to Trustee:

Or

Surface Estate/Place of Appropriation/Diversion:

And/Or

Surface Estate/Place of Use:

Continue with the following.

Grantor’s Intended [Purpose of Use] [and] [Point of Diversion] of Water Rights:

Water Authority: [include as applicable: The Texas Commission on Environmental Quality (TCEQ) [and/or [any groundwater authority, watermaster, or conservation district, or other agency or governmental bodies or authorities having jurisdiction over the administration of the water rights covered]].]

Prior Lien: [include recording information]

If there is more than one prior lien, repeat above information for each additional prior lien and change the words Prior Lien to Prior Liens in all applicable instances.

Other Exceptions to Conveyance and Warranty:
A. **Granting Clause**

For value received and to secure payment of the Obligation, Grantor conveys the Property to Trustee, in trust [include if applicable: ]; provided, however, that the conveyance of the Water Rights is separate and apart from the Surface Estate, and no right in the Surface Estate is granted, except as expressly provided above and described as Appurtenant Land]. Grantor warrants and agrees to defend the title to the Property, subject to the [include if applicable: Prior Lien and] Other Exceptions to Conveyance and Warranty. On payment of the Obligation and all other amounts secured by this deed of trust, this deed of trust will have no further effect, and Lender will release it at Grantor’s expense. In addition to creating a deed-of-trust lien on all the real and other property described above, Grantor also grants to Lender a security interest in all of the above-described property pursuant to and to the extent permitted by the Texas Uniform Commercial Code.

B. **Grantor’s Obligations**

Grantor agrees to—

* B.1. keep the Property in good repair and condition, and in accordance with all applicable laws, rules and regulations, and the terms of this agreement;*

* B.2. pay all taxes, fees, and assessments on the Property before delinquency, not authorize a taxing entity to transfer its tax lien on the Property to anyone other than Lender, and not request a deferral of the collection of taxes pursuant to section 33.06 of the Texas Tax Code;*

* B.3. defend title to the Property subject to the [include if applicable: Prior Liens and] Other Exceptions to Conveyance and Warranty, preserve the lien’s priority as it is established in this deed of trust, and take all action necessary to protect or preserve Grantor’s and Lender’s rights and interests in the Water Rights and under the Permits/Certificates;*
B.4. maintain all insurance coverages with respect to the Property, revenues generated by the Property, and operations on the Property that Lender reasonably requires ("Required Insurance Coverages"), issued by insurers and written on policy forms acceptable to Lender, and deliver evidence of the Required Insurance Coverages in a form acceptable to Lender at least ten days before the expiration of the Required Insurance Coverages;

B.5. obey all laws, ordinances, and restrictive covenants applicable to the Property;

B.6. keep any buildings occupied as required by the Required Insurance Coverages;

B.7. if the lien of this deed of trust is not a first lien, pay or cause to be paid all prior lien notes and abide by or cause to be abided by all prior lien instruments;

B.8. notify Lender of any change of address or if Grantor has obtained any new easement rights for use in connection with the Water Rights;

B.9. timely pay all permit fees, use fees, assessments, taxes, or other charges levied or assessed by any Water Authority, and maintain all Permits/Certificates or other rights covered by this deed of trust in accordance with the terms of this deed of trust and in good standing with the issuing Water Authority;

B.10. comply with all rules and regulations of any applicable Water Authority, and immediately notify Lender of any threatened or actual enforcement action against Grantor or the Property by any applicable Water Authority;

B.11. obtain Lender’s written consent before seeking to modify or convert any agreement, including any Permits/Certificates issued by any applicable Water Authority, relating to the Property;

B.12. immediately notify Lender of any change in any permit or certificate issued by any Water Authority for the Property and of any proposed amendment, conversion, or other
change to the permit or certificate [include if applicable: and immediately record the permit or certificate, as amended, in the real property records of the applicable county or counties]; and

B.13. provide and maintain with the Water Authority written instructions, in form approved by Lender, notifying the Water Authority of Lender’s rights and interests in the Water Rights and the Permits/Certificates, and prohibiting the Water Authority, without the prior written authorization of Lender, from (a) approving or documenting a conveyance of all or any portion of the Water Rights or (b) approving a request or application by Grantor or any other person to transfer, amend, or terminate the Permits/Certificates as it or they pertain to the Water Rights.

C. Lender’s Rights

C.1. Lender or Lender’s mortgage servicer may appoint in writing one or more substitute trustees, succeeding to all rights and responsibilities of Trustee.

C.2. If the proceeds of the Obligation are used to pay any debt secured by prior liens, Lender is subrogated to all the rights and liens of the holders of any debt so paid.

C.3. Lender may apply any proceeds received under the insurance policies covering the Property either to reduce the Obligation or to repair or replace damaged or destroyed improvements covered by the policy.

C.4. Notwithstanding the terms of the Note to the contrary, and unless applicable law prohibits, all payments received by Lender from Grantor with respect to the Obligation or this deed of trust may, at Lender’s discretion, be applied first to amounts payable under this deed of trust and then to amounts due and payable to Lender with respect to the Obligation, to be applied to late charges, principal, or interest in the order Lender in its discretion determines.

C.5. If Grantor fails to perform any of Grantor’s obligations, Lender may perform those obligations and be reimbursed by Grantor on demand for any amounts so paid, including
attorney’s fees, plus interest on those amounts from the dates of payment at the rate stated in the Note for matured, unpaid amounts. The amount to be reimbursed will be secured by this deed of trust.

C.6. COLLATERAL PROTECTION INSURANCE NOTICE

In accordance with the provisions of section 307.052(a) of the Texas Finance Code, the Beneficiary hereby notifies the Grantor as follows:

(A) the Grantor is required to:

(i) keep the collateral insured against damage in the amount the Lender specifies;

(ii) purchase the insurance from an insurer that is authorized to do business in the state of Texas or an eligible surplus lines insurer; and

(iii) name the Lender as the person to be paid under the policy in the event of a loss;

(B) the Grantor must, if required by the Lender, deliver to the Lender a copy of the policy and proof of the payment of premiums; and

(C) if the Grantor fails to meet any requirement listed in Paragraph (A) or (B), the Lender may obtain collateral protection insurance on behalf of the Grantor at the Grantor’s expense.

C.7. If there is a default on the Obligation or if Grantor fails to perform any of Grantor’s obligations and the default continues after any required notice of the default and the time allowed to cure, Lender may—
a. declare the unpaid principal balance and earned interest on the Obligation immediately due;

b. direct Trustee to foreclose this lien, in which case Lender or Lender’s agent will cause notice of the foreclosure sale to be given as provided by the Texas Property Code as then in effect; and

c. purchase the Property at any foreclosure sale by offering the highest bid and then have the bid credited on the Obligation.

C.8. Lender may remedy any default without waiving it and may waive any default without waiving any prior or subsequent default.

C.9. Grantor authorizes Lender to file financing statements under the Uniform Commercial Code describing the Property. This deed of trust constitutes a fixture filing as to the Property.

D. Trustee’s Rights and Duties

If directed by Lender to foreclose this lien, Trustee will—

D.1. either personally or by agent give notice of the foreclosure sale as required by the Texas Property Code as then in effect;

D.2. sell and convey all or part of the Property “AS IS” to the highest bidder for cash with a general warranty binding Grantor, subject to the Prior Lien and to the Other Exceptions to Conveyance and Warranty and without representation or warranty, express or implied, by Trustee;

D.3. from the proceeds of the sale, pay, in this order—

a. expenses of foreclosure, including a reasonable commission to Trustee;
b. to Lender, the full amount of principal, interest, attorney’s fees, and other charges due and unpaid, including all attorney’s fees and expenses attendant to (i) any proceedings before any applicable Water Authority to seek the approval of that Water Authority for the necessary changes in ownership, diversion point, place of use, and/or purpose of use of the Water Rights and (ii) the conveyance of the Water Rights;

c. any amounts required by law to be paid before payment to Grantor; and

d. to Grantor, any balance; and

D.4. be indemnified, held harmless, and defended by Lender against all costs, expenses, and liabilities incurred by Trustee for acting in the execution or enforcement of the trust created by this deed of trust, which includes all court and other costs, including attorney’s fees, incurred by Trustee in defense of any action or proceeding taken against Trustee in that capacity.

E. Grantor’s Authorization

Grantor agrees that Lender is authorized, but is not obligated, to perform one or more of the following:

E.1. To sever the Property, including the Water Rights, into separate groups or parcels [include if applicable: , to sever the Water Rights from the [Appurtenant Land/Surface Estate/easements]], and to foreclose or convey the Property in lieu of foreclosure in one or more separate or combined transactions.

E.2. To seek the approval of the Water Authority for a change in ownership, diversion point, place of use, or purpose of use of the Water Rights, and to transfer any existing unused water allotments that apply or pertain to the Water Rights in connection with a foreclosure or conveyance in lieu of foreclosure.
E.3. To file any application, institute any proceedings, and to perform such other acts or actions on behalf of Grantor, and in Grantor’s name, as Lender may determine to be necessary to protect or preserve the Property, including the value of the Water Rights and the rights provided by the Permits/Certificates and Grantor’s or Lender’s interest therein. Grantor hereby appoints Lender as Grantor’s attorney-in-fact, to perform the acts set forth above. This appointment as attorney-in-fact is coupled with an interest, is irrevocable, and shall survive Grantor’s disability, foreclosure of this deed of trust, and conveyance of the Property in lieu of foreclosure.

F. General Provisions

F.1. If any of the Property is sold under this deed of trust, Grantor must immediately surrender possession to the purchaser. If Grantor does not, Grantor will be a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

F.2. Recitals in any trustee’s deed conveying the Property will be presumed to be true.

F.3. Proceeding under this deed of trust, filing suit for foreclosure, or pursuing any other remedy will not constitute an election of remedies.

F.4. This lien will remain superior to liens later created even if the time of payment of all or part of the Obligation is extended or part of the Property is released.

F.5. If any portion of the Obligation cannot be lawfully secured by this deed of trust, payments will be applied first to discharge that portion.
F.6. Grantor assigns to Lender all amounts payable to or received by Grantor from condemnation of all or part of the Property, from private sale in lieu of condemnation, and from damages caused by public works or construction on or near the Property. After deducting any expenses incurred, including attorney’s fees and court and other costs, Lender will either release any remaining amounts to Grantor or apply such amounts to reduce the Obligation. Lender will not be liable for failure to collect or to exercise diligence in collecting any such amounts. Grantor will immediately give Lender notice of any actual or threatened proceedings for condemnation of all or part of the Property.

F.7. Interest on the debt secured by this deed of trust will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the debt.

F.8. In no event may this deed of trust secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

If a due-on-sale clause is desired, select one of the following.

F.9. If Grantor transfers any part of the Property without Lender’s prior written consent, Lender may declare the Obligation immediately payable and invoke any remedies provided in this deed of trust for default.

Or

F.9. Grantor may not sell, transfer, or otherwise dispose of any Property, whether voluntarily or by operation of law, without the prior written consent of Lender. If granted,
consent may be conditioned on (a) the grantee’s integrity, reputation, character, creditworthiness, and management ability being satisfactory to Lender; and (b) the grantee’s executing, before such sale, transfer, or other disposition, a written assumption agreement containing any terms Lender may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, a transfer fee, or any other modification of the Note, this deed of trust, or any other instruments evidencing or securing the Obligation.

Grantor may not cause or permit any Property to be encumbered by any liens, security interests, or encumbrances other than the liens securing the Obligation and the liens securing ad valorem taxes not yet due and payable without the prior written consent of Lender. If granted, consent may be conditioned upon Grantor’s executing, before granting such lien, a written modification agreement containing any terms Lender may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, an approval fee, or any other modification of the Note, this deed of trust, or any other instruments evidencing or securing the Obligation.

Grantor may not grant any lien, security interest, or other encumbrance (a “Subordinate Instrument”) covering the Property that is subordinate to the liens created by this deed of trust without the prior written consent of Lender. If granted, consent may be conditioned upon the Subordinate Instrument’s containing express covenants to the effect that—

a. the Subordinate Instrument is unconditionally subordinate to this deed of trust;

b. if any action is instituted to foreclose or otherwise enforce the Subordinate Instrument, no action may be taken that would terminate any occupancy or tenancy without the prior written consent of Lender, and that consent, if granted, may be conditioned in any manner Lender determines;
c. rents, if collected by or for the holder of the Subordinate Instrument, will be applied first to the payment of the Obligation then due and to expenses incurred in the ownership, operation, and maintenance of the Property in any order Lender may determine, before being applied to any indebtedness secured by the Subordinate Instrument;

d. written notice of default under the Subordinate Instrument and written notice of the commencement of any action to foreclose or otherwise enforce the Subordinate Instrument must be given to Lender concurrently with or immediately after the occurrence of any such default or commencement; and

e. in the event of the bankruptcy of Grantor, all amounts due on or with respect to the Obligation and this deed of trust will be payable in full before any payments on the indebtedness secured by the Subordinate Instrument.

Grantor may not cause or permit any of the following events to occur without the prior written consent of Lender: if Grantor is (a) a corporation, the termination of the corporation or the sale, pledge, encumbrance, or assignment of any shares of its stock; (b) a limited liability company, the termination of the company or the sale, pledge, encumbrance, or assignment of any of its membership interests; (c) a general partnership or joint venture, the termination of the partnership or venture or the sale, pledge, encumbrance, or assignment of any of its partnership or joint venture interests, or the withdrawal from or admission into it of any general partner or joint venturer; or (d) a limited partnership, (i) the termination of the partnership, (ii) the sale, pledge, encumbrance, or assignment of any of its general partnership interests, or the withdrawal from or admission into it of any general partner, (iii) the sale, pledge, encumbrance, or assignment of a controlling portion of its limited partnership interests, or (iv) the withdrawal from or admission into it of any controlling limited partner or partners. If granted, consent may be conditioned on (a) the integrity, reputation, character, creditworthiness, and management ability of the person succeeding to the ownership interest in Grantor (or security
interest in such ownership) being satisfactory to Lender; and (b) the execution, before such event, by the person succeeding to the interest of Grantor in the Property or ownership interest in Grantor (or security interest in such ownership) of a written modification or assumption agreement containing such terms as Lender may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, a transfer fee, or any other modification of the Note, this deed of trust, or any other instruments evidencing or securing the Obligation.

F.10. When the context requires, singular nouns and pronouns include the plural.

F.11. The term Note includes all extensions, modifications, and renewals of the Note and all amounts secured by this deed of trust.

F.12. This deed of trust binds, benefits, and may be enforced by the successors in interest of all parties.

F.13. If Grantor and Borrower are not the same person, the term Grantor includes Borrower.

F.14. Grantor and each surety, endorser, and guarantor of the Obligation waive all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

F.15. Grantor agrees to pay reasonable attorney’s fees, trustee’s fees, and court and other costs of enforcing Lender’s rights under this deed of trust if an attorney is retained for its enforcement.
F.16. If any provision of this deed of trust is determined to be invalid or unenforceable, the validity or enforceability of any other provision will not be affected.

F.17. The term Lender includes any mortgage servicer for Lender.

F.18. Grantor represents that this deed of trust and the Note are given for the following purposes: [list specific purposes].

Include the following if applicable.

F.19. The Note is secured by this deed of trust [[/and] a Security Agreement[and/, and] [include form 8-3 vendor’s lien language, if applicable]]. This deed of trust does not waive the provisions of the Security Agreement [include if applicable: and the vendor’s lien], and the liens and the rights created are cumulative. Lender may elect to foreclose under one or more liens without waiving any of the other lien(s).

Continue with the following.

[Name of grantor]

Include acknowledgment.
Form 16-22

Security Agreement
[Water Rights]

Date:

Debtor:

Debtor’s Mailing Address:

Secured Party:

Secured Party’s Mailing Address:

Classification of Collateral: [include as applicable: [Inventory/Equipment/Goods/Fixtures/
General Intangibles]]

Collateral: All of Debtor’s interest in the following property and all supporting obligations
and proceeds of such property:

1. Water Rights: [include appropriate description[s] (same as in the deed of trust,
form 16-21), which may be found in the subject permit[s], certificate[s] of adjudication, deed[s],
easement[s], or other document[s] of conveyance].

2. Permits and Certificates of Adjudication (“Permits/Certificates” whether one or more): [describe, e.g., All Permits and Certificates of Adjudication pertaining to the Water Rights, now existing or hereafter acquired, including those identified below, and all amend-
ments, replacements, and modifications thereto].

3. [Include as applicable: [Goods/Equipment/Fixtures/Inventory]]
4. All agreements for the sale of water derived from the Water Rights, whether now existing or hereafter executed, and the proceeds thereof.

5. All agreements for the lease of any portion of the Water Rights, whether now existing or hereafter executed, and all rents and proceeds thereof.

Water Authority: [include as applicable: The Texas Commission on Environmental Quality (TCEQ) [and [any groundwater authority, watermaster, or conservation district, or other agency or governmental bodies or authorities having jurisdiction over the administration of the water rights covered]]].

Obligation

Note

Date:

Original principal amount:

Borrower (Obligor):

Include either or both of the following if applicable.

Other Debt/Future Advances: The security interest also secures all other present and future debts and liabilities of Debtor and/or Obligor to Secured Party, including future advances.

Other Obligation[s]:

Continue with the following.
A. Debtor’s Representations Concerning Debtor and Locations:

A.1. [Include if applicable: Description of Land to Which Water Rights Are [or Are to Become] Appurtenant (“Appurtenant Land”): [include legal description of land].]

A.2. [Include if applicable: Debtor’s Intended [Place of Use/Purpose of Use/Point of Diversion] of Water Rights: [specify].]

A.3. [Include if applicable: [Debtor’s place of business/Debtor’s chief executive office] is located at [address, city, state].]

A.4. [Include if the debtor is an individual: Debtor’s residence is located at [address, city, state].]

A.4. [Include if the debtor is a corporation, limited partnership, or limited liability company: Debtor’s state of organization is [Texas/[state]], and Debtor’s name, as shown in its public organic record, as amended, is exactly as set forth above.]

A.5. Debtor’s records concerning the Collateral are located at [address, city, state].

A.6. Debtor has [caused the original of the Permits or Certificates to be delivered to Secured Party/recorded the Permits or Certificates in the real property records of all applicable counties].

B. Granting Clause

Debtor grants to Secured Party a security interest in the Collateral and all its proceeds to secure the Obligation and all renewals, modifications, and extensions of the Obligation. Debtor authorizes Secured Party to file financing statements describing the Collateral.
C. **Debtor Represents the Following:**

   **C.1.** No financing statement covering the Collateral is filed in any public office [include if the secured party has prefiled a financing statement or otherwise has a financing statement on file: except any financing statement in favor of Secured Party].

   **C.2.** Debtor owns the Collateral and has the authority to grant this security interest, free from any setoff, claim, restriction, lien, security interest, or encumbrance except liens for taxes not yet due.

   **C.3.** All information about Debtor’s financial condition is or will be accurate when provided to Secured Party.

   **C.4.** All fees, taxes, and other charges levied or assessed against the Collateral have been properly paid, and none are delinquent or due and owing.

   **C.5.** The Collateral is not the subject of any enforcement action by any Water Authority or other governmental entity.

   Include the following if applicable if the debtor is an individual.

   **C.6.** The Obligation was not incurred primarily for personal, family, or household purposes.

And/Or

   **C.7.** The Collateral was not acquired and will not be held primarily for personal, family, or household purposes.

Continue with the following.
D. Debtor Agrees to——

D.1. Defend the Collateral against all claims adverse to Secured Party’s interest; pay all fees, taxes, and other charges imposed on the Collateral, and provide Secured Party with proper evidence thereof; keep the Collateral free from liens, except for liens in favor of Secured Party or for taxes not yet due; keep the Collateral in Debtor’s possession and ownership except as otherwise provided in this agreement; and protect the Collateral against waste, normal usage and normal wear and tear excepted.

D.2. Pay all of Secured Party’s expenses, including reasonable attorney’s fees [include for a loan transaction subject to Texas Finance Code section 342.502: assessed by a court], incurred to (a) obtain, preserve, perfect, defend, and enforce this agreement; (b) retake, hold, prepare for disposition, dispose, collect, or enforce the Collateral; and (c) collect or enforce the Obligation. These expenses will bear interest from the date of advance at the rate stated in the Note for matured, unpaid amounts and are payable on demand at the place where the Obligation is payable. These expenses and interest are part of the Obligation and are secured by this agreement.

D.3. Sign and deliver to Secured Party any documents or instruments that Secured Party considers necessary to obtain, maintain, and perfect this security interest in the Collateral.

D.4. Notify Secured Party immediately of any event of default and of any material change (a) in the Collateral; (b) in Debtor’s Mailing Address; (c) in the location of any Collateral; (d) in any other representation or warranty in this agreement; (e) in the permit or certificate issued by any Water Authority for the Collateral, or any proposed adjustment, modification, amendment, or other change to the permit or certificate; (f) that may affect this security interest; and (g) any change in Debtor’s name and any location set forth above.

D.5. Use the Collateral primarily according to the stated classification.
D.6. Maintain accurate records of the Collateral at the address set forth above, furnish Secured Party any requested information related to the Collateral, and permit Secured Party to inspect and copy all records relating to the Collateral.

D.7. File with any applicable Water Authority all required reports and provide Secured Party with a true and correct copy of all such reports.

D.8. On Secured Party’s demand, hold payments, including instruments, items, and money received as proceeds of the Collateral, separate and in an express trust for Secured Party and deposit all such payments received as proceeds of the Collateral in a special bank account designated by Secured Party, who alone will have power of withdrawal.


E. Debtor Agrees Not to—

E.1. Sell, transfer, or encumber any of the Collateral except in the ordinary course of Debtor’s business.

E.2. Allow the Collateral to become the subject of any enforcement action by any Water Authority or any other governmental authority.

Select one of the following.

Include the following if the debtor is a corporation, limited partnership, or limited liability company.

E.3. Change its name or jurisdiction of organization, merge or consolidate with any person, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or
E.3. Change the state in which Debtor’s place of business (or chief executive office if Debtor has more than one place of business) is located, change its name, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

E.3. Change Debtor’s name or state of residence without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

E.4. Amend or convert any agreement, permit, or certificate related to the Collateral without the prior written consent of Secured Party.

F. Insurance and Risk of Loss

F.1. Debtor will insure the Collateral in accordance with Secured Party’s reasonable requirements regarding choice of carrier, risks insured against, and amount of coverage. Policies must be written in favor of Debtor, be endorsed to name Secured Party as an additional insured or as otherwise directed in writing by Secured Party, and provide that Secured Party will receive at least ten days’ notice before cancellation. Debtor must provide copies of the policies or evidence of insurance to Secured Party.

F.2. COLLATERAL PROTECTION INSURANCE NOTICE

In accordance with the provisions of section 307.052(a) of the Texas Finance Code, the Secured Party hereby notifies the Debtor as follows:
(A) the Debtor is required to:

   (i) keep the collateral insured against damage in the amount the
       Secured Party specifies;

   (ii) purchase the insurance from an insurer that is authorized to do
        business in the state of Texas or an eligible surplus lines insurer;
        and

   (iii) name the Secured Party as the person to be paid under the policy in
        the event of a loss;

(B) the Debtor must, if required by the Secured Party, deliver to the Secured
    Party a copy of the policy and proof of the payment of premiums; and

(C) if the Debtor fails to meet any requirement listed in Paragraph (A) or
    (B), the Secured Party may obtain collateral protection insurance on behalf of the
    Debtor at the Debtor’s expense.

  F.3. Debtor assumes all risk of loss to the Collateral.

  F.4. Debtor appoints Secured Party as attorney-in-fact to collect any returned
       unearned premiums and proceeds of any insurance on the Collateral and to endorse and
       deliver to Secured Party any payment from such insurance made payable to Debtor. Debtor’s
       appointment of Secured Party as Debtor’s agent is coupled with an interest and if Debtor is an
       individual will survive any disability of Debtor.

G. Default and Remedies

  G.1. A default exists if—
a. Debtor, Obligor, or any secondary obligor fails to timely pay or perform any obligation or covenant in any written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor;

b. any warranty, covenant, or representation in this agreement or in any other written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor is materially false when made;

c. a receiver is appointed for Debtor, Obligor, any secondary obligor, or any Collateral;

d. any Collateral is assigned for the benefit of creditors;

e. a bankruptcy or insolvency proceeding is commenced by Debtor, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor;

f. a bankruptcy or insolvency proceeding is commenced against Debtor, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor, and the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered;

g. any of the following parties is terminated, begins to wind up its affairs, is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of any of the following parties: Debtor; a partnership of which Debtor is a general partner; Obligor; or any secondary obligor;
h. any Collateral is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly replaced with collateral of like kind and quality or restored to its former condition; or

i. Debtor receives notice from any applicable Water Authority of the potential of an enforcement action by that Water Authority related to the Collateral, Debtor’s use of the Collateral, or a violation of any rule or regulation of the Water Authority and that matter is not cured within thirty days after the notice.

G.2. If a default exists, Secured Party may—

a. demand, collect, convert, redeem, settle, compromise, receipt for, realize on, sue for, and adjust the Collateral either in Secured Party’s or Debtor’s name, as Secured Party desires, or take control of any proceeds of the Collateral and apply the proceeds against the Obligation;

b. take possession of any Collateral not already in Secured Party’s possession, without demand or legal process, and for that purpose Debtor grants Secured Party the right to enter any premises where the Collateral may be located;

c. without taking possession, sell, lease, or otherwise dispose of the Collateral at any public or private sale in accordance with law;

d. exercise any rights and remedies granted by law or this agreement; and

e. cause the Collateral to be transferred to Secured Party’s name with any appropriate Water Authority. Debtor appoints Secured Party as Debtor’s attorney-in-fact to file any application, institute any proceedings, and per-
form such other acts or actions on behalf of Debtor, and in Debtor’s name, as Secured Party may determine to be necessary to protect or preserve the Collateral and Lender’s interest therein, and to seek the approval of that Water Authority for the necessary changes in ownership, diversion point, place of use, and/or purpose of use of the Collateral. This appointment is coupled with an interest, is irrevocable, and survives Debtor’s disability or foreclosure under this security agreement.

G.3. Foreclosure of this security interest by suit does not limit Secured Party’s remedies, including the right to sell the Collateral under the terms of this agreement. Secured Party may exercise all remedies at the same or different times, and no remedy is a defense to any other. Secured Party’s rights and remedies include all those granted by law and those specified in this agreement. The debt is secured by a deed of trust [include if applicable: and [include form 8-3 vendor’s lien language]]. This security agreement does not waive the provisions of the deed of trust [include if applicable: and the vendor’s lien], and the liens and the rights created are cumulative. Secured Party may elect to foreclose under one or more liens without waiving any of the other lien(s).

G.4. Secured Party’s delay in exercising, partial exercise of, or failure to exercise any of its remedies or rights does not waive Secured Party’s rights to subsequently exercise those remedies or rights. Secured Party’s waiver of any default does not waive any other default by Debtor. Secured Party’s waiver of any right in this agreement or of any default is binding only if it is in writing. Secured Party may remedy any default without waiving it.

G.5. Secured Party has no obligation to clean or otherwise prepare the Collateral for sale.

G.6. Secured Party has no obligation to satisfy the Obligation by attempting to collect the Obligation from any other person liable for it. Secured Party may release, modify, or
waive any collateral provided by any other person to secure any of the Obligation. If Secured Party attempts to collect the Obligation from any other person liable for it or releases, modifies, or waives any collateral provided by any other person, that will not affect Secured Party’s rights against Debtor. Debtor waives any right Debtor may have to require Secured Party to pursue any third person for any of the Obligation.

G.7. If Secured Party must comply with any applicable state or federal law requirements in connection with a disposition of the Collateral, such compliance will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.8. Secured Party may sell the Collateral without giving any warranties as to the Collateral. Secured Party may specifically disclaim any warranties of title or the like. This procedure will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.9. If Secured Party sells any of the Collateral on credit, Debtor will be credited only with payments actually made by the purchaser and received by Secured Party for application to the indebtedness of the purchaser. If the purchaser fails to pay for the Collateral, Secured Party may resell the Collateral and Debtor will be credited with the proceeds of the sale.

G.10. If Secured Party purchases any of the Collateral being sold, Secured Party may pay for the Collateral by crediting the purchase price against the Obligation.

G.11. Secured Party has no obligation to marshal any assets in favor of Debtor or against or in payment of the Note, any of the Other Obligation[s], or any other obligation owed to Secured Party by Debtor or any other person.
G.12. If the Collateral is sold after default, recitals in the bill of sale or transfer will be prima facie evidence of their truth and all prerequisites to the sale specified by this agreement and by law will be presumed satisfied.

H. General

H.1. Secured Party may at any time—

   a. take control of proceeds of insurance on the Collateral and reduce any part of the Obligation accordingly or permit Debtor to use the funds to repair or replace the Collateral and

   b. purchase single-interest insurance coverage that will protect only Secured Party if Debtor fails to maintain insurance, and premiums for the insurance will become part of the Obligation.

H.2. Notice is reasonable if it is mailed, postage prepaid, to Debtor at Debtor’s Mailing Address at least ten days before any public sale or ten days before the time when the Collateral may be otherwise disposed of without further notice to Debtor.

H.3. This security interest will attach to an after-acquired commercial tort claim only to the extent permitted by law.

H.4. This security interest will neither affect nor be affected by any other security for any of the Obligation. Neither extensions of any of the Obligation nor releases of any of the Collateral will affect the priority or validity of this security interest.

H.5. This agreement binds, benefits, and may be enforced by the successors in interest of Secured Party and will bind all persons who become bound as debtors to this agreement. Assignment of any part of the Obligation and Secured Party’s delivery of any part of the Collateral will fully discharge Secured Party from responsibility for that part of the Collateral. If
such an assignment is made, Debtor will render performance under this agreement to the assignee. Debtor waives and will not assert against any assignee any claims, defenses, or setoffs that Debtor could assert against Secured Party except defenses that cannot be waived. All representations, warranties, and obligations are joint and several as to each Debtor.

H.6. This agreement may be amended only by an instrument in writing signed by Secured Party and Debtor.

H.7. The unenforceability of any provision of this agreement will not affect the enforceability or validity of any other provision.

H.8. This agreement will be construed according to Texas law, without regard to choice-of-law rules of any jurisdiction. This agreement is to be performed in [include if applicable in a consumer transaction: , and has been signed by Debtor in,] the county of Secured Party’s Mailing Address.

H.9. Interest on the Obligation secured by this agreement will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Obligation or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Obligation or, if the principal of the Obligation has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Obligation.

H.10. In no event may this agreement secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

H.11. When the context requires, singular nouns and pronouns include the plural.
H.12. Any term defined in sections 1.101 to 9.709 of the Texas Business and Commerce Code and not defined in this agreement has the meaning given to the term in the Code.

[Name of debtor]
Memorandum of Groundwater Loan
[For Use with Edwards Aquifer Authority]

Date:

Maker:

Maker’s Mailing Address:

Payee:

Payee’s Mailing Address:

Date of Loan:

Loan Term:

Real Property:

Groundwater Rights: Legal title to the Groundwater beneath the following Real Property

[include description from deed]

Groundwater Permit: [include copies of permit[s] issued by the groundwater authority]

Groundwater District: [include the name and mailing address of the local groundwater dis-

trict[s] with jurisdiction over the groundwater rights]

Maker:

By ...................................................

Printed Name:

Payee:
By ________________________________

Printed Name: ________________________________

Title: ________________________________

Include acknowledgments.
Form 16-24

Notice of Lender’s Interest in Water Rights and Permit

Date:

Borrower:

Borrower’s Mailing Address:

Lender:

Lender’s Mailing Address and Contact Information:

    Loan officer:

    Phone:

    E-mail:

Date of Loan:

Loan No.:

[Real Property:]

Water Rights, including any Permit[s] now existing or hereafter issued:

    All persons dealing with the Water Rights or the Permit[s] issued in connection with the Water Rights are hereby notified of Lender’s interest in the Water Rights and Permit[s].

    Lender has made a loan to Borrower secured by a lien and a security interest in Borrower’s Water Rights and Permit[s]. Under the terms of the loan documents—
1. If Borrower defaults on the loan, Lender has the right to foreclose on its security interest in the Water Rights and to sell or acquire the Water Rights.

2. Lender’s prior written consent is required for a sale or conveyance of any interest in the Water Rights and assignment of all or any portion of the Permit[s].

3. Lender’s prior written consent is required for the issuance of [a] Permit[s] for the Water Rights and Lender must sign the application for issuance of [a] Permit[s].

4. Lender’s prior written consent is required for a modification of the Water Rights or the Permit[s] and Lender must sign the application for modification of the Water Rights or the Permit[s].

If a Release of Lender’s security interest in the Water Rights and Permit[s] does not appear in these records, then any person dealing with the Water Rights or the Permit[s] should assume that Lender still has a lien and security interest in the Water Rights and the Permit[s], even if Borrower has conveyed its interest in the Water Rights or assigned or modified the Permit[s]. You may contact Lender to determine whether the security interest has been released.

Borrower:

By ______________________________

Printed Name:

Lender:

By ______________________________

Printed Name:

Title:

Include acknowledgments.
Permittee’s Instruction Letter to Water Authority

[Date]

[Name and address of water authority]

Re: Lender’s Consent Required for a Transfer, Termination, or Modification of Permit No. [number]

[Salutation]

I am the owner of the water rights described in Permit No. [number] (the “Permit”) and the holder of the Permit. I have obtained a loan from [name] (“Lender”) in the original principal amount of $[amount], which is secured by a [first-lien] deed of trust and security interest in the water rights and Permit. Under these loan documents, as long as the loan is outstanding, Lender’s consent is required for a transfer, termination, or modification of the water rights and Permit.

You are hereby directed not to authorize or approve a transfer, termination, or modification of the Permit unless the [name of water authority] has received the written consent of Lender to the transfer or modification or a copy of a written release of the lien and security interest. The consent may be evidenced by the signature of Lender on the application for transfer, termination, or modification submitted to you or by separate written authorization signed by Lender. Alternatively, no consent will be required if you receive a copy of a release or partial release of the lien and security interest in the water rights and Permit signed by Lender.

Questions regarding this matter should be directed to Lender at the following address:

[Name of lender]
[Contact person]

[Address]

Re: [loan number]

Phone:

E-mail:

Please include a copy of this letter with your file and records on the water rights and Permit.

Thank you for your cooperation.

Sincerely,

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of permittee]
Chapter 17
Risk Allocation: Indemnity, Waiver, and Insurance

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Chapter 17
Risk Allocation: Indemnity, Waiver, and Insurance

Note: The State Bar of Texas Real Estate Forms Committee is grateful to Charles Comiskey, senior vice president of Brady Chapman Holland & Associates, Inc., an insurance brokerage firm with offices in Houston, Texas, and president of RiskTech, Inc., a risk management consulting firm in Houston, Texas; Aaron Johnston of the Johnston Law Firm in Dallas, Texas; and William W. Pugh of the Liskow & Lewis law firm in Houston, Texas, for their suggestions with respect to the content of this chapter.

§ 17.1 Risk Allocation Methods and Definitions

**Indemnity:** An indemnity is a promise to safeguard and hold another party harmless against a liability. An indemnity creates a potential cause of action for the indemnitee against the indemnitee. *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993).

**Waiver:** A waiver is an agreement not to hold another party responsible for a liability. A waiver operates to bar any right of action on the released matter. *Hart v. Traders & General Insurance Co.*, 189 S.W.2d 493, 494 (Tex. 1945). Waivers are sometimes referred to as “releases.”

**Insurance:** Insurance is a contract under which a company in the business of insuring against losses undertakes for a specified period of time to defend a party against, and compensate the party for, loss arising from a specified risk in consideration for the payment of a premium by the insured party.

**Transfers of Risk:** One strategy employed by a party in a transaction to minimize exposure to losses is to transfer identified risks to one or more of the following parties:

1. the party on the other side of the transaction through the use of contractual indemnities and waivers (and if the damages or injuries are of the type covered by the indemnitee’s commercial general liability insurance policy and the indemnity is an insured contract, as the term is defined in the indemnitee’s commercial general liability insurance policy, the risks may also be transferred to the general liability carrier of the indemnitee to the extent of coverage);
2. a third party through a guaranty of payment or performance;
3. an insurance company or corporate surety by purchasing insurance or bonds (provided the risks are insurable or bondable); or
4. an insurance company or corporate surety by becoming a loss payee, additional insured, or beneficiary, as applicable, under an insurance policy or a bond purchased by another party (provided the risks are insurable or bondable).

§ 17.2 Indemnities and Waivers

§ 17.2:1 Types of Indemnities and Waivers

Insurance professionals sometimes describe indemnities as being “limited,” “intermediate,” or “broad.”
1. A limited indemnity clause imposes liability on the indemnitor only to the extent of the indemnitor’s fault or negligence and is the most favorable type of indemnity clause for an indemnitor.

2. Under an intermediate indemnity clause, the indemnitor assumes all liability except for the sole negligence of the indemnitee.

3. A broad-form indemnity clause imposes the entire risk of loss on the indemnitor, including the sole negligence of the indemnitee, and is the most favorable type of indemnity clause for an indemnitee.

§ 17.2:2 Drafting Considerations for Indemnities and Waivers

1. Does the party giving the indemnity or waiver have the authority or capacity to enter into the indemnity or waiver? (See section 17.2:3 below.)

2. What is the creditworthiness of the indemnitor? Is a guaranty, a surety bond, or insurance necessary?

3. Should persons other than the contracting parties (for example, shareholders, directors, officers, employees, contractors, or subcontractors) benefit from the indemnity or waiver?

4. Will liabilities arising out of the acts or omissions of persons other than the party giving the indemnity or waiver (for example, employees, agents, and contractors) be subject to the indemnity or waiver?

5. Is the recovery against the party giving the indemnity or waiver limited as to amount, ability to seek a deficiency judgment, or source of funds to pay damages?

6. What risks are covered by the indemnity or waiver?

7. Is the indemnity or waiver consistent with insurance coverages carried by the parties, both as to amounts and risks insured?

8. Is the obligation to defend and the entire cost of defense included in the indemnity? If so, will the beneficiary of the indemnity be entitled to separate counsel of its choosing?

9. Are there any types of damages (for example, punitive or consequential) that are excluded?

10. Are there any limitations as to the time period the indemnity or waiver will be in effect or the time period for making a claim under the indemnity or waiver?

11. Do any anti-indemnity statutes apply? (See section 17.2:4 below.)

12. Is compliance with the fair notice doctrine necessary? (See section 17.2:5 below.)

§ 17.2:3 Indemnities by Cities and Counties Prohibited

The Texas Constitution states that no debt for any purpose may be incurred by any city or county unless provision is made at the time of creating the debt for levying and collecting a sufficient tax to repay the debt. See Tex. Const. art. XI, §§ 5, 7. Because an indemnity is by its nature uncertain as to the timing and amount of the liability that could be incurred, an indemnity by a city or county is invalid. See T. & N.O.R.R. Co. v. Galveston County, 169 S.W.2d 713 (Tex. 1943).
§ 17.2:4 Anti-Indemnity Laws

With some exceptions, Texas Insurance Code chapter 151 prohibits broad-form and intermediate indemnities in construction contracts and requirements in a construction contract for insurance policies or endorsements that cover broad-form or intermediate indemnities. Under Tex. Ins. Code § 151.102, an indemnity in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable to the extent that it requires an indemnitor to indemnify a party, including a third party, against a claim caused by the negligence or fault, violation of a law, or breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier. Under Tex. Ins. Code § 151.104, a provision in a construction contract that requires the purchase of additional insured coverage or any coverage endorsement or provision within an insurance policy providing additional insured coverage is void and unenforceable to the extent that it requires coverage that is prohibited under Tex. Ins. Code § 151.102.

The definition of a “construction contract” contained in Tex. Ins. Code § 151.001(5) is extremely broad, including any “contract, subcontract, or agreement . . . made by an owner . . . for the design, construction, alteration, renovation, remodeling, repair, or maintenance of . . . a building, structure, appurtenance, or other improvement to or on . . . real property.” Whether the definition covers a lease that contemplates leasehold improvements or contains provisions regarding repairs, maintenance, or alterations is, at best, unclear.

Among the exceptions under Insurance Code chapter 151 are the following:

1. There is a broad exception for any provision in a construction contract that requires a party to indemnify, hold harmless, or defend another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier (that is, so-called third-party-over actions). Tex. Ins. Code § 151.103.

2. Indemnity provisions contained in loan and financing documents other than construction contracts to which the contractor and owner’s lender are parties. Tex. Ins. Code § 151.105(3).

3. An indemnity provision in a construction contract, or in an agreement collateral to or affecting a construction contract, pertaining to a single family house, townhouse, duplex, or directly related land development, or to a public works project of a municipality. Tex. Ins. Code § 151.105(10).

Texas law also prohibits certain indemnities by a contractor with respect to an architect’s negligence and certain indemnities by an architect with respect to an owner’s negligence. See Tex. Civ. Prac. & Rem. Code § 130.002.

§ 17.2:5 Fair Notice Doctrine

Even if no anti-indemnity statute applies, when an indemnity, release, or waiver provision seeks to shift the risk of one party’s future negligence or other fault to the other party, Texas imposes a fair notice requirement before enforcing that agreement. Dresser Industries, Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1993). The fair notice requirements are set out as the express negligence doctrine and the conspicuousness requirement. Storage & Processors, Inc. v. Reyes, 134 S.W.3d 190, 192 (Tex. 2004). The fair notice requirement is a rule of contract interpretation and is therefore determinable as a matter of law. Fisk Electric Co. v. Constructors & Associates, 888 S.W.2d 813, 814 (Tex. 1994).
Express Negligence Rule:  If the parties to a contract want to indemnify one of the parties against its own negligence, the parties must express their intent in specific terms within the four corners of the contract. *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705, 707–08 (Tex. 1987). This same rule applies to releases. *Dresser Industries, Inc.*, 853 S.W.2d 505. There is no specific required language to use to comply with the express negligence doctrine in Texas, other than use of the terms negligence or fault, but a good example to follow states: “TENANT WILL RELEASE, DEFEND, AND INDEMNIFY LANDLORD [AND ANY OTHER INDEMNITNEES] FROM ANY CLAIM OR LOSS EVEN THOUGH CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE (WHETHER SOLE, JOINT, OR CONCURRENT), STRICT LIABILITY, OR OTHER LEGAL FAULT OF LANDLORD [OR ANY OTHER INDEMNITNEES].” Whether a release or indemnity for gross negligence is enforceable is unclear, but any release or indemnity intended to apply to gross negligence may need to specifically mention gross negligence to meet the express negligence test. *Van Voris v. Team Chop Shop, LLC*, 402 S.W.3d 915 (Tex. App.—Dallas 2013, no pet.).

Conspicuousness Rule:  The indemnity, release, or waiver provision indemnifying or releasing a party from its own negligence must be conspicuous (for example, a separate indemnity and waiver provision in contrasting, capitalized, or colored type with a clear and informative heading). *Dresser Industries, Inc.*, 853 S.W.2d at 510–11.

Extensions of Fair Notice Doctrine:  The fair notice doctrine has also been held to apply to indemnities or waivers—for strict liability (*Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 890 S.W.2d 455, 459 (Tex. 1994)) and of a third party by a subscribing employer notwithstanding the exclusive recovery (or one action) rule under the Workers’ Compensation Act (*Enserch Corp. v. Parker*, 794 S.W.2d 2, 9 (Tex. 1990)).

§ 17.3 Overview of Insurance Policies

§ 17.3:1 Categories of Insurance

Property Policies:  Property insurance is “first party” insurance that compensates the named insured for property that has been lost, damaged, or destroyed. Examples of property insurance policies are commercial property, builder’s risk, and business income and insurance. (See section 17.4 below.)

Liability Policies:  Liability insurance is “third party” insurance that compensates a third party injured by the actions or omissions of an insured. Examples of liability insurance are commercial general, business auto, and workers’ compensation insurance. (See section 17.5 below.)

Package Coverage Policies:  Package coverage policies cover both property risks and liability risks. An example of a package coverage insurance policy is homeowner’s insurance. (See section 17.4:4 below.)

§ 17.3:2 Lines of Insurance

Personal lines of insurance are for individuals and families—for example, homeowner’s insurance and renter’s insurance. Commercial lines of insurance cover businesses—for example, commercial property insurance, commercial general liability insurance, and business owner’s policies.
§ 17.3:3 Policy Forms

Insurance Services Office, Inc., commonly known in the insurance industry as ISO, drafts insurance forms that are used either verbatim or with modifications in all fifty states. (The National Board of Fire Underwriters, the organization to which many real estate documents still refer, merged with the American Insurance Association in 1966 and ceased to exist as a separate entity. In 1971 the American Insurance Association merged with twenty-nine other ratings agencies to create ISO.) Although ISO forms are dominant, other forms in the marketplace may be (1) “manuscripted,” that is, drafted by an insurance company (and which may be similar to or less broad than the ISO equivalent); (2) promulgated by the Texas Department of Insurance (for example, the Homeowner’s A, B, and C coverages); or (3) drafted by a competitor of ISO (for example, the American Association of Insurance Services).

Another set of property insurance forms, known as inland marine forms or floaters, evolved to insure property being transported by canal barges and later railroads and trucks. Today, inland marine is used primarily for “property which is mobile by nature and for which there is no fixed situs; and . . . instruments of communication or transportation such as bridges, tunnels, piers or television antennas” (State of New York Insurance Department, Circular Letter No. 22 (2000), August 11, 2000). In addition, inland marine forms are used in the construction area and for specialized coverages such as jewelry and computer data. Inland marine forms are generally manuscripted.

§ 17.4 Property Insurance

§ 17.4:1 Terminology and Structure

Commercial property insurance is the property insurance form used in most commercial settings. The phrase fire and extended coverage insurance was the name of a named-peril property insurance policy that is no longer available, and the phrase casualty insurance is incorrect if used to describe property insurance.

An ISO commercial property insurance policy is not a single form. Rather, an ISO commercial property insurance policy is made up of six different forms:

1. Common policy conditions (ISO Form IL 00 17)—describes the conditions applicable to all insurance policies.
2. Commercial property conditions (ISO Form CP 10 90)—describes the conditions applicable only to commercial property policies.
3. ISO Form CP 00 10, entitled “Building and Personal Property Coverage Form”—describes the property being covered.
4. Declarations and schedules provide specifics such as the name of the insured, location of property, and coverage amounts.
5. A causes of loss form (ISO Forms CP 10 10, CP 10 20, or CP 10 30)—determines whether the policy will be a named peril policy or an all risks policy (see section 17.4:2 below).
6. Any necessary coverage forms or endorsements describing additional property covered, additional limits, and optional coverages.

As a general rule, commercial property insurance is used to cover completed buildings, and builder’s risk insurance is used to cover buildings under construction or, in some cases, under extensive renovation. No bright line exists as to when builder’s
risk insurance should be used rather than commercial property insurance. Builder’s risk policies have several important advantages over commercial property policies with respect to coverage for buildings under construction, such as coverage for property stored offsite and property in transit.

§ 17.4:2 Standard Forms of Commercial Property Policies

Historically, property insurance was written on either a named-peril basis, which insured against property damage arising from causes of loss expressly enumerated in the policy, or an all-risks basis, which insured against property damage arising from all causes of loss except those that were expressly excluded by the policy. The insurance industry has now abandoned use of the words risk and peril and instead uses the term cause of loss.

Basic and Broad (Named-Peril) Forms: Two named-peril commercial property insurance policies are currently available: causes of loss—basic form and causes of loss—broad form. The basic form (ISO Form CP 10 10) covers twelve causes of loss: (1) fire, (2) lightning, (3) explosion, (4) windstorm or hail, (5) smoke, (6) aircraft, (7) vehicle collision, (8) riot or civil commotion, (9) vandalism, (10) sprinkler leakage, (11) sinkhole collapse, and (12) volcanic action. The broad form (ISO Form CP 10 20) covers all the causes of loss covered by the basic form plus (1) breakage of glass; (2) falling objects; (3) weight of snow, ice, or sleet; (4) water damage from leaking appliances; and (5) collapse from specified causes.

Special (All-Risks) Form: The correct terminology for commercial property insurance currently written on an all-risks basis is causes of loss—special form (ISO Form CP 10 30).

§ 17.4:3 Specialized Coverages

Separate property policies or endorsements are available to fill the gaps created under standard forms of commercial property insurance policies.

Equipment Breakdown: Equipment breakdown (formerly boiler and machinery) coverage (for example, ISO Endorsement Form BM 00 20) insures against property losses caused by the explosion of pressure vessels and sudden and accidental, mechanical, or electrical breakdown of covered machinery and the resulting loss of business income.

Builder’s Risk: Because of the higher likelihood of property loss during construction, a specialized form of property insurance called builder’s risk is used during the construction of a building in lieu of commercial property insurance.

Although ISO has promulgated a builder’s risk form (ISO Form CP 00 20), most builder’s risk policies are written on manuscripted inland marine forms. ISO builder’s risk insurance forms are available on a basic, broad, or special causes of loss basis, but the inland marine forms that are more commonly used may, depending on the insurer, have broader or narrower coverage than their ISO counterparts. Among the causes of loss that may not be covered by a builder’s risk policy without endorsement are collapse resulting from design error and damage resulting from freezing, flood, and earthquake.

Builder’s risk property insurance is available in nonreporting (commonly known as “completed value”) or reporting forms. Under a completed value form, coverage is automatically increased as construction occurs. A reporting form will not cover the increased value until the increase is reported to the insurance carrier.

A builder’s risk policy usually covers most of the property used in or incidental to the construction even if the property is stored off-site or in transit, but may not cover the following unless the policy is specifically endorsed: landscaping, temporary
structures such as scaffolding, construction trailers, site work, underground structures such as footings, equipment used to construct the building, and business income.

Many extensions of coverage are available under builder’s risk insurance policies. Because builder’s risk policies forms are generally manuscripted, these extensions may be included within the basic coverage of some policies but must be added by endorsement to other policies. Most extensions or endorsements have a “sublimit,” which is less than the full policy limit but the maximum amount recoverable with respect to the extension or endorsement. The following are some of the extensions of coverage or endorsements that are available for builder’s risk policies:

1. Contract penalties—covers contractual penalties to the insured’s customers incurred as a result of a delay of completion date.
2. Collapse—covers damage or loss from collapse of the structure caused by certain causes of loss, generally including defective materials and faulty design, plans, or workmanship (but not the cost of correcting the defective workmanship or faultily designed work).
3. Debris removal—covers the cost of removing debris resulting from a covered cause of loss in excess of the limit of proceeds for debris removal contained in basic coverage.
4. Expediting expense—covers additional expenses necessarily incurred to complete construction on schedule after the occurrence of a covered cause of loss.
5. Pollutant cleanup—covers the cost of removing pollutants released by a covered cause of loss.
6. Preservation of property—covers the cost of removing covered property from the premises to preserve the property from loss after a covered cause of loss has occurred.
7. Soft costs (sometimes called “extra expenses”)—covers necessary expenses incurred as a result of a delay of completion date, such as interest on the construction loan, real estate taxes, architectural and engineering supervisory costs, costs to renegotiate leases, brokerage commissions, and legal and accounting costs (*caveat: coverage varies from policy to policy*).
8. Testing—covers damage or loss from testing of boilers or other pressure vessels, air-conditioning systems, and mechanical or electrical machines or devices.
9. Loss of rents—covers the loss of rents caused by the delay of completion.

Because builder’s risk property policies typically suspend coverage if any portion of the structure is occupied for purposes other than testing, a phased project may require an endorsement to permit a certain level of occupancy.

**Business Income:** Business income coverage (ISO Endorsement Form CP 00 32) insures against loss of earnings resulting from the insured’s inability to operate a business after the occurrence of a covered cause of loss. This type of coverage was formerly known as “business interruption” insurance. Business income and extra expense coverage (ISO Endorsement Form CP 00 30) also insure against extraordinary additional expenses resulting from the insured’s inability to operate a business after the occurrence of a covered cause of loss.

Rental value coverage insures against loss of rents (including abatement of rentals under leases) resulting from the insured’s inability to operate a building after the occurrence of a covered cause of loss. Rental value coverage is available under both business income endorsement forms (ISO Forms CP 00 30 and CP 00 32) but is not included unless specified in the declaration to the policy.
All of the ISO commercial property causes of loss forms (ISO Forms CP 10 10, CP 10 20, and CP 10 30) exclude coverage for business income loss caused by “the failure of power or other utility services . . . if the failure occurs outside of a covered building.” ISO Form CP 15 45, entitled “Off-Premises Services—Time Element,” is an endorsement to a business income coverage form (with or without extra expense coverage) that provides coverage for the loss of income arising from off-premises utility service disruption.

ISO Form CP 15 08, entitled “Business Income from Dependent Properties—Broad Form,” is an endorsement to a business income coverage form (with or without extra expense coverage) that provides coverage for loss of income (and extra expenses incurred, if applicable) because of damage to another company’s facility. For example, a San Antonio–based automobile manufacturer depends on parts from an automobile parts facility located in Beaumont. If the Beaumont plant were damaged and rendered inoperable by a hurricane, the San Antonio manufacturer would incur losses even though the automobile manufacturer’s plant is unharmed.

**Crime (or Fidelity):** This coverage protects the insured against loss of property (generally money, securities, and inventory) resulting from the types of crime enumerated in the policy. Among the crimes for which crime insurance is available are computer fraud, social engineering fraud, employee dishonesty, embezzlement, extortion, forgery, premises theft, premises burglary, safe burglary, wire transfer fraud, counterfeiting, and off-premises robbery.

**Earthquake:** Earth movement or earthquake coverage insures against property losses caused by earth movement, including earthquake shocks, mudslides, and volcanic eruptions.

**Flood:** Flood coverage insures against property losses caused by rising waters, backup of storm sewers, and storm surges. Flood coverage is necessary because all three of the ISO commercial property insurance causes of loss forms (ISO Forms CP 10 10, CP 10 20, and CP 10 30) expressly exclude coverage for floods and many other types of water damage.

The National Flood Insurance Act of 1968 (42 U.S.C. §§ 4001–4131) (NFIP) created a program to make available flood insurance for property owners in flood-prone areas. Regulations implementing the NFIP are found at 44 C.F.R. pts. 59–78. See also Tex. Loc. Gov’t Code § 240.901 (participation in federal flood insurance program); Tex. Water Code §§ 16.311–.324 (Flood Control and Insurance Act). The Flood Disaster Protection Act of 1973 mandated that federally regulated lending institutions could not “make, increase, extend, or renew any loan secured by improved real estate or a mobile home located or to be located in an area that has been identified . . . as an area having special flood hazards and in which flood insurance has been made available” under the NFIP without flood insurance in an amount equal to the lesser of the loan amount or the available coverage. 42 U.S.C. § 4012a(b)(1).

NFIP insurance has several drawbacks:

1. The maximum coverage limits are $500,000 for a building and $500,000 for contents.
2. The policy pays only direct physical loss by or from flood and does not pay indirect damages such as loss of income.
3. In most cases, NFIP insurance pays only actual cash value, not replacement cost.

See section 17.4:5 below.

Private flood insurance coverage is also available. Coverage under a commercial property policy can be expanded with ISO Endorsement Form CP 10 65. Form CP 10 65 also has several drawbacks:
1. The endorsement does not cover underground water flows or seepage.

2. The endorsement excludes coverage for flooding within a wait period of seventy-two hours after the inception date of the endorsement, damage to land (including excavations, grading, filling, or backfilling), removal of mud and earth deposited by flooding, and loss or damage caused by sewer backup or overflow unless the backup or overflow occurs within seventy-two hours after the flood recedes.

3. A commercial property policy endorsed for flood coverage usually contains a very high deductible with respect to properties located in a special flood hazard area shown on flood insurance rate maps produced by the Federal Emergency Management Agency.

4. A commercial property insurance policy endorsed for flood coverage for flooding usually contains a sublimit with respect to the amount of coverage available for flood damage (a sublimit limits the amount of coverage available to cover a specific type of loss to an amount smaller than the policy limit).

Glass: Before 2000, coverage was excluded or limited in commercial property insurance policies for damage to plate glass. Glass coverage was obtained through so-called “plate glass insurance,” issued as a separate coverage form. The exclusions and limitations were removed from ISO forms CP 10 10, CP 10 20, and CP 10 30 in 2000.

Loss Payee and Mortgagee Clauses: A loss payee is a party named in a loss payee endorsement. A loss payee clause is referred to as an open clause if the loss payee under the loss payable clause has no independent right to enforce the policy but is simply a recipient of payments when the insured becomes entitled to collect under the policy. The drawback of an open clause is that the action or inaction of the insured can defeat the right of a loss payee to collect (for example, the insured may make a misrepresentation, fail to pay premiums, or fail to report a loss timely). On the other hand, a closed clause creates a separate contract between the insurer and the loss payee or mortgagee and contains language to the effect that the act or neglect of the insured will not invalidate the policy. A closed loss payee clause is also referred to as a mortgagee clause. It provides special protections to the mortgage holder that generally include payment for covered loss that will be made to the mortgage holder, not to the insured or to the insured and the mortgagee; coverage applies for the benefit of the mortgagee even if the insured’s claim is denied because of the insured’s acts, subject to a couple of basic requirements. The mortgagee will receive written notice of policy cancellation by the insurer.

Standard mortgage holder protection for buildings or structures only (but not the business personal property) is built into the current ISO Building and Personal Property Coverage Form (ISO Form CP 00 10).

The current edition of ISO Endorsement Form CP 12 18, entitled “Loss Payable Provisions,” uses four different descriptions to describe the loss payee: “Loss Payable,” “Lender Loss Payable,” “Contract of Sale,” and “Building Owner Loss Payable.” It is critical for a mortgagee to pick the right category. If “Loss Payable” is chosen in the schedule to the endorsement, the provision becomes an open clause, and the interest of the loss payee is protected only if the named insured chooses to enforce the protection. However, if “Lender Loss Payable” is chosen in the schedule, the provision becomes a closed clause and protects a lender loss payee the same way as a mortgage holder is protected by the standard mortgagee clause in the building and personal property coverage form, with an important difference: under ISO Endorsement Form CP 12 18, the mortgagee protection applies to both the building and the business personal property associated with the building.

Form CP 12 18 may also be used by a landlord to create a “Building Owner Loss Payable” and establish privity between the landlord and the tenant’s property carrier with respect to insurance proceeds payable because of the loss of the landlord’s property.
**Signs:** This coverage (ISO Form CM 00 28) insures against damage to signs resulting from windstorm, vandalism, or vehicle damage.

**Terrorism:** Terrorism insurance protects the insured against losses arising from terrorist activities that are excluded from commercial property policies.

Until 2002, damage or loss from terrorism was not expressly excluded by ISO’s commercial property insurance policy forms. Following the attacks of September 11, 2001, ISO introduced several exclusions for losses caused by terrorism. In November 2002, the federal government enacted the Terrorism Risk Insurance Act of 2002 (TRIA) requiring all U.S. commercial property insurers to offer coverage for losses caused by international terrorism and creating a reinsurance program for this coverage with a total annual limit of $100 billion. TRIA was extended in 2005 and reauthorized in 2015, in a modified form, through December 31, 2020. As originally enacted, TRIA applied to violent acts causing damage in excess of $5 million in the United States (or aircraft or U.S.-flagged vessels), committed by a party acting on behalf of a foreign person or interest, and certified as terrorism by the secretary of the U.S. Treasury. The 2007 reauthorization deleted the requirement that an act of terrorism be committed by someone acting on behalf of a foreign person or interest to be certified as an act of terrorism. However, the insurer is not required under TRIA to provide terrorism coverage if the insured rejects the coverage in writing or if the insured does not pay the premium for the terrorism coverage. TRIA does not set the premiums for terrorism coverage. See 15 U.S.C. § 6701 note (Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322, as amended by Terrorism Risk Insurance Extension Act of 2005, Pub. L. No. 109-144, 119 Stat. 2660, the Terrorism Risk Insurance Program Reauthorization Act of 2007, Pub. L. No. 110-160, 121 Stat. 1839, and the Terrorism Risk Insurance Program Reauthorization Act of 2015, Pub. L. No. 114-1, 129 Stat. 3). See also 31 C.F.R. pt. 50.

### § 17.4:4 Residential or Farm Property Insurance

**Homeowner’s Insurance:** Homeowner’s insurance is available to the owner of an owner-occupied dwelling. Homeowner’s insurance is a package coverage insurance policy covering both property claims, such as loss of or injury to the dwelling and to the insured’s personal property, and liability claims, such as bodily injury to third parties caused by the insured. A homeowner’s insurance policy also covers some living expenses incurred as a result of temporary displacement because of damage to a dwelling.

Most homeowner’s policies may be written on forms generated by the Texas Department of Insurance (TDI) (HO-A, HO-B, and HO-C) or forms generated by ISO (HO 00 02, HO 00 03, and HO 00 05).

The property coverage under homeowner’s insurance policies varies as follows:

1. TDI Form HO-A and ISO Form HO 00 02—named-peril basis (see section 17.4:2 above) for both the dwelling and its contents;

2. TDI Form HO-B and ISO Form HO 00 03—all-risks basis (see section 17.4:2 above) for the dwelling and a named-peril basis for its contents; and

3. TDI Form HO-C and ISO Form HO 00 05—all-risks basis for both the dwelling and its contents.

The amount collected for loss of or injury varies as follows under the various forms:

1. TDI Form HO-A—actual cash value (see section 17.4:5 below) for both the dwelling and its contents;
2. ISO Form HO 00 05—replacement cost (see section 17.4:5 below) for both the dwelling and its contents; and

3. TDI Forms HO-B and HO-C and ISO Forms HO 00 02 and HO 00 03—replacement cost for the dwelling and actual cash value for its contents. (All four forms can be endorsed to cover replacement cost for the contents.)

**Condominium Insurance:** A condominium has two sets of insurance, one covering the condominium association and another covering the individual unit owners.

The condominium association’s insurance requirements are set forth in Tex. Prop. Code § 82.111. Tex. Prop. Code § 82.111(a) requires that the condominium association maintain separate commercial property and commercial general liability policies. A commonly used condominium association property coverage form, ISO Form CP 00 17, entitled “Condominium Association Coverage Form,” is nearly identical to its commercial property insurance coverage counterpart, ISO Form CP 00 10, except that the definition of business personal property is limited to the personal property owned by the association or indivisibly by all unit owners and other property for which the association is responsible under the declaration. Tex. Prop. Code § 82.111(d) also requires that the unit owners be named as insureds under the association’s policies, that the association’s insurers waive subrogation as to the unit owners, and that the association’s policies are primary to a unit owner’s policies if there is duplicate coverage.

Individual unit owners purchase the equivalent of homeowners coverage for their individual units known as “condominium unit owners” policies. Like homeowners insurance, unit owners insurance is a package coverage insurance policy covering both property claims with respect to the dwelling and the insured’s personal property, and liability claims. Unit owners policies may be written on TDI forms HO-B-CON and HO-C-CON and ISO Form HO 00 06.

The property coverage under unit owners insurance policies varies as follows:

1. TDI Form HO-B-CON and ISO Form HO 00 06—named-peril basis (see section 17.4:2 above) for both the dwelling and its contents (all risks coverage is available for both dwelling and contents under ISO Form HO 00 06 by endorsement); and

2. TDI Form HO-C-CON—all-risks basis for both the dwelling and its contents.

The amount collected for loss of or injury varies as follows under the various forms:

1. TDI Form HO-C-CON—replacement cost (see section 17.4:5 below) for both the dwelling and its contents; and

2. TDI Form HO-B-CON and ISO Form HO 00 06—replacement cost for the dwelling and actual cash value for its contents. (Both forms can be endorsed to cover replacement cost for the contents.)

**Tenant’s Insurance:** Tenant homeowner’s insurance (commonly known as tenant’s or renter’s insurance) is available to tenants of residential property. Tenant’s insurance is a package coverage insurance policy that covers the property insurance causes of loss of injury to or loss of the tenant’s personal property and the liability insurance cause of loss of bodily injury to third parties. The property portion of tenant’s insurance is available in either a named-peril version called broad form or, for a higher premium, an all-risks version called comprehensive form (see section 17.4:2 above). The amount collected for property loss under tenant’s insurance is limited to actual cash value, unless the insured has purchased an endorsement increasing coverage to replacement cost (see section 17.4:5 below). The risks of injury to or loss of the dwelling are generally covered by the landlord’s commercial property insurance policy on the dwelling, but tenant’s insurance may cover some damage to the dwelling caused by the tenant if the tenant is liable for the damage under the lease. Tenant’s insurance also covers some living expenses incurred as a result of temporary displacement from the dwelling because of damage.
Farm and Ranch Insurance: Farm owner’s (sometimes called farmowner’s) insurance is available to individuals who own and occupy property meeting the definition of a farm or ranch and who do not elect to be insured by a farm mutual insurance company (in Texas, farm mutual insurance companies cannot write liability insurance). Farm owner’s insurance is a package coverage insurance policy that covers the property insurance causes of loss of injury to or loss of farm dwellings, outbuildings, and personal property and the liability insurance causes of loss of bodily injury to third parties.

If a farmer or rancher is not an individual or is purchasing his property insurance from a farm mutual company, the farmer or rancher must purchase separate property and liability insurance policies. In a farm or ranch context, the equivalent of a commercial property insurance policy is typically called a farm and ranch insurance policy, and the equivalent of a general liability insurance policy is typically called a farm liability policy. In some situations liability insurance is provided through a commercial general liability policy properly endorsed to cover farm or ranch operations.

Farm or ranch operations can be covered by personal lines or commercial lines of insurance depending on the magnitude of the farming operation. Typically, an insurance company will set a threshold of gross income from farm or ranch activities or number of acres farmed or number of cattle grazed to differentiate between a personal line farm policy and a commercial line farm policy.

Caveat: The activities of a farm tenant may impact the size of the operation for insurance purposes. Assume, for example, a gentleman farmer (typically, a person with a country home and a few horses or other farm animals) whose level of farming or ranching activity does not rise to a commercial level insures the property in question under a homeowner’s insurance policy, a personal lines coverage. The gentleman farmer then leases out surplus acreage to a farmer whose level of activity on the leased property is attributed to the gentleman farmer for insurance purposes. When a claim is made against both the owner and tenant because of an injury arising out of the operation of the tenant, the owner may discover that he is not covered because personal lines policies exclude from coverage losses arising out of operations covered under commercial lines policies.

§ 17.4:5 Amount of Proceeds

The discussion in this section covers terminology used in commercial property and business owner’s policies. These concepts may vary under homeowner’s or farm and ranch policies.

Actual Cash Value: Actual cash value means an amount equal to the difference between the cost of replacing property with property of like kind and quality at the time of loss and the amount of physical (not book) depreciation of the property. Unless a commercial property policy is properly endorsed, the insured is entitled only to actual cash value. Actual cash value will be paid whether or not the property is replaced or restored.

Replacement Cost: Replacement cost is the cost of repairing or replacing insured property at the time of the occurrence of the loss, without reduction for loss of value through depreciation. Replacement cost will not be paid until the property is replaced or restored with property of like kind.

Agreed Value: Agreed value is an agreed valuation method that can be used with either actual cash value or replacement cost. The named insured and insurance company agree to the amount of the actual cash value or replacement cost for the insured property (less the applicable deductible) before the policy is written. Agreed value is desirable because it eliminates coinsurance. An agreed value endorsement usually requires annual agreement between the insurer and named insured.
**Coinsurance:** Coinsurance is a method by which an insurance company penalizes its insured for underinsuring below a minimum percentage of the replacement cost of a property at the time of loss (usually 80 percent if the policy is written for a single property and 90 percent if the policy covers more than one property). If coinsurance applies, the insurer will pay only an amount (subject to the policy limit and less any applicable deductible or self-insured retention) equal to the product obtained by multiplying the amount of the loss by a fraction having as its numerator the amount of coverage the insured actually carried and as its denominator the minimum amount of coverage the insured should have carried.

**Ordinance or Law Coverage:** The valuation methods discussed above focus on the cost of replacing the existing structure without consideration to changes in laws or codes. Additional coverage under the Standard Building and Personal Coverage Form (ISO Form CP 00 10) is available up to the lesser of $10,000 or 5 percent of the value of the damaged building as of the time of the loss. Larger amounts can be covered by an ordinance or law coverage endorsement (ISO Endorsement Form CP 04 05).

**Debris Removal:** The commercial property insurance policy limit includes debris removal costs resulting from a covered loss, but the recovery is limited to 25 percent of the sum of the paid loss plus the deductible. An additional limit of $10,000 is made available by the current edition of the ISO commercial property policy for debris removal if (1) the amount payable under the policy to reconstruct or repair plus the amount payable under the policy for debris removal exceeds the entire policy limit or (2) the cost of debris removal exceeds 25 percent of the sum of the paid loss plus deductible. Higher limits for debris removal can be purchased by adding ISO Endorsement Form CP 04 15 entitled “Debris Removal Additional Limit of Insurance.”

### § 17.5 Liability Insurance

### § 17.5:1 Claims-Made vs. Occurrence-Basis Liability Policies

**Claims-Made:** In theory, a claims-made liability policy covers any claim actually made during the policy term, regardless of when the injury or damage that gave rise to the claim occurred, but in reality the claims-made policy probably excludes claims arising from injuries or damages that occurred before the inception of the policy term (known as prior acts). For an additional premium, a claims-made policy can sometimes be modified to cover prior acts. Unless renewed on a similar form with retroactive coverage or with a coverage extension known as extended reporting period or tail coverage, all coverage ends when the claims-made policy expires. Defense is frequently included within the policy limits of claims-made policies and reduces the amount available to compensate an injured party for a loss. Claims-made policies are usually manuscripted.

**Occurrence-Basis:** An occurrence-basis liability policy covers claims for injuries or damages caused by an occurrence, but only if the injury or damage actually occurs during the policy period, regardless of when the claim is made (subject, of course, to statutes of limitation applicable to the claim). ISO Form CG 00 01 defines an occurrence as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Defense is provided as an additional benefit under ISO occurrence-basis commercial general liability forms and does not reduce the limits available to pay for a loss, except for the defense of indemnitees if certain conditions are not met.
Comprehensive General Liability: Comprehensive general liability insurance is, in fact, much less comprehensive in coverage than the commercial general liability insurance, has not been widely used since 1986, and should not be specified in real estate or other transaction documents.

Commercial General Liability: Commercial general liability insurance is the prevalent form of liability insurance in a commercial real estate context and has three coverages:

1. Coverage A—bodily injury (including death, disease, and illness) and property damage (including loss of use).
2. Coverage B—personal and advertising injury (including false arrest, detention or imprisonment, malicious prosecution, wrongful eviction or entry, slander, or libel, publication violating a person’s right of privacy, using another’s advertising idea, and copyright infringement).
3. Coverage C—medical payments.

Limits: The standard ISO commercial general liability policy form contains six policy limits: (1) each occurrence limit, (2) general aggregate limit, (3) products-completed operations aggregate limit, (4) personal and advertising injury limit, (5) damage to premises rented limit (formerly “fire damage limit”), and (6) medical expense limit.

A general aggregate limit is the maximum amount that a commercial liability insurance company will pay for all losses incurred during any one policy period except for bodily injury and property damage covered by the products-completed operations aggregate. ISO Form CG 25 04, entitled “Designated Location(s) General Aggregate Limit,” an endorsement to a commercial general liability policy covering multiple properties, applies the general aggregate limit separately to each location but only with respect to bodily injury, property damage, and medical expenses. ISO Form CG 25 03, entitled “Designated Construction Project(s) General Aggregate Limit,” an endorsement to a contractor’s commercial general liability policy covering multiple projects, applies the general aggregate limit separately to each project but only with respect to bodily injury, property damage, and medical expenses.

Contractual Liability: Several exclusions apply to Coverage A and Coverage B under a commercial general liability insurance policy: willful misconduct, liquor liability, workers’ compensation, employer’s liability, pollution, aircraft, auto or watercraft, mobile equipment, war, damage to property, damage to product, damage to impaired property not physically injured, recall of products, and work or property, subject to the exception for damage to premises rented. However, the exclusion most often referenced in a real estate transaction is contractual liability.

The term contractual liability in the insurance context generally refers to claims that arise out of liability for the actions of others, rather than out of the actions of an insured, that has been contractually assumed by the insured. Coverage A excludes liability assumed under contracts but has an exception to this exclusion for liability assumed in a contract or agreement that is an insured contract. The definition of “insured contract” includes most indemnities that cover the tort liability of another party; however, a contractual assumption of another person’s contractual liability is not covered under the typical definition of “insured contract.” If, for example, a contractor agrees to indemnify the owner for its potential tort liability to an injured employee, the contractor would have insurance coverage for its indemnity obligation; if, however, the contractor agreed to indemnify the owner for the owner’s contractual indemnity to the owner’s representative, the contractor’s indemnity might be enforceable but would not be covered under the contractor’s standard commercial general liability policy. In addition, the insured contract exception cannot expand the scope of the commercial general liability policy beyond the coverage provided
or the limits of liability that have been purchased. If, for example, the policy excludes coverage for property damage and bodily injury caused by pollutants, an indemnity for property damage and bodily injury caused by pollutants will not be covered by the policy even if the indemnity is contained in an insured contract. Coverage B of the ISO form of commercial general liability policy also contains an exclusion for liability assumed in contracts but does not contain the insured contract exception. Coverage is typically available by the addition of ISO Form CG 22 74, entitled “Limited Contractual Liability Coverage for Personal or Advertising Injury,” or, in some cases, by the deletion of the contractual liability exclusion.

§ 17.5:3 Business Auto

Business auto insurance (ISO Form CA 00 01) is a form of insurance covering liability arising out of the operation of automobiles by the insured and the ownership, maintenance, or use of mobile equipment subject to compulsory insurance or financial responsibility laws or other motor vehicle insurance laws. Landlords and mortgagees may require business auto insurance to cover potential liability arising from vehicular accidents occurring in project parking lots (commercial general liability policies expressly exclude coverage for injuries and damages arising from the operation of autos) and from the loading or unloading of goods from vehicles not being performed by certain types of mobile equipment such as forklifts.

§ 17.5:4 Workers’ Compensation Insurance

Workers’ compensation insurance is a statutory program that imposes strict liability on employers for injuries to employees occurring while the employees are acting in the scope of employment but limits the exposure of employers to a schedule of maximum recoveries. Tex. Lab. Code ch. 406. Landlords and lenders may wish to require tenants and borrowers to carry workers’ compensation insurance to reduce the possibility that the tenant or borrower suffers an economically disastrous judgment because of an employee injury. If an employee of a tenant receives an award from a workers’ compensation policy in a situation in which the landlord is also negligent, the employee is less likely to sue the landlord.

§ 17.5:5 Employer’s Liability Insurance

Employer’s liability insurance supplements workers’ compensation insurance by covering an employee for bodily injury occurring while in the scope of his or her employment if the injury is not covered by workers’ compensation insurance. Unlike workers’ compensation, the injured party must prove that the employer owed a duty to the injured party, that the employer breached the duty, and that the breach was the proximate cause of the injury. Employer’s liability policies have defined each occurrence and aggregate limits, and these limits may be expanded by an umbrella or excess liability policy.

§ 17.5:6 Liquor Liability Insurance

Liquor liability insurance covers liability for bodily injury or property damage arising from (1) causing or contributing to the intoxication of any person, (2) furnishing alcoholic beverages to a person under the legal drinking age or under the influence of alcohol, or (3) violating any law relating to the sale, gift, distribution, or use of alcoholic beverages. Coverage applies only if the insured is involved in (1) manufacturing, selling, or distributing alcoholic beverages; (2) serving or furnishing alcoholic beverages for a charge; or (3) serving or furnishing alcoholic beverages for no charge, if a license is required for such activity. Insurance is available on an occurrence basis (ISO Form CG 00 33), on a claims-made basis (ISO Form CG 00 34), and on an aggregate per location basis (ISO Form CG 25 14).
§ 17.5:7  Innkeeper’s Liability

Innkeeper’s liability insurance protects motel and hotel operators from liability arising from the safekeeping of the property of guests.

§ 17.5:8  Garage Liability

Garage liability insurance (ISO Form CA 00 05) protects garage and parking lot operators from liability arising from garage operations, automobile physical damage, and uninsured or underinsured motorists. Ten different levels of coverage are generally available, ranging from the broad category of “any auto” to the narrow category of “specifically described autos.” Garagekeeper’s liability insurance protects garage operators against only direct damage or legal liability for damage to vehicles in the care, custody, or control of the garage operator (for example, if the named insured provides valet service). Although garagekeeper’s liability insurance is available as separate coverage, garage liability insurance is broader coverage and includes garagekeeper’s coverage.

§ 17.5:9  Umbrella or Excess Liability

Both umbrella and excess liability policies provide additional protection against catastrophic liability claims by increasing the policy limits of primary coverages.

Excess Liability:  An excess liability policy relies on the primary policy for the insuring agreement and exclusions and provides coverage only in excess of the scheduled primary liability policies. The coverage is usually not broader than the primary policies.

Umbrella:  An umbrella liability policy has its own insuring agreement and exclusions and usually serves three functions: (1) providing additional limits of liability over limits provided by the primary liability policies, (2) providing “drop down” coverage (that is, the umbrella coverage becomes primary) if the limits of the primary policy are exhausted, and (3) affording coverage for claims not covered by primary policies (to the extent not excluded by the umbrella liability policy). Because both an umbrella policy and the primary policy have their own insuring sections, differences may arise between coverages, especially if the two policies have been issued by different companies. To ensure that no gap in coverage is created, the umbrella liability policy should contain an affirmative statement that the umbrella policy follows the form of the primary policy or at least provides coverage that is no less broad than the underlying policy.

Primary Liability:  Both umbrella and excess liability policies contain a schedule of the primary liability policies over which umbrella or excess liability coverage is to be provided. This schedule may require that the primary coverage limits be unimpaired on inception of the umbrella or excess liability coverage, in which case the umbrella or excess liability coverage policies and their primary policies may need to have the same inception date.

§ 17.5:10  Hunting Lease Liability

An individual may be able to purchase an endorsement under the individual’s homeowner’s insurance policy extending personal liability coverage to a hunting lease. The availability and cost of this type of endorsement may vary with different insurance carriers. Although most forms of homeowner’s insurance currently do not exclude bodily injuries caused by firearms, an individual should confirm that his homeowner’s insurance policy does not contain an exclusion for hunting accidents before
seeking to extend coverage to the premises under a hunting lease. An individual should also consider whether the personal liability limits under his homeowner’s insurance policy are adequate to cover a hunting accident.

Hunting lease insurance, which covers hunting accidents, is also available from specialized insurance carriers, often through organizations such as hunting clubs and the National Rifle Association.

If the tenant under a hunting lease is a business entity, the tenant will probably be unable to extend its commercial liability policy to cover hunting accidents at the hunting lease and will need to purchase a hunting lease insurance policy.

§ 17.6 Additional Insured Status and Forms

§ 17.6:1 Usage

An additional insured is a party that is provided coverage as an insured under a policy by an additional insured endorsement. (Note that the correct terminology is “additional insured,” not “additional named insured.”) Except as discussed in sections 17.6:4 through 17.6:7 below, the status of additional insured is always used with reference to liability policies. An additional insured party is not responsible for payment of the policy premium, but a small administrative charge may be required to issue the endorsement. The policy premium is not adjusted for an additional insured’s loss history.

With some exceptions, most notably coverage for bodily injury or death of an employee, Texas law prohibits a requirement in a construction contract for an additional insured endorsement covering a broad-form or intermediate indemnity. See section 17.2:4 above.

§ 17.6:2 Coverage

Many real estate attorneys believe that if a person or entity is an additional insured under the liability insurance of another person, the additional insured is afforded all the benefits of the other person’s insurance policy; but in reality, protection is provided to the additional insured party only to the extent stipulated in the additional insured endorsement. Numerous additional insured endorsement forms exist for different situations with varying degrees of coverage. Many additional insured endorsements explicitly or by implication exclude coverage for the sole or contributory negligence of the additional insured and limit or deny coverage to specific types of operations or locations.

§ 17.6:3 Additional Insured Endorsement Forms

Additional insured endorsement forms contain a granting clause stating that the party listed or described in the endorsement is to be included as an insured under the policy followed by restrictions introduced by the phrase but only with respect to. Granting clauses in additional insured endorsements do not typically cover partners, employees, agents, and other parties related to the party named as additional insured unless language to that effect is added or a contractual requirement to that effect is picked up by the wording of the endorsement. Although ISO publishes more than thirty different additional insured endorsement forms, individual insurance companies are increasingly using manuscripted forms that differ greatly in coverages and clarity. Hence, the type of additional insured endorsement required must be stipulated by ISO designation (including title, form number, and edition date) or, at a minimum, described in terms of the desired coverage.
The additional insured endorsements discussed below are standard forms promulgated by ISO. Note that the words you and your used in the forms quoted below refer to the named insured, not the additional insured.

In 2004, the ISO 20 10 additional insured form was amended to exclude coverage for the additional insured’s sole negligence by adding a requirement that the claim be caused “in whole or in part” by the acts or omissions of the named insured. Then, in April 2013, both of the additional insured endorsements described below (as well as several others) were amended to add three significant additional limitations. First, coverage is restricted to the extent permitted by law. While the apparent intent was to incorporate statutes such as Tex. Ins. Code § 151.104, voiding a contractual provision requiring an additional insured endorsement to the extent that the provision requires coverage for an indemnity prohibited under Tex. Ins. Code § 151.102, the prohibition, if applicable, would presumably apply without this language. Second, coverage cannot be broader than the coverage required by the provision contained in the underlying contract, which is often limited to the indemnity obligations assumed by the named insured. Here, the intent is to prevent coverage from exceeding what is required by the contract, so it is important for the contract to properly describe the scope of coverage required. Third, the dollar amount of coverage under the additional insured endorsement is limited to the lesser of the policy limit or the dollar limit of coverage required by the underlying contract. For this reason, insurance provisions in contracts often state that the policy limits set forth in the contract are minimum coverages and are not intended to limit the total amount the party should carry. However, some manuscript endorsements may include endorsements that limit coverage to the lesser of the policy limit or the “minimum” limits of coverage required by the underlying contract. The party seeking additional insured coverage should specify in the contract that the limits of insurance are just minimums and should specifically require that additional insured status be provided to the full limits of any liability policies. In any event, named insureds may wish to avoid restrictive additional insured endorsements, because the named insured’s contractual obligation to provide additional insured coverage may be broader than the scope of the coverage of the available additional insured endorsement. On the other hand, the named insured may not want to provide additional insured coverage for risks that are assumed by or are the obligation of the additional insured. If so, both the contract and the policy should limit the additional insured coverage to the risks contractually assumed by the named insured.

The following provisions from ISO endorsement CG 20 10 04 13 illustrate the three limitations discussed in the preceding paragraph:

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.
3. With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits of Insurance:

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.
This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

ISO Form CG 20 10 04 13.

**Owners, Lessees, or Contractors:** The additional insured endorsement form entitled “Additional Insured—Owners, Lessees or Contractors—Scheduled Person or Organization” (ISO Form CG 20 10 04 13, quoted in part below) is commonly used in construction situations. The endorsement has three drawbacks: (1) it covers only the named insured’s ongoing operations—that is, the additional insured is not covered for bodily injury or property damage occurring after completion or abandonment of the work; (2) it excludes from coverage injuries or damage caused by the sole negligence (but not the contributory negligence) of the additional insured, since the endorsement requires that the injury or damage be partially or totally caused by the named insured; and (3) it substitutes the word *caused* for the phrase *arising out of* used in editions before 2004 in order to eliminate coverage for losses or injuries occurring because of contractors’ operations but not necessarily because of contractors’ actions.

A. **Section II—Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for “bodily injury”, “property damage” or “personal and advertising injury” caused in whole or in part by:

1. Your acts or omissions; or

2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

ISO Form CG 20 10 04 13.

Coverage for completed operations can be obtained by using ISO Form CG 20 10 in tandem with ISO Form CG 20 37.

**Managers or Lessors of Premises:** The additional insured endorsement form entitled “Additional Insured—Managers or Lessors of Premises” (ISO Form CG 20 11 04 13, quoted in part below) is commonly used in lease situations and does not exclude the sole or contributory negligence of the additional insured. Coverage is tied to the lease’s definition of “premises.” Thus, if a lease defines “premises” in a way that excludes adjacent driveways or corridors, the landlord may not be an additional insured with respect to bodily injuries and property damage occurring in loading areas serving the premises.

A. **Section II – Who Is An Insured** is amended to include as an insured the person(s) or organization(s) shown in the Schedule but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to:

1. Any “occurrence” which takes place after you cease to be a tenant in that premises.

2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.

ISO Form CG 20 11 04 13.
Additional Insured as Its Interest May Appear

The beneficiary of a property insurance policy must have an “insurable interest” in the insured property, that is, a lawful, substantial, and enforceable interest in the safety or preservation of the subject matter of the insurance. Examples of parties having insurable interests in a building are the owner and the mortgagee. The owner is the named insured under a property policy, and a lender’s interest would be protected with a lender loss payable or other mortgagee clause endorsement. In the context of builder’s risk policies the terminology “additional insureds as their interests may appear” has often been used to attempt to protect parties other than the named insured and mortgagee. If the owner of a building under construction procured a builder’s risk policy, the owner would be the named insured and the contractor and subcontractors would be named as additional insureds as their interests may appear. In theory, if the building were destroyed before completion, the contractor and subcontractors would be entitled to the portion of the insurance proceeds attributable to the portion of the completed construction for which the contractor and subcontractors had not been paid at the time the destruction occurred, and the insurance company would not be able to sue its “insureds” to recover its loss. However, the phrase has led to confusion in litigation and to unintended consequences. Risk managers now advise against the use of “additional insureds as their interests may appear” in builder’s risk policies and suggest instead that (1) all parties be named as insureds under the builder’s risk policy, without reference to the phrase “additional insureds as their interests may appear”; (2) mutual waivers of subrogation be included in the construction contracts and subcontracts; and (3) the parties confirm that the policy permits the waivers of subrogation. If there are coverages that are not intended to benefit all parties (such as a third-party liability extension that is not intended to benefit the contractor), that issue may need to be addressed in the policy and the applicable contracts.

Additional Insured Status for Landlords in Property Proceeds

ISO Form CP 12 19, entitled “Additional Insured—Building Owner,” provides that the building owner identified in the endorsement is a “Named Insured” with respect to the coverage provided under the tenant’s property policy “for physical loss or damage to the building(s) described in the Schedule” to the endorsement.

Additional Insured Status for Landlords in Rental Value

ISO Form CP 15 03, entitled “Business Income—Landlord as Additional Insured (Rental Value),” names the landlord as an additional insured with respect to that portion of proceeds payable under a business income endorsement representing the amount of rent payable under the lease. The remainder of the business income proceeds are payable to the tenant, that is, the named insured. In addition, the insurer commits to provide advance notice in writing of cancellation to the additional insured. This endorsement is especially useful in an absolutely net lease transaction.

Requirement that Coverage Be Primary and Noncontributory

If a party that is named as additional insured expects such coverage to be primary and noncontributory to the additional insured’s existing insurance coverage, the policy providing additional insured coverage must be endorsed to that effect. All policies have “other insurance” clauses that govern how overlapping insurance policies are required to share coverage. Some such clauses say a particular policy will be excess to any other policy, while some “other insurance” clauses provide for sharing duplicate coverage pro rata. When the issue arises because the named insured has two policies that provide overlapping coverage, these “other insurance” clauses make sense—the named insured is covered in any event, and the loss is shared by the overlapping insurers in accordance with the policy provisions. However, if a party has its own insurance but also requires that it be an additional insured on another party’s policy, it could be argued that the “other insurance” clauses should not apply.
and that the coverage obtained from the counterparty’s policy should be primary. In the absence of an endorsement, however, this may not be the result; the courts may split coverage between a party’s own insurance and its coverage as an additional insured. In addition, if the “other insurance” clause is a strong excess clause, the additional insured coverage might be rendered completely inapplicable depending on the amount of the claim and the limits of the respective policies. This result can be avoided by contractually requiring that coverage provided to the additional insured shall be primary and noncontributory to any other policy providing coverage to any additional insured, at least to the extent of the risks and liabilities assumed by the counterparty. ISO Form CG 20 01 04 13 is an example of such an endorsement, stating:

This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:

1. The additional insured is a Named Insured under such other insurance; and
2. You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

ISO Form CG 20 01 04 13.

However, the above endorsement applies only to policies in which the additional insured is a named insured, and the additional insured and the counterparty will both want to determine the existence of any such restrictions and whether any such restrictions are acceptable to them.

§ 17.7 Waivers of Subrogation

§ 17.7:1 Application

An insurance company is subrogated to the rights of its insured against third parties to the extent of a loss paid by the insurance company. However, the parties to a business transaction may prefer not to endanger their business relationship with potentially expensive, stressful, and time-consuming litigation conducted by an insurance company in the name of one party against the other party. Hence, each insured may require its insurance company to waive its right of subrogation to the insured’s rights against the other party. If the named insured does not want to waive subrogation for risks that it did not intend, the contract can limit the scope of the waiver to the risks assumed by the named insured.

§ 17.7:2 Components of Waiver of Subrogation

A waiver of subrogation provision should have two components: a covenant by the insured to obtain the waiver of subrogation from its insurer and a release by the insured with respect to the liability that is covered by the insurance policy for which the waiver is sought. The purpose of the release is to protect the beneficiary of the waiver if the party agreeing to obtain the waiver fails to purchase insurance or if the loss exceeds the scope or limit of the insurance policy.

A waiver of subrogation should also state affirmatively which party is to be responsible for any deductible or self-insured retention under the policy in question.

§ 17.7:3 Availability

The current ISO edition of “Commercial Property Conditions” form (ISO Form CP 00 90) used in conjunction with an ISO commercial property insurance policy contains the following waiver of subrogation:
If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

1. Prior to a loss to your Covered Property or Covered Income.

2. After a loss to your Covered Property or Covered Income only if, at time of loss, that party is one of the following:
   a. Someone insured by this insurance;
   b. A business firm:
      (1) Owned or controlled by you; or
      (2) That owns or controls you; or
   c. Your tenant.

This will not restrict your insurance.

ISO Form CP 00 90 07 88 (emphasis added).

The ISO form of commercial general liability policy (ISO Form CG 00 01) states “The insured must do nothing after loss to impair” the insurance company’s right of recovery. Most insurance professionals believe that the implication of the language is that a waiver of subrogation given by the named insured before the occurrence is permissible.

Waivers of subrogation are also available for workers’ compensation, employer’s liability, and builder’s risk policies but are not provided absent a request.

§ 17.7:4 Fair Notice Doctrine Compliance

A provision that requires one party to release the liability of the other party even if the other party is negligent must comply with the fair notice doctrine under Texas law. See section 17.2:5 above. However, a provision requiring the insurer to waive subrogation has never been held to be subject to the fair notice doctrine.

§ 17.8 Deductible vs. Self-Insured Retention

Both a deductible and a self-insured retention (SIR) require the insured to pay the first dollars of a loss. However, the potential that a third-party claimant will not be compensated under a liability policy with an SIR is substantially greater than that under a policy with a deductible. When a deductible exists under a liability policy, the insurance company keeps control of the adjustment process, defends the insured, typically pays the claim to the third party, and thereafter charges the insured for the deductible. If an SIR exists, the insured controls the adjustment process to the extent of its SIR (unless the insured has contracted with a third party to administer the process) and the liability insurer has no duty to defend the insured or pay the claim to the third party until the SIR is exhausted.

§ 17.9 Quality of Insurance

A.M. Best’s analysis of property and casualty insurance companies is generally the standard cited in real estate transaction documents. Best assigns a “Financial Strength Rating” to insurance carriers. If a company is below Best’s minimum asset
threshold or if sufficient information is not available or is not submitted or if the insurer so requests, Best may elect not to assign a Financial Strength Rating to an insurance company. Reports are available from the A.M. Best website (www.ambest.com) at no cost.

The components of a Best’s financial strength rating are the following:

1. **Rating**—A company is assigned one of sixteen “Best’s Ratings.” Each rating is composed of a letter (A to D) with or without plus or minus signs. A++ is the highest rating and D is the lowest.

2. **Financial Size Category**—A rated company is also assigned one of fifteen Financial Size Categories on the basis of its capital, surplus, and conditional reserve funds from which losses are paid. The Financial Size categories are referred to as “Classes” and described with capital roman numerals. Class I (up to $1 million) is the smallest and Class XV ($2 billion or more) is the largest.

3. **Outlook**—An Outlook indicates the potential future direction of the company’s rating over a designated period of twelve to thirty-six months. Outlooks can be “positive,” “negative,” or “stable.”

Property and casualty insurance companies that are not rated are designated “NR-1” through “NR-5” based on the reason for which Best did not rate the company.

The desired quality of insurance companies should be specified with a combination of both Best’s Rating and Financial Size Category. Most mortgagees require a minimum Best’s financial strength rating of “A” (Excellent) and a financial size category of “Class X” ($500 million to $750 million).

§ 17.10 **Evidencing the Existence of Coverage**

The most common method for evidencing the existence of insurance coverage is to obtain a certificate of liability insurance or evidence of personal or commercial property insurance issued by an insurance broker. The standard forms of certificates of liability insurance and evidence of property insurance are published by the Association for Cooperative Operations Research and Development (ACORD), an insurance industry trade association.

§ 17.10:1 **ACORD 25 “Certificate of Liability Insurance”**

The 2016 edition of the ACORD 25 certificate (form 17-1 in this chapter) combines all disclaimers contained in previous editions into two disclaimers located at the top of the certificate:

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).
The disclaimers address several matters:

1. The certificate is issued as a matter of information only.
2. The certificate confers no rights on the certificate holder.
3. The certificate does not create a contract between the certificate holder and the insurer or the insurance broker.
4. The certificate does not amend, extend, or alter the coverage afforded by the enumerated policies.
5. If the certificate contains a statement that an insurance policy has been endorsed to include an additional insured or to include a waiver of subrogation, but the endorsements were not, in fact, issued, the holder of the certificate has no rights against the insurer or broker.

An ACORD 25 certificate is expressly made subject to “all the terms, exclusions and conditions” of the policies listed therein, notwithstanding any requirement in any contract pursuant to which the certificate was issued. The certificate holder is also made aware that the policy limits shown in the certificate may have been reduced by paid claims.

An ACORD 25 certificate requires the issuing company to deliver notice only in the event of cancellation of the policies before the expiration date “in accordance with the policy provisions.”

An ACORD 25 certificate is designed to be used with liability policies. To use the form for property policies, information must be inserted into the “DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES” space, which appears below the workers’ compensation blank.

§ 17.10:2 ACORD 28 “Evidence of Commercial Property Insurance”

The 2016 edition of the ACORD 28 certificate (form 17-2 in this chapter) summarizes and states coverage under a commercial lines property policy (for example, a commercial property policy) to a mortgagee, additional insured, or loss payee and is designed to comply with the requirements of current lending practices. ACORD 25 and 28 have similar disclaimers. (See section 17.10:1 above for a discussion of the disclaimers.) ACORD 28 requires the issuing company to deliver notice only in the event of cancellation of the policies before the expiration date “in accordance with the policy provisions.”

§ 17.10:3 Practical Considerations

According to risk managers, the vast majority of certificates of insurance are incorrectly completed. Hence, the forms should be reviewed for accuracy.

Insurance certificates are subject to fraud. A red flag is a certificate that is provided directly from the party that is supposedly insured rather than a third-party insurance agent. The recipient of a certificate may wish to consider (1) contacting the issuing insurance agency to confirm its existence, (2) contacting the insurance carrier to confirm the existence of the coverage, and (3) requiring copies of all endorsements dealing with additional insureds, loss payees, mortgagees, and waivers of subrogation.

§ 17.10:4 Alteration, Modification, Disclaimers, and Notice

Texas has joined a large number of states that have enacted laws to prevent modification of the provisions of ACORD forms. Tex. Ins. Code § 1811.052(b) provides that “[a] person may not execute, issue, or require the issuance of a certificate of insur-
ance for risks located in this state, unless the certificate of insurance form has been filed with and approved by the [Texas Department of Insurance].” Under Tex. Ins. Code § 1811.103, a standard certificate of insurance form promulgated by ACORD or ISO is deemed approved when filed with the Texas Department of Insurance, unless the standard form violates certain parameters contained in Tex. Ins. Code § 1811.102. The effect of approval of a certificate form by the Department is that a certificate confirms only that the referenced policy has been issued. Any certificate in violation of Texas Insurance Code chapter 1811 “is void and has no effect.” Tex. Ins. Code § 1811.156.

Tex. Ins. Code § 1811.053 prohibits any alteration or modification of a certificate of insurance form approved the Texas Department of Insurance unless the alteration or modification is approved by the Department. In addition, Tex. Ins. Code § 1811.051 forbids an agent from issuing a certificate of insurance that alters, amends, or extends the coverage or terms and conditions provided by the referenced insurance policy. “A certificate of insurance may not contain a reference to a legal or insurance requirement contained in a contract other than the underlying contract of insurance, including a contract for construction or services.” Tex. Ins. Code § 1811.154.

In the parameters for an acceptable form, Tex. Ins. Code § 1811.101 adopts many of the disclaimers contained in ACORD forms: “for information purposes only”; the certificate “does not confer any rights or obligations other than the rights and obligations conveyed by the policy”; the certificate does not convey a contractual right to a certificate holder; and “the terms of the policy control over the terms of the certificate.”

Tex. Ins. Code § 1811.155(b) prohibits any alteration in a certificate of the notice provisions of a referenced insurance policy. Under Tex. Ins. Code § 1811.155(a), a certificate can require notice to a person only if the person is named in the policy or endorsement and the policy or endorsement (or law) requires notice to be provided.
Additional Resources


# ACORD 25 Certificate of Liability Insurance

## Certificates of Liability Insurance

**CERTIFICATE OF LIABILITY INSURANCE**

**IMPORTANT:** If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed.

### COVERAGES

- **COMMERICAL GENERAL LIABILITY**
  - CLAIMS-MADE
  - OCCUR

- **AUTOMOBILE LIABILITY**
  - ANY AUTO
  - OWNED
  - Hired and Non-Owned
  - SCHEDULED AUTOS ONLY

- **UMBRELLA LIABILITY**
  - OCCUR
  - CLAIMS-MADE

- **EXCESS_liability**
  - OCCUR
  - CLAIMS-MADE

- **WORKERS’ COMPENSATION AND EMPLOYERS’ LIABILITY**
  - ANY PROFIT OR LOSS OR EXECUTIVE OFFICER EXCLUDED
  - ANY PROFIT OR LOSS OR EXECUTIVE OFFICER EXCLUDED (Mandatory in NH)

### DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES

- **(ACORD 101, Additional Remarks Schedule, may be attached if more space is required)**

### COVERAGE

- **COMMENTS:**
  - (EA accident), (EA occurrence)
  - (Per occurrence), (Per accident)
  - EACH OCCURRENCE
  - GENERAL AGGREGATE
  - PRODUCT COMPOUNDS AGGREGATE
  - OTHER

### LIMITS

- **PROPERTY DAMAGE**
  - GENERAL AGGREGATE
  - EXCESS LIABILITY
  - CLAIMS-MADE

- **BODILY INJURY & PROPERTY DAMAGE**
  - PERSONAL & ADJ INJURY
  - GENERAL AGGREGATE
  - MEDICAL EXPENSE

- **GENERAL LIABILITY**
  - APPLIED PER:
  - POLICY PERIOD

- **PRODUCTS LIABILITY**
  - PRODUCT LIABILITY
  - OTHER

- **PUBLIC LIABILITY**
  - PERSONAL INJURY
  - PROPERTY DAMAGE

### CERTIFICATE HOLDER

- **ADDRESS:**
  - INSURER(s) AFFORDING COVERAGE
  - NAIC #

### CANCELLATION

- **AUTHORIZED REPRESENTATIVE**

---

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ACORD 25 (2016/03) The ACORD name and logo are registered marks of ACORD
ACORD 28
Evidence of Commercial Property Insurance

EVIDENCE OF COMMERCIAL PROPERTY INSURANCE

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS EVIDENCE OF PROPERTY INSURANCE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

COVERAGE INFORMATION

COMMERCIAL PROPERTY COVERAGE AMOUNT OF INSURANCE: $_________ DED: $_________

☐ BUSINESS INCOME DED: $_________
☐ RENTAL VALUE

BLANKET COVERAGE

☐ YES
☐ NO if multiple companies, complete separate form for each

TERRORISM COVERAGE

☐ YES if indicates value(s) reported on property identified above: $_________

☐ NO

IS THERE A TERRORISM-SPECIFIC EXCLUSION?

☐ YES
☐ NO

IS DOMESTIC TERRORISM EXCLUDED?

☐ YES
☐ NO

LIMTED FUNGUS COVERAGE

☐ YES
☐ NO

FUNGUS EXCLUSION (If "YES", specify organization's form used)

☐ YES
☐ NO

REPLACEMENT COST

AGREED VALUE

CERTIFICATE

☐ YES
☐ NO

EARTH MOVEMENT (If Applicable)

☐ YES
☐ NO

FLOOD (If Applicable)

☐ YES
☐ NO

WIND / HAIL INCL

☐ YES
☐ NO

SUBROGATION IN FAVOR OF MORTGAGE HOLDER PRIOR TO LOSS

☐ YES
☐ NO

PERILS INSURED

☐ BASIC
☐ BROAD
☐ SPECIAL

COMMENTS

☐ YES
☐ NO

COVERAGE HAVING ESPECIALLY AFFECTED THE RISK:

☐ YES
☐ NO

EXCLUSIONS

☐ YES
☐ NO

ATTACH DISCLOSURE NOTICE / DECTERRORISM COVERAGE

BLANKET COVERAGE

☐ YES
☐ NO

Additional interest(s)

NAME AND ADDRESS

© STATE BAR OF TEXAS

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# ACORD 45
## Additional Interest Schedule

**Agency Customer ID:**

<table>
<thead>
<tr>
<th>Agency</th>
<th>Carrier</th>
<th>NAIC Code</th>
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**Policy Number**

**Effective Date**

**Named Insured(s)**

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**E-mail Address:**

**Phone (A/C, No, Ext):**

**Lien Amount:**

**Interest End Date:**

**Item Description:**

**Certificate Interest in Item Number:**

**Certified Interest in Item:**

**Additional Loss Payee:**

**Mortgagee:**

**Lienholder:**

**Employee:**

**Location:**

**Building:**

**Vehicle:**

**Boat:**

**Item Class:**

**Sched #:**

**Policy:**

**Evidence:**

**Send Bill:**

**Lessor’s Loss Payable:**

**Beneficiary:**

**Insured:**

**Owner:**

**Leaseback:**

**Warranty:**

**Breach of Trustee:**

**Registrant:**

**Reason for Interest:**

**Other:**

**Additional Interest Schedule**

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Chapter 18

Residential Construction Contract Documents

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Form 18-7  Owner Affidavit of Completion ................................................................. 18-7-1 to 18-7-2
Form 18-8  Conditional Partial Release During Construction ................................................................. 18-8-1 to 18-8-2
Form 18-9  Unconditional Partial Release During Construction ................................................................. 18-9-1 to 18-9-2
Form 18-10  Conditional Final Release ................................................................. 18-10-1 to 18-10-2
Form 18-11  Unconditional Release on Final Payment ................................................................. 18-11-1 to 18-11-2
Form 18-12  [Final] Bills-Paid Affidavit ................................................................. 18-12-1 to 18-12-4
Chapter 18

Residential Construction Contract Documents

§ 18.1 General Considerations

The principal functions of a residential construction contract are to establish the terms of the construction agreement, such as price, description of the project, commencement and completion dates, warranties, and allocation of responsibilities, and to create a system for building, approving, and paying for the construction.

The Texas Constitution provides several consumer protection provisions relating to construction on homestead property. For a lien for the construction of improvements to be created against homestead property there must be a written contract. For remodeling or renovations the constitution requires a written application for extension of credit be submitted by the homeowners at least five days before executing the contract, unless the work is acknowledged to be necessary for the immediate repair of conditions that materially affect the health or safety of the residents of the homestead. In addition to this five-day application period, the owner has a three-day right of rescission following execution of the contract. For renovation or repair projects, the contract must also be executed at the office of the third-party lender extending credit for the work and material, the office of an attorney at law, or a title company office. Tex. Const. art. XVI, § 50(a)(5). See chapter 20 in this manual for a detailed discussion of these requirements. Forms 20-6 and 20-7 are closing certificates used to confirm compliance with these requirements.

This chapter contains a residential construction contract (form 18-4). Designed as a basic form, the contract specifies construction costs, a description of the property on which the new improvements are to be situated, a description of the plans and specifications for the project, and a completion date for the work.

Each transaction should be examined to determine if additional provisions are necessary. If form 18-4 is used to document a transaction in which the construction costs are financed, a comprehensive review of chapter 20 in this manual is needed. The attorney may also wish to consider including additional provisions, which are beyond the scope of this chapter, relating to such matters as work delays, responsibility for soil condition and design, loan commitment requirements, late charges, and delay damages.

§ 18.2 Cautions

§ 18.2:1 Construction Trust Fund Statute

The Texas Construction Trust Fund Act (Texas Property Code sections 162.001–.033) states that contractors agreeing to do more than $5,000 worth of work must put the owner’s funds for each such job in a “construction account” at a financial institution. Tex. Prop. Code § 162.006. The general contractor becomes a trustee for the funds received from the owner for the benefit of the subcontractors and suppliers on the project. Tex. Prop. Code § 162.003. The builder’s profit on a cost-plus contract is not considered a trust fund. Tex. Prop. Code § 162.001(c). Misuse of trust funds of $500 or more with intent to defraud is a third-degree felony. Failure to establish or maintain a construction account in violation of sections 162.006 or 162.007 is a class A misdemeanor. Making a false affidavit that the contractor has paid the project bills is a class A misdemeanor with a
possible penalty of up to one year in jail, a $4,000 fine, or both, and personal liability for loss or damage resulting from a false statement. Tex. Prop. Code §§ 53.085(d), (e), 162.032.

The attorney should also be familiar with the law of involuntary mechanic’s liens. See chapter 21 in this manual.

§ 18.2:2 Texas Residential Construction Liability Act

The Texas Residential Construction Liability Act (RCLA), Texas Property Code chapter 27, controls key aspects of residential construction regarding defect claims. Analysis of the provisions of the RCLA is beyond the scope of this manual, although an overview of the RCLA is included below because of its applicability to certain requirements in residential construction contract documents.

RCLA Applicability and Notice: The RCLA applies to construction defect disputes involving a residence, which the RCLA defines as “the real property and improvements for a single-family house, duplex, triplex, or quadruplex or a unit and the common elements in a multiunit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system.” Tex. Prop. Code § 27.001(7).

Notices Required in Contract: Contracts for home or residential construction must contain the statutory notices prescribed by the RCLA. The notice is included in form 18-4 in this chapter.

Dispute Resolution Requirements: Residential construction defect disputes are addressed by the RCLA. The RCLA requires owner claimants to complete several conditions precedent before filing suit or arbitration based on most residential construction defect claims. Certain limited types of claims are exempt from the RCLA dispute resolution process, including claims solely for personal injury, wrongful death, or property damage; cases of builder wrongful abandonment of the project; real estate fraud claims under chapter 27 of the Texas Business and Commerce Code; and violations of the Trust Fund Act (Property Code chapter 162). Tex. Prop. Code § 27.002.

The dispute process includes several steps, including advance notice to builders, opportunity for builder inspection of the claimed defects, disclosure to the builder of expert reports, and builder offers to repair. Tex. Prop. Code § 27.004.

§ 18.2:3 Construction Anti-Indemnity Statute

Chapter 151 of the Texas Insurance Code prohibits an indemnity in a construction contract, or in an agreement collateral to or affecting a construction contract, to the extent that it requires an indemnitor to indemnify a party, including a third party, against a claim caused by the negligence or fault, violation of a law, or breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier. A provision in a construction contract that requires the purchase of additional insured coverage is void to the extent that it requires coverage that is prohibited under subchapter C of chapter 151. This subchapter does not apply to an indemnity provision in a construction contract, or an agreement collateral to or affecting a construction contract, pertaining to a single-family house, townhouse, duplex, or directly related land development, or to a public works project of a municipality. Tex. Ins. Code § 151.105(10).
§ 18.3 Precommencement

§ 18.3:1 Homestead and Mechanic’s Liens

Texas homesteads are exempt from forced sale except for the enforcement of purchase-money liens, property tax liens, an owelty of partition, the refinancing of a federal tax lien, mechanic’s and materialman’s liens, “home equity” or second-lien financing, a reverse mortgage, and the conversion and refinancing of a personal property lien secured by a manufactured home to a lien on real property. A contract for new improvements or improvements to an existing home that create a mechanic’s and materialman’s lien against the homestead must be in writing, made before material is furnished or labor performed, signed by both husband and wife if the homestead is a family one, and compliant with other conditions provided in the Texas Constitution. Tex. Const. art. XVI, § 50; Tex. Prop. Code § 53.254. The contract must also contain the notice required by Tex. Prop. Code § 41.007. The residential construction contract, used alone, does not create a mechanic’s lien. For a more complete discussion of lien and financing issues, see chapter 20 in this manual.

§ 18.3:2 Contract Price

Three basic price structures are used in construction contracts.

Lump sum or stipulated sum is the simplest type of contract price. The contractor reviews the plans and specifications for the project and contractually agrees on a fixed price for the work. Unless the parties agree to change this stipulated amount, this will be the amount paid by the owner.

A unit price contract establishes a price for a given unit of work (for example, $13 per square yard of asphalt paving).

A cost-plus arrangement establishes the price to the owner based on the actual cost of the work plus a certain percentage of profit for the contractor. In cost-plus, guaranteed-maximum construction contracts the contractor guarantees that the cost to the owner will not exceed a maximum price.

§ 18.3:3 Cautions

Commencement of construction before the contract is executed invalidates a mechanic’s lien on a homestead. Tex. Prop. Code § 53.254(b).

Changes to the scope of a project should be documented through the use of a change order, form 18-6 in this chapter. Whether a contractual mechanic’s lien extends to such changes depends on the agreement of the parties as expressed in the original construction contract.

Without an agreement to the contrary, there is no contractual lien for partial performance on a homestead. The contract must be substantially performed. Fidelity Savings & Loan Ass’n v. Baldwin, 416 S.W.2d 482, 483 (Tex. Civ. App.—Beaumont 1967, writ ref’d n.r.e.).

Sales taxes are the responsibility of the owner unless the contract provides for a lump-sum price, in which case the cost is the responsibility of the contractor as the consumer. Tex. Tax Code § 151.056. If the contractor manufactures or produces and also places ready-mix concrete into the property, the concrete must be separately billed, with tax on the materials paid by the owner. Tex. Tax Code § 151.056(g).
Workers’ compensation laws apply to employer-employee relationships but not to independent contractors. Tex. Lab. Code §§ 406.121–.123.

The Texas Home Solicitations Transaction Act may apply if the consumer’s obligation is entered into at a location other than the contractor’s place of business. If the Act applies, additional notices are required. Tex. Bus. & Com. Code §§ 601.002, 601.051–.053. The statutory notice of cancellation is included in the residential construction contract (form 18-4 in this chapter).

In unincorporated areas of certain counties, a builder’s failure to provide the notice indicating all inspections of a new residential construction of a single-family house or duplex showed compliance with applicable building code standards constitutes a criminal offense. The builder has an affirmative defense if the builder’s failure to submit the notice is the result of the failure of the person who performed the inspection to provide appropriate documentation to the builder to submit to the county. Tex. Loc. Gov’t Code §§ 233.154–.155.

§ 18.3:4  Owner Liability to Mechanic’s Lien Claimants and Owner Retainage

The perfection of involuntary mechanic’s liens is covered in chapter 21 in this manual. Before contracting for residential construction, owners should become familiar with their potential liability for mechanic’s liens. Owner liability for properly noticed and filed subcontractor and supplier mechanic’s liens is the sum of two amounts described in Tex. Prop. Code § 53.084. First, an owner is liable for the 10 percent statutory retainage owners are required to withhold from payments to the original contractor on every construction project. Tex. Prop. Code §§ 53.101–.103; Page v. Structural Wood Components, 102 S.W.3d 720 (Tex. 2003). In addition, an owner is liable for “fund trapping,” which means “trapping” or withholding remaining contract funds otherwise owed to the original contractor. This is required when the owner receives a mechanic’s lien notice letter containing language telling the owner to withhold payment from the contractor for the claim amount. Tex. Prop. Code § 53.056(b), (d). If an owner receives a lien notice letter containing the required fund-trap warning and fails to withhold payment from the contractor, the owner is personally liable and the owner’s property is subject to a lien for amounts paid after receipt of the notice. This fund-trapping liability is in addition to the owner’s liability for the 10 percent statutory retainage. Consequently, to protect the owner in case involuntary mechanic’s liens are asserted, the owner must do two things: (1) retain 10 percent of the adjusted original contract price throughout the duration of the project and for the time after completion provided for lien claimants to file mechanic’s liens and (2) withhold the proper amount of undisbursed funds (“trapped funds”) from the contractor if lien notices are received from subcontractors or suppliers. Tex. Prop. Code §§ 53.081, 53.084, 53.101. If an owner fails to withhold the statutory retainage, the owner is nevertheless liable for the amount that should have been withheld. Tex. Prop. Code § 53.103(a).

Time for Withholding Statutory 10 Percent Retainage: Owners, to protect themselves from mechanic’s lien claimant liability, should withhold payment of statutory retainage for at least the time allowed for claimants to file lien affidavits. Tex. Prop. Code § 53.057. This period of time is discussed in chapter 21 in this manual. However, an outline of the applicable time limits is provided below.

The retainage provisions affecting first- and second-tier claimants were amended by the 2011 Texas legislature. Owners must withhold retainage until the earliest of the following:

1. The lien filing date provided by Tex. Prop. Code § 53.052, which is the fifteenth day of the third month following the last month of work or delivery by the claimant. (See the chart at section 21.9:2 in this manual.)
2. The fortieth day after the date stated in the affidavit of completion for the original contract, but only if the owner sent the claimant notice of the affidavit. This affidavit of completion is provided for in Tex. Prop. Code § 53.106, which allows, but does not require, the owner to file such an affidavit stating the date of final completion for the project. See form 18-7. Notice of filing and a copy of the affidavit must be sent to claimants making a written request for one or to claimants who have sent out owner lien notices. However, regardless of whether a claimant makes a request for such affidavit or sends a lien notice, if the affidavit is not sent to a claimant, then the forty-day deadline described in this section does not apply to that claimant. The affidavit is prima facie evidence of the actual final completion date for the project if it is sent to claimants as required.

3. The thirtieth day after the day the owner sends written notice to the claimant demanding that the claimant file its mechanic’s lien affidavit. The notice must contain a legal description of the project property and the owner’s name and address, and it must specify that the lien affidavit must be filed within thirty days of the date the notice was sent. The “demand to file a lien” section of the Texas Property Code, Tex. Prop. Code § 53.057(g), provides that this notice is effective only for the amount of contractual retainage earned by the claimant as of the day notice was sent.

Owner Failure to Withhold 10 Percent Retainage: If the owner fails to withhold statutory retainage, then the claimants are entitled to perfect their claims by notice and affidavit within the longer deadlines described above (i.e., the fifteenth day of the third month following the last month of work or delivery). No thirty-day or forty-day deadlines, under Tex. Prop. Code § 53.057(f), are applicable if the owner fails to withhold the statutory retainage.

Summary of Owner Retainage Withholding Period on Residential Projects: In summary, for residential projects, owners are liable to hold retainage for the longer lien-filing period provided by Tex. Prop. Code § 53.052, meaning the fifteenth day of the third month following the last month of work or delivery completing the project. See the chart at section 21.9:2 in this manual. If an owner wants to shorten this time, he must send one of the applicable notices described above: either filing and sending an affidavit of completion (form 18-7) or sending notice to claimants demanding that they file their lien affidavits. Because the effect of the thirty-day notice to file lien is limited to the accrued amount of the claimant’s retainage, this notice is of limited use. Therefore, residential owners should consider the affidavit of completion process if they want to shorten the retainage withholding period. Owners are cautioned that only those suppliers and subcontractors who are sent the affidavit of completion are subject to the forty-day deadline. A second-tier supplier-claimant, delivering material at the end of the project and not known to the owner, will not receive an affidavit of completion, and therefore that claimant’s lien will not be cut off by the forty-day deadline.

§ 18.3:5 Other Considerations

Both property and liability insurance should be obtained by the contractor to insure the project, and the cost should be factored into the contract price.

Water and electricity should be provided to the lot line by the owner. If not, the contract should allocate the additional cost of obtaining service.

A survey should be performed before the commencement of construction, at the owner’s cost.

The Federal Trade Commission requires insulation installers and new home sellers to supply information on the efficacy of the home insulation products they sell. See 16 C.F.R. pt. 460. The residential construction contract, form 18-4 in this chapter, includes a section for providing the required insulation disclosure data.
Independent contractor status of the contractor reduces the risk of owner liability. *Exxon Corp. v. Quinn*, 726 S.W.2d 17, 19–20 (Tex. 1987). To help preserve the contractor’s independent contractor status, the owner’s control over the performance of the work should be limited.

Responsibility for the foundation is one of the most important risk allocation issues in a construction contract. Usually, the party who has the most control over the design of the foundation bears the responsibility for its performance.

If a contract that provides for the construction of new improvements to real property located in Texas contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation in the courts of another state, or to arbitration in another state, that provision is voidable by the party obligated to perform the construction. *Tex. Bus. & Com. Code §§ 272.001–.002.*

§ 18.4 Commencement

Commencement of construction is required under the residential construction contract, form 18-4 in this chapter, to begin within thirty days from the contract date. The inception date of a statutory mechanic’s lien is the date that construction begins or materials are first delivered. *Tex. Prop. Code § 53.124.* This date may be established by filing an affidavit of commencement, form 18-5.

§ 18.5 Postcommencement

In the residential construction contract, form 18-4 in this chapter, delays caused by unforeseen circumstances extend the completion date. Delays caused by either party can be made the subject of monetary penalties. The price of the project may be adjusted for concealed conditions.

The contractor agrees to clean up the property following completion. The owner walk-through is intended to produce a “punch list” of items the owner wants completed or corrected by the contractor. Acceptance of work occurs only after inspection and approval by the owner. Evidence of completion must be provided by the contractor to the owner. Substantial completion occurs when a certificate of occupancy is issued.

Change orders occur only on agreement by the owner and the contractor. This agreement may be documented by form 18-6.

§ 18.6 Warranties

Alternative express warranty provisions are included in form 18-4 in this chapter, in paragraph E.1.e. Texas law implies a warranty of “good and workmanlike” construction, which can be disclaimed. Also, a warranty of “habitatibility” is implied, which cannot be disclaimed. *See Centex Homes v. Buecher*, 95 S.W.3d 266 (Tex. 2002); *Melody Home Manufacturing v. Barnes*, 741 S.W.2d 349 (Tex. 1987); *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168 (Tex. 1983); *March v. Thiery*, 729 S.W.2d 889 (Tex. App.—Corpus Christi 1987, no writ). In *Centex Homes*, the Texas Supreme Court held that—

the implied warranty of good workmanship may be disclaimed by the parties when their agreement provides for the manner, performance, or quality of the desired construction. We further hold that the warranty of habitability may not be disclaimed generally. This latter implied warranty, however, only extends to defects that render the property so defective that it is unsuitable for its intended use as a home.
One of the alternative express warranties provided in form 18-4 refers to the Texas Residential Construction Commission (TRCC) warranties. These TRCC warranties provide detailed quality standards for residential construction. Although the TRCC was abolished effective September 1, 2009, the warranty standards previously developed by the TRCC may still be incorporated by reference. The TRCC warranties are available online at www.texasinspector.com/files/TRCC-Standards-of-Performance.pdf.

§ 18.7 Instructions for Completing Forms

§ 18.7:1 Contractor’s Disclosure Statement for Residential Construction Contracts

Form 18-1 in this chapter is mandated by the Texas Property Code. This statement must be delivered to the owner before the execution of the construction contract. Tex. Prop. Code § 53.255.

§ 18.7:2 Contractor’s List of Subcontractors and Suppliers

Before beginning work on a project the original contractor must furnish to the owner a written list with the name, address, and telephone number of each subcontractor and supplier that the general contractor intends to use. See form 18-2 in this chapter. This list must be updated within fifteen days of the addition or deletion of a subcontractor or supplier unless the owner signs a written waiver of the right to an updated list. Tex. Prop. Code § 53.256(a). Specific language for the written waiver is given in Tex. Prop. Code § 53.256(d). To use the first alternative for payment of project retainage, described in form 18-4, paragraph 3.f. of exhibit A, the contractor must list all subcontractors and suppliers of any tier involved with the project, timely update this list, and furnish a final updated list on or before the date of final completion. See also the optional paragraph C.1.c. in form 18-4. The owner should recognize that if this alternative is selected and an affidavit of completion is not sent to a claimant for any reason, including that the owner was not made aware of the claimant, then the owner will be liable to that claimant for the claimant’s share of statutory retainage even though the owner may have already paid the retainage.

§ 18.7:3 Contractor’s Disbursement Disclosure for Residential Construction

As a prerequisite to obtaining an advance of funds in a residential construction project, the general contractor is required to provide the owner with a signed statement listing the bills paid and to be paid. See form 18-3 in this chapter. If the lender is funding an advance directly to the contractor and not through the owner, that lender must provide the owner a lender’s disbursement statement and the contractor’s disbursement statement used to apply for the advance. Tex. Prop. Code § 53.258.

§ 18.7:4 Residential Construction Contract

Form 18-4 in this chapter is a contract for the construction of a residence without an architect. The contract assumes a project in which the ultimate homeowner holds title to the land before the commencement of construction. Under the contract, the construction process and the duties and obligations of the parties are divided into distinct preconstruction, construction, and postconstruction stages. The principal functions of the contract are to establish the terms of the construction agreement, such as price, description of the project, commencement and completion dates, allocation of responsibilities, and so forth, and to create a system for building, approving, and paying for the construction.
§ 18.7:5 Affidavit of Commencement

The owner and the original contractor may jointly execute and file an affidavit of commencement with the county clerk of the county in which the land is located. Tex. Prop. Code § 53.124(c). See form 18-5 in this chapter. An affidavit of commencement is prima facie evidence of the date of the commencement of construction and fixes the date of inception of the involuntary mechanic’s liens filed relating to the construction. Tex. Prop. Code § 53.124(d).

The affidavit should be executed and recorded within thirty days after the date of actual commencement of construction or delivery of materials. Tex. Prop. Code § 53.124(c). The owner and the original contractor should not execute this affidavit at the closing of the construction loan lest a delay in recording cause the affidavit to reflect a commencement date before the recording date. The owner and the contractor should execute and record the affidavit promptly after the construction loan documents have been filed and construction has actually commenced.

§ 18.7:6 Change Order

Form 18-6 in this chapter documents amendments to the residential construction contract that may change the plans and specifications, adjust the contract amount, or alter the completion date.

§ 18.7:7 Affidavit of Completion

The owner may file an affidavit of completion with the county clerk of the county in which the property is located. See form 18-7 in this chapter. Completion is defined not as “substantial completion” as used in the contract but as “the actual completion of the work, including any extras or change orders reasonably required or contemplated under the original contract, other than warranty work or replacement or repair of the work performed under the contract.” Tex. Prop. Code § 53.001(15). An affidavit of completion meeting the requirements of section 53.106 constitutes prima facie evidence of the date of completion. Tex. Prop. Code § 53.106(d).

The affidavit should be filed on or before the tenth day after the completion of the work. If the affidavit is filed following the tenth day after the date of completion, the date of completion is presumed to be the date of actual filing. Tex. Prop. Code § 53.106(d).

The owner must send a copy, by certified mail, return receipt requested, or registered mail, to the original contractor not later than the date the affidavit is filed and to each claimant who has sent the owner a notice of lien liability not later than the date the affidavit is filed or the tenth day after the date the owner receives notice. Tex. Prop. Code § 53.106(b). The owner must also furnish a copy of the affidavit to any person who furnished materials or labor for the construction and requests a copy. The affidavit must be furnished not later than the tenth day after the date the request is received or ten days after the date the affidavit is filed, whichever is later. Tex. Prop. Code § 53.106(c).

§ 18.7:8 Lien Waiver

Forms 18-8 through 18-11 in this chapter are statutory forms required for lien and bond claim waivers to document final or interim acknowledgment of payments. The forms must be used verbatim, in lieu of any other form of lien release associated with construction payments. However, if a mechanic’s lien affidavit has already been filed in the real estate records, the form of release does not have to conform to forms 18-8 through 18-11. Tex. Prop. Code §§ 53.281–.287. Blanket advance releases
of all mechanic’s lien rights of the contractor should be enforceable, if expressly stated in the residential construction contract and if the contract is executed before commencement of any work. Tex. Prop. Code § 53.282(a)(3).

§ 18.7:9 Bills-Paid Affidavit

The contractor, on request by the owner and as a condition of payment to the contractor, must provide the owner an affidavit stating that all of the contractor’s subcontractors, laborers, and materialmen have been paid or identifying those not paid. See form 18-12 in this chapter. The affidavit may include representations regarding bills to be paid with the funds received and indemnity provisions. Tex. Prop. Code § 53.085.

A bills-paid affidavit must be signed by the general contractor as a condition for final payment. Tex. Prop. Code § 53.259.

There are significant penalties, both civil and criminal, for the making of false affidavits. The penalties may include a $4,000 fine, confinement in jail for a period not to exceed one year, or both, and personal liability of the person signing the affidavit for any loss or damage resulting from the false statement. Tex. Prop. Code §§ 53.085(d), (e), 53.259(c), (d).
Additional Resources


Form 18-1

The language of this disclosure is based on Tex. Prop. Code § 53.255(b). The disclosure must be substantially similar to the statutory language.

Contractor’s Disclosure Statement for Residential Construction

Basic Information

Date:

Owner:

Contractor:

Property:

[Lender:]

Know Your Rights and Responsibilities under the Law. You are about to enter into a transaction to build a new home or remodel existing residential property. Texas law requires your contractor to provide you with this brief overview of some of your rights, responsibilities, and risks in this transaction.

Conveyance to Contractor Not Required. Your contractor may not require you to convey your real property to your contractor as a condition to the agreement for the construction of improvements on your property.

Know Your Contractor. Before you enter into your agreement for the construction of improvements to your property, make sure that you have investigated your contractor. Obtain and verify references from other people who have used the contractor for the type and size of construction project on your property.
Get It in Writing. Make sure that you have a written agreement with your contractor that includes (1) a description of the work the contractor is to perform; (2) the required or estimated time for completion of the work; (3) the cost of the work or how the cost will be determined; and (4) the procedure and method of payment, including provisions for statutory retainage and conditions for final payment. If your contractor made a promise, warranty, or representation to you concerning the work the contractor is to perform, make sure that promise, warranty, or representation is specified in the written agreement. An oral promise that is not included in the written agreement may not be enforceable under Texas law.

Read Before You Sign. Do not sign any document before you have read and understood it. NEVER SIGN A DOCUMENT THAT INCLUDES AN UNTRUE STATEMENT. Take your time in reviewing documents. If you borrow money from a lender to pay for the improvements, you are entitled to have the loan closing documents furnished to you for review at least one business day before the closing. Do not waive this requirement unless a bona fide emergency or another good cause exists, and make sure you understand the documents before you sign them. If you fail to comply with the terms of the documents, you could lose your property. You are entitled to have your own attorney review any documents. If you have any question about the meaning of a document, consult an attorney.

Get a List of Subcontractors and Suppliers. Before construction commences, your contractor is required to provide you with a list of the subcontractors and suppliers the contractor intends to use on your project. Your contractor is required to supply updated information on any subcontractors and suppliers added after the list is provided. Your contractor is not required to supply this information if you sign a written waiver of your rights to receive this information.

Monitor the Work. Lenders and governmental authorities may inspect the work in progress from time to time for their own purposes. These inspections are not intended as quality control inspections. Quality control is a matter for you and your contractor. To ensure that
your home is being constructed in accordance with your wishes and specifications, you should inspect the work yourself or have your own independent inspector review the work in progress.

**Monitor Payments.** If you use a lender, your lender is required to provide you with a periodic statement showing the money disbursed by the lender from the proceeds of your loan. Each time your contractor requests payment from you or your lender for work performed, your contractor is also required to furnish you with a disbursement statement that lists the name and address of each subcontractor or supplier that the contractor intends to pay from the requested funds. Review these statements and make sure that the money is being properly disbursed.

**Claims by Subcontractors and Suppliers.** Under Texas law, if a subcontractor or supplier who furnishes labor or materials for the construction of improvements on your property is not paid, you may become liable and your property may be subject to a lien for the unpaid amount, even if you have not contracted directly with the subcontractor or supplier. To avoid liability, you should take the following actions:

1. If you receive a written notice from a subcontractor or supplier, you should withhold payment from your contractor for the amount of the claim stated in the notice until the dispute between your contractor and the subcontractor or supplier is resolved. If your lender is disbursing money directly to your contractor, you should immediately provide a copy of the notice to your lender and instruct the lender to withhold payment in the amount of the claim stated in the notice. If you continue to pay the contractor after receiving the written notice without withholding the amount of the claim, you may be liable and your property may be subject to a lien for the amount you failed to withhold.

2. During construction and for thirty days after final completion, termination, or abandonment of the contract by the contractor, you should withhold or cause your lender to
withhold 10 percent of the amount of payments made for the work performed by your contractor. This is sometimes referred to as “statutory retainage.” If you choose not to withhold the 10 percent for at least thirty days after final completion, termination, or abandonment of the contract by the contractor and if a valid claim is timely made by a claimant and your contractor fails to pay the claim, you may be personally liable and your property may be subject to a lien up to the amount that you failed to withhold.

If a claim is not paid within a certain time period, the claimant is required to file a mechanic’s lien affidavit in the real property records in the county in which the property is located. A mechanic’s lien affidavit is not a lien on your property, but the filing of the affidavit could result in a court imposing a lien on your property if the claimant is successful in litigation to enforce the lien claim.

**Some Claims May Not Be Valid.** When you receive a written notice of a claim or when a mechanic’s lien affidavit is filed on your property, you should know your legal rights and responsibilities regarding the claim. Not all claims are valid. A notice of a claim by a subcontractor or supplier is required to be sent, and the mechanic’s lien affidavit is required to be filed, within strict time periods. The notice and the affidavit must contain certain information. All claimants may not fully comply with the legal requirements to collect on a claim. If you have paid the contractor in full before receiving a notice of a claim and have fully complied with the law regarding statutory retainage, you may not be liable for that claim. Accordingly, you should consult your attorney when you receive a written notice of a claim to determine the true extent of your liability or potential liability for that claim.

**Obtain a Lien Release and a Bills-Paid Affidavit.** When you receive a notice of claim, do not release withheld funds without obtaining a signed and notarized release of lien and claim from the claimant. You can also reduce the risk of having a claim filed by a subcontractor or supplier by requiring as a condition of each payment made by you or your lender that your contractor furnish you with an affidavit stating that all bills have been paid. Under
Texas law, on final completion of the work and before final payment, the contractor is required to furnish you with an affidavit stating that all bills have been paid. If the contractor discloses any unpaid bill in the affidavit, you should withhold payment in the amount of the unpaid bill until you receive a waiver of lien or release from that subcontractor or supplier.

**Obtain Title Insurance Protection.** You may be able to obtain a title insurance policy to insure that the title to your property and the existing improvements on your property are free from liens claimed by subcontractors and suppliers. If your policy is issued before the improvements are completed and covers the value of the improvements to be completed, you should obtain, on the completion of the improvements and as a condition of your final payment, a “completion of improvements” policy endorsement. This endorsement will protect your property from liens claimed by subcontractors and suppliers that may arise from the date the original title policy is issued to the date of the endorsement.

I have received a copy of this contractor’s disclosure statement for residential construction.

I have also received a copy of the attached contractor’s list of subcontractors and suppliers.

[Name of owner]

Attach list of subcontractors and suppliers. See form 18-2 in this chapter.
Form 18-2

The prescribed language in the “Notice” paragraph of this form must appear in a minimum of ten-point bold-faced type. The list may be given either with form 18-1 in this chapter or before the commencement of construction. This list must be updated and provided to the owner not later than the fifteenth day after a subcontractor or supplier is added or deleted unless the owner has signed a written waiver of the right to receive updates. Tex. Prop. Code § 53.256.

Contractor’s List of Subcontractors and Suppliers

Basic Information

Date:

Owner:

Contractor:

Property:

[Lender:]

NOTICE: THIS LIST OF SUBCONTRACTORS AND SUPPLIERS MAY NOT BE A FINAL LISTING. UNLESS YOU SIGN A WAIVER OF YOUR RIGHT TO RECEIVE UPDATED INFORMATION, THE CONTRACTOR IS REQUIRED BY LAW TO SUPPLY UPDATED INFORMATION, AS THE INFORMATION BECOMES AVAILABLE, FOR EACH SUBCONTRACTOR OR SUPPLIER USED IN THE WORK PERFORMED ON YOUR RESIDENCE.

Name of subcontractor or supplier:

Address:

Telephone number:

Repeat above information as needed.
If this list was not delivered with form 18-1, include the following.

I have received a copy of this list of subcontractors and suppliers.

[Name of owner]
Contractor’s Disbursement Disclosure for Residential Construction (Consumer-Owned)

Basic Information

Date:

Owner:

Property:

Project: [include description]

Contractor:

[Lender:]

The following information is required to be provided under section 53.258 of the Texas Property Code in connection with this payment request for construction on the Property. This statement will be furnished by depositing the statement in the United States mail, first class, postage paid, and properly addressed to Owner or by hand delivering the statement to Owner before Contractor receives the requested funds.

A. Bills Paid. The following is a list of bills or expenses for labor or materials used on the Project that have been paid and for which Contractor is requesting payment:

Name and address of subcontractor or supplier:

Description of bill or expense paid:

Amount paid:
B. Bills to Be Paid. The following is a list of bills or expenses relating to labor or materials used on the Project that will be paid from the funds requested. This list contains the name and address of each person who subcontracted directly with Contractor and whom Contractor intends to pay from the requested funds.

Name and address of payee:

Description of bill or expense to be paid:

Amount to be paid:

Repeat above information as needed.

[Name of contractor]
Residential Construction Contract

Basic Information

Date:

Owner:

Owner’s Mailing Address:

Contractor:

Contractor’s Mailing Address:

Property Address:

Legal description:

Project Description:

A. Construction Terms

A.1. Allowance Items:

Flooring: $[amount] [retailer]

Light fixtures: $[amount] [retailer]

Wall coverings: $[amount] [retailer]
A.2. Contract Sum:

A residential construction contract may include more than one method of calculating the contract sum. Select one or more of the following as applicable. Attach exhibit A (payment schedule) if applicable.

Stipulated sum: [dollars] DOLLARS ($[amount])

And/Or

Unit price: [dollars] DOLLARS ($[amount]) per [unit of work, e.g., square yard of asphalt paving]

And/Or

Cost-plus basis: costs plus [percent] percent ([percent]%) of “costs” as defined in Exhibit [exhibit letter/number] [include if applicable: but not to exceed a guaranteed maximum of [dollars] DOLLARS ($[amount])].

A.3. F.T.C. Insulation Disclosure Data: The following data reflect characteristics of insulation according to data from the manufacturer:

Ceilings: Type: Thickness: R-Value:

Exterior walls: Type: Thickness: R-Value:

Other: Type: Thickness: R-Value:
B. Definitions

B.1. “Commencement Date” means the date on which the building permit is issued for Contractor to construct the Improvements.

B.2. “Completion Date” means the date of Substantial Completion and notice to Owner, but not later than [date], unless extended by the terms of the Contract Documents, force majeure delays, or other delays not within Contractor’s control.

B.3. “Concealed Conditions” means preexisting physical conditions situated below the surface of the ground, or concealed or unknown conditions in an existing structure, at variance with the conditions indicated in the Contract Documents or differing materially from those ordinarily encountered and generally recognized as inherent in Work of the character provided for in the Contract Documents.

B.4. “Contract Documents” means this residential construction contract, the Plans, warranty documents, and any other documents governing the Work (collectively, the “Contract”).

B.5. “Improvements” means the improvements to be constructed on the Property according to the Plans, including [describe, e.g., a single-family residence].

B.6. “Payment Deadline” means 2:00 P.M. on the third business day after Contractor’s request for payment is received by [Owner/Owner’s lender/[specify]].

B.7. “Plans” means all design plans and specifications for the Improvements (dated and initialed by Owner and Contractor).


B.9. “Substantial Completion” or “Substantially Complete” means the stage of construction when a new home is sufficiently complete that the home can be occupied or used for
its intended purpose; or, if required, a certificate of occupancy has been issued in which the
parties stipulate the Improvements have been completed in accordance with the Plans and are
fit for their intended use except for minor “punch list” items, which are typically completed or
cured following the taking of possession by Owner. However, if Owner moves into the home
or Improvements, the home or Improvements shall be deemed to be Substantially Complete.

B.10. The “Work” means the physical activities, materials, and equipment relating to
the construction of the Improvements.

C. Precommencement Matters

C.1. Contractor agrees to—

a. Provide Owner a copy of the Builder’s Risk Insurance Policy for the Prop-
erty with a coverage amount equal to or greater than the Contract Sum.

b. Obtain Contractor’s risk insurance coverage for casualty loss and public
liability in reasonable amounts, to protect Contractor and Owner.

c. Provide Owner with a written list of all subcontractors and suppliers of any
tier furnishing labor, material, equipment, or other improvements for the
project. The list will include each subcontractor’s or supplier’s name,
address, and telephone number and will be updated within fifteen days of
any addition or deletion of a subcontractor or supplier. A final list will be
provided to Owner on or before final completion of the project.

d. If Contractor provides the Plans, Contractor will deliver to Owner two cop-
ies of the Plans. Contractor hereby assigns to Owner the right to use the
Plans for the purpose of completing the Improvements if Contractor fails to do so in accordance with the terms of the Contract Documents.

C.2. Owner agrees to—

a. Furnish to Contractor reasonable proof acceptable to Contractor that Owner has the ability to pay to Contractor the full Contract Sum.

b. Provide water and electricity to the property line.

C.3. The following are stipulated:

a. Change Orders. Contractor is under no duty to make any changes in the Plans requested by Owner until a mutually agreeable change order is signed by Contractor and Owner.


c. Consumer Products. “Consumer Products,” as defined by the Federal Trade Commission, are excluded from Contractor’s warranty only to the extent individual manufacturers’ warranties are passed through Contractor and assigned to Owner, with a copy received by Owner. Contractor assigns and passes through to Owner the manufacturers’ warranties on all appliances and equipment. In the case of passed-through and received manufacturers’ warranties on Consumer Products, Owner’s recourse is directly to the manufacturer, and Contractor will have no responsibility for them,
except for problems relating to Contractor’s installation and hookup of the items.

d.  *Consult Your Attorney.* This is intended to be a legally binding contract. READ IT CAREFULLY. If you do not understand the effect of any part of the Contract Documents, consult your attorney BEFORE signing.


D.  **After Completion of Precommencement Matters**

*D.1.* Contractor agrees to—

a. Obtain a building permit and commence the Work within thirty days after Owner has completed all of Owner’s obligations under the Precommencement Matters and file an affidavit of commencement in the real property records of the county in which the Property is located.

b. Comply with all regulations and restrictions imposed by local, state, and federal agencies.

c. Diligently prosecute the Work to completion and substantially complete the Work according to the Plans by the Completion Date.

d. Pay all valid bills and charges to Contractor for material or labor relating to the Improvements.

e. Keep the Property free from claims of liens for labor or material arising directly through Contractor, except that Contractor may reasonably dispute any claim.
f. Include in the Improvements insulation with the characteristics set forth above in the F.T.C. Insulation Disclosure Data.

**D.2.** Contractor agrees not to delay the work.

**D.3.** Owner agrees to—

a. Pay to Contractor the Contract Sum, disbursed according to the [Contract terms/payment schedule], no later than the Payment Deadline.

b. Promptly pay to the seller of the Allowance Items all charges in excess of the allowances.

c. Make selection of Allowance Items within ten days after receipt of notice from Contractor; otherwise, Contractor may make the selections or extend the time for Owner to make the selections, in which case Owner will pay any charges related to the delay and Contractor is entitled to extend the Completion Date.

d. Deliver to Contractor, within three business days of Contractor’s draw request, written notice of Work not accepted, with specific reasons and reasonable requirements stated for causing the Work to be accepted.

**D.4.** Owner agrees not to—

a. Communicate directly with laborers about the Work.

b. Delay or interfere with the progress of the Work.

**D.5.** Contractor and Owner agree that—

a. If Owner, at any time before or during the progress of the Work, wants any modifications made to the Plans (“Changed Work”), Owner will request in
writing that Contractor undertake the Changed Work. If Contractor agrees
to do the Changed Work, Contractor may submit to Owner an estimate of
the cost of the Changed Work and an extension of the Completion Date to
reflect the additional time required for completing it. If a preapproved writ-
ten change order is not obtained, Contractor may submit to Owner the
notice of change order and extension of time in writing, and the failure of
Owner to make written objection within ten days of the notice is conclu-
sively deemed approval by Owner. The Contract Sum and the Completion
Date will automatically adjust to incorporate any change orders.

b. Should Contractor encounter Concealed Conditions, the Contract Sum will
be equitably adjusted by change order on claim by either party made
within twenty days after notice by Contractor to Owner of the Concealed
Conditions.

c. Contractor occupies the status of an independent contractor, as that term is
defined in the construction industry.

d. Unless otherwise specifically provided, reference to any equipment, mate-
rial, article, or patented process by trade name, make, or catalog number is
regarded as establishing a standard of quality and is not construed as limit-
ing competition. Contractor may, at Contractor’s option, use any equip-
ment, material, article, or patented process that is substantially equal to that
named.

e. Contractor has the right to subcontract any part or all of the Work.

E. After Substantial Completion

E.1. Contractor agrees to—
a. Remove debris and surplus materials occasioned by the Work.

b. Notify Owner on Substantial Completion of the Work and file an affidavit of completion in the real property records of the county in which the Property is located.

c. Deliver possession of the Improvements to Owner on the day following the later of Substantial Completion or final payment to Contractor of the Contract Sum.

d. Release the Work and Property from all claims, including claims of subcontractors and materialmen, on receipt of final payment.

[Select one of the following. Use the second paragraph to reference the Texas Residential Construction Commission warranty standards.]

e. Contractor warrants its labor and materials against construction defects and warrants that its construction services have been performed in a good and workmanlike manner and that the materials are adequate for their intended purposes. These warranties extend for a period of one year after substantial completion. Owner must give notice of the defect within this one-year warranty period, and contractor has up to six months to correct the defect. The giving of this express warranty is not intended to, and does not, negate implied warranties.

[Or]

e. Contractor warrants that its performance of work on the project meets the residential construction warranties adopted by the Texas Residential Construction Commission. The warranties will extend for the following periods after substantial completion:
i. one year for workmanship and materials;

ii. two years for plumbing, electrical, heating, and air-conditioning delivery systems; and

iii. ten years for major structural components of the home.

These express warranties are given in lieu of the implied warranty of good and workmanlike construction, which is disclaimed.

E.2. Owner agrees to—

a. Pay to Contractor the final payment of the Contract Sum, including all amounts due under the Contract Documents, according to Exhibit A.

b. Sign and file for record within five days after Substantial Completion a notice of substantial completion and acceptance.

E.3. Owner and Contractor agree that Owner’s acceptance of possession will be conclusively presumed to constitute Owner’s acceptance of the Improvements as Substantially Complete and inhabitable.

F. Default and Termination

F.1. Building Permit. If a building permit has not been issued within ten business days of completion of all Precommencement Matters, Owner may terminate this Contract by written notice within ten business days and recover out-of-pocket costs from Contractor; otherwise, Owner must give Contractor ten days’ written notice and opportunity to cure before terminating this Contract.
F.2. Precommencement Matters. If the Precommencement Matters have not been completed within thirty days from the Contract Date, Owner or Contractor may unilaterally terminate this Contract by written notice within forty days from the Contract Date, in which case this Contract will terminate, and the performing party is entitled to recover reasonable out-of-pocket costs from the nonperforming party.

F.3. Owner’s Default. Each of the following constitutes a material breach of this Contract by Owner: (a) failing to fully and timely perform any covenant of Owner under this Contract; (b) making any representation to Contractor found to be materially false, misleading, or erroneous; and (c) substantially breaching any of Owner’s obligations under this Contract.

F.4. Contractor’s Default. Each of the following constitutes a material breach of this Contract by Contractor: (a) delaying the Work such that the progress of the Substantial Completion of the Improvements falls more than thirty days behind the time shown for completion of the Work; (b) failing to fully and timely perform any covenant of Contractor under this Contract; (c) making any representation to Owner found to be materially false, misleading, or erroneous; and (d) substantially breaching any of Contractor’s obligations under this Contract or required by applicable law.

F.5. Remedies. If one party defaults, and the default is not cured within ten days of written notice specifically describing the default, this Contract may be terminated by written notice from the nondefaulting party to the defaulting party.

Include the following if desired, modifying if needed to reflect the appropriate price structure.

In the event of such termination, the following formula is agreed on as a reasonable and fair way to assess the actual damages, without the expense and delay associated with other forms of dispute resolution:
a. **Damages to Contractor.** If termination resulted from an act of default of Owner, Owner will pay to Contractor, within thirty days of written notice from Contractor, an amount equal to all amounts due and owing at the time of the termination, including payment for Changed Work, plus [percent] percent of the remaining Contract Sum to compensate Contractor for the lost profit and for the difficulty and burden of locating other work for the Contractor’s subcontractors to prevent hardship on them and the loss of loyalty resulting from such hardship.

b. **Damages to Owner.** If termination resulted from an act of default of Contractor, damages recoverable by Owner from Contractor will be in accordance with Texas Property Code chapter 27 (the Residential Construction Liability Act), if applicable. If the Residential Construction Liability Act does not apply, Contractor will pay to Owner, in addition to actual damages, consequential damages, which are liquidated in an amount equal to two months’ interest on Owner’s interim construction loan (based on the assumption, whether true or not, that there exists such a loan and that it is fully disbursed and in an amount equal to the Contract Sum) to compensate Owner for the time and expense associated with obtaining another contractor to complete the Work. It is agreed by the parties that this liquidated amount is a reasonable estimate of the consequential damages actually incurred by Owner. Payment by Contractor will be delivered to Owner on the earlier of (i) payment of all amounts due to Contractor, with a right of offset to Owner for unpaid damages under this section; (ii) completion of construction of the Improvements; or (iii) the expiration of thirty days from written notice from Owner.

Continue with the following.
G. Miscellaneous Provisions

G.1. Agreement of Parties. The Contract Documents, including any of their exhibits and attachments, are the entire agreement of the parties. There are no representations, agreements, or promises between the parties, and neither party is relying on any statements or representations of any agent of the other party, that are not in those documents.

G.2. Amendment of Contract. This Contract may be amended only by an instrument in writing signed by the parties.

G.3. Attorney’s Fees. If either party retains an attorney to enforce this Contract, the party prevailing in litigation is entitled to recover reasonable attorney’s fees, court and other costs, and related expenses.

G.4. Binding Effect. This Contract binds, benefits, and may be enforced by the parties and their respective representatives, successors in interest, and, if permitted, their assigns.

G.5. Counterparts. If this Contract is executed in multiple counterparts, all counterparts taken together will constitute this Contract.

G.6. Choice of Law. This contract is to be construed under the laws of the state of Texas, without regard to choice-of-laws in any jurisdiction.

G.7. Venue. Venue is in the county or counties in which the Property is located.

G.8. Notices. Any notice required or permitted under this Contract must be in writing. Any notice required by this Contract will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this Contract. Notice may also be given by regular
mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

G.9. **Time.** Time is of the essence. Unless otherwise specified, all references to days mean calendar days. Business days exclude all Saturdays, Sundays, and national holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or national holiday, that obligation is performable on the next business day.

G.10. When the context requires, singular nouns and pronouns include the plural.

Include the following if the contract calls for renovation or repair of existing homestead improvements and a lien for financing the improvements is contemplated. See section 20.1:1 in this manual.

G.11. **Repair or Renovation Construction.** If the Scope of Work includes repair or renovation of existing improvements, the following provisions apply. Contractor and Owner certify and represent that they are aware of and have complied with the following legal rights and obligations:

a. **Rescission.** Owner may rescind this contract (and any other proposals, contracts, or agreements with Contractor regarding the repair or renovation of existing improvements) without penalty or charge within three days after the execution of the contract by all parties. See the “Notice of Cancellation” form below.

b. **Place of Signing Contract.** Owner acknowledges that this contract was signed at one of the following offices and not elsewhere: (i) the office of a third-party lender making an extension of credit for the Work and material to be furnished; (ii) the office of an attorney at law; or (iii) the office of a title company.
c. **Five-Day Waiting Period.** This contract and any other contract signed in connection with the repair and renovation Work mentioned in this contract have not been executed by Owner or Owner’s spouse before the fifth day after Owner made written application for an extension of credit for the Work and material contemplated.

Include the following if applicable.

**G.12. Special Provisions.** [specify]

**G.13. Notices.**

The following notice is required by Tex. Prop. Code § 41.007. This notice must appear in a minimum of ten-point bold-faced type or equivalent “next to” the owner’s signature line. Tex. Prop. Code § 41.007(a).

**IMPORTANT NOTICE:** You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract and you fail to meet the terms and conditions of this contract, you may lose your legal ownership rights in your home. **KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.**

The following notice is required by Tex. Prop. Code § 27.007.

**RESIDENTIAL CONSTRUCTION LIABILITY ACT (RCLA) NOTICE**

This contract is subject to Chapter 27 of the Texas Property Code. The provisions of that chapter may affect your right to recover damages arising from a construction defect. If you have a complaint concerning a construction defect and that defect has not been corrected as may be required by law or by contract, you must provide the notice required by Chapter 27 of the Texas Property Code to the contractor by certified mail, return receipt requested, not later than the 60th day before the date you file suit to recover damages in a court of law or initiate arbitration. The notice must refer to Chapter 27 of the Texas Property Code and must describe the construction defect. If
requested by the contractor, you must provide the contractor an opportunity to inspect and cure the defect as provided by Section 27.004 of the Texas Property Code.

[Name of owner]

If the owner is married, both spouses must sign the contract.

Include the following if applicable.

YOU, THE OWNER, MAY CANCEL THIS TRANSACTION AT ANY TIME BEFORE MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

[Name of contractor]

If the notice of the owner’s right to cancel is included, attach completed duplicate copies of the following notice of cancellation.

A notice concerning the purchaser’s three-day right of rescission under a contract to purchase real property must be given if (1) the seller or the seller’s agent solicits the sale at a place other than the seller’s place of business; (2) the purchaser submits the purchase contract to the seller or the seller’s agent at a place other than the seller’s place of business; and (3) the consideration payable under the purchase contract exceeds $100; unless either (1) the purchaser is represented by a licensed attorney; (2) the transaction is negotiated by a licensed real estate broker; or (3) the transaction is negotiated at a place other than the purchaser’s residence by the person who owns the property, as described in Tex. Bus. & Com. Code ch. 601.

The notice of cancellation form must be easily detachable from the contract to which it is attached, must be in the same language as the contract, and must contain the following information and statements. Tex. Bus. & Com. Code § 601.053.

Notice of Cancellation

[Date]

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TEN BUSINESS DAYS FOLLOWING RECEIPT BY THE MERCHANT OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.

IF YOU CANCEL YOU MUST MAKE AVAILABLE TO THE MERCHANT AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE MERCHANT REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE MERCHANT’S EXPENSE AND RISK.
IF YOU DO NOT AGREE TO RETURN THE GOODS TO THE MERCHANT OR IF THE MERCHANT DOES NOT PICK THEM UP WITHIN TWENTY DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [name of merchant], AT [address of merchant's place of business] NOT LATER THAN MID-NIGHT OF [date].

I HEREBY CANCEL THIS TRANSACTION.

Dated: _________________________________.

[Name of purchaser]

Include any attachments.
Exhibit A

Payment Schedule

The Contract Sum will be paid by Owner to Contractor as follows:

1. *Retainage.* Ten percent of all draws, including 10 percent of all change orders or other modifications to the contract price, will be withheld by Owner to be paid at the time of the Retainage Draw described below.

2. *Precommencement.* Owner has deposited with Contractor the sum of $[amount], which will be credited to Owner on the [initial/final/describe other] draw.

3. *Interim Draws.* Owner will pay to Contractor the following portions of the Contract Sum according to the following schedule:
   
   a. Draw No. 1 for $[amount]: After foundation poured
   
   b. Draw No. 2 for $[amount]: Roof work begins
   
   c. Draw No. 3 for $[amount]: Interior trim work begins
   
   d. Draw No. 4 for $[amount]: Interior painting begins
   
   e. Draw No. 5 for $[amount]: Substantial Completion
   
   f. Retainage Draw for remaining unpaid 10 percent withheld from each draw, change order, or other modification to the contract price: [select one of the following: If Contractor has complied with paragraph C.1.e. under “Precommencement Matters” by timely providing Owner with the updated written list of subcontractors and suppliers of any tier and Contractor has verified the list]
as accurate as of final completion, Owner will prepare, file, and send an affidavit of completion within ten days of the date of project final completion. Retainage will then be released to Contractor the fiftieth day after the date of final completion as stated in the affidavit, provided no unreleased mechanic’s liens have been filed by that time. Retainage will be paid to Contractor on the last business day of the third month following the month of final completion of the project, provided no unreleased mechanic’s liens have been filed by that time.]

g. Other Draws: In addition to the draws provided for above, Contractor will also make the following draws on the Contract Sum:

$[amount] for [specify]

$[amount] for [specify]

$[amount] for [specify]

Or

3. Interim Draws. Owner will pay to Contractor the following portions of the Contract Sum according to the following schedule: [describe schedule for interim draws, including retainage draw].
Form 18-5

Affidavit of Commencement

Basic Information

Date:

Owner:

Owner’s Mailing Address:

Contractor:

Contractor’s Mailing Address:

Property: [include legal description]

Improvements:

Affiants, [name of owner] and [name of contractor], on oath swear that the following statements are true and within the personal knowledge of Affiants:

1. **Commencement of Construction.** Construction of the Improvements commenced on [date].

2. **Delivery of Materials.** Materials to be used in constructing the Improvements were first delivered to the Property on [date].

3. **Representations.** Affiant, [name of contractor], makes these representations individually and on behalf of Contractor.
Form 18-5
Affidavit of Commencement

[Name of owner]

SUBSCRIBED AND SWORN TO before me on ________________ by [name of affiant].

_____________________________________________________________
Notary Public, State of Texas

[Name of contractor]

SUBSCRIBED AND SWORN TO before me on ________________ by [name of affiant].

_____________________________________________________________
Notary Public, State of Texas
Change Order

Basic Information

Date:

Change Order Number:

Owner:

Owner’s Mailing Address:

Contractor:

Contractor’s Mailing Address:

Property and Improvements: The Improvements described in the Residential Construction Contract (“Contract”) (incorporated by reference) between Owner and Contractor for [specify].

Changes to Contract:

1. Change to Plans and Specifications

   In accordance with the Contract terms, the following changes (“Changed Work”) are approved: [specify].

2. Contract Sum Adjustment

   Original contract sum: [specify]
Include if applicable: Prior change orders number 1 through number [number]:

[specify]

This change order: [specify]

Revised contract sum: [specify]

3. Completion Date Adjustment

Original completion date: [date]

Include if applicable: Previous time changes number 1 through number [number]:

[days]

This time change: [days]

Revised completion date: [date]

4. Contract Amendment. For the same consideration that supports the Contract, Owner and Contractor agree to amend the Contract as described in the Changes to Contract. The Contract as amended remains in full force and effect.

5. When the context requires, singular nouns and pronouns include the plural.

[Name of owner]

[Name of contractor]

If the owner is married, both spouses must sign any written agreement regarding estimates for changed work.
Owner Affidavit of Completion

Basic Information

Date:

Owner:

Owner’s Mailing Address:

Original Contractor:

Original Contractor’s Mailing Address:

Property: [include legal description]

Improvements:

Completion Date: [date]

Affiant, [name of affiant], on oath swears that the following statements are true and within the personal knowledge of Affiant:

1. Date of Completion. The Improvements to the Property were completed on the Completion Date. For purposes of this affidavit, “completion” means the actual completion of the work, including any extras or change orders reasonably required or contemplated under the original contract, other than warranty or repair work.

2. Claims against Retained Funds. No subcontractor or other lien claimant may have a lien on retained funds unless the claimant files an affidavit
CLAIMING A LIEN NO LATER THAN THE FORTIETH DAY AFTER THE WORK UNDER THE ORIGINAL CONTRACT IS COMPLETED.

3. **Statement as to Other Notices.** Owner states that Owner has received a written request to receive a copy of an affidavit of completion from the following persons who have furnished labor or materials for the Property and from no other persons:

Persons requesting copy of affidavit of completion: [list].

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of owner]

SUBSCRIBED AND SWORN TO before me on _________________ by [name of affiant].

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

Notary Public, State of Texas
Conditional Partial Release During Construction

Form 18-8

This form is based on the form found in Tex. Prop. Code § 53.284(b). If a contractor (or other potential lien claimant) is required to execute a waiver and release in exchange for or to induce payment of a progress payment and is not paid in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must read as follows.

Conditional Partial Release During Construction

Project:

Job No.:

On receipt by the signer of this document of a check from [name of maker of check] in the sum of $[amount] payable to [name[s] of payee[s] of check], and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic’s lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer’s position that the signer has on the property of [name of owner] located at [specify location] to the following extent: [specify job description].

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to [name of person with whom signer contracted] as indicated in the attached statement[s] or progress payment request[s], except for unpaid retention, pending modifications and changes, or other items furnished.

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.
The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer’s laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project in regard to the attached statement[s] or progress payment request[s].

______________________________
Date

[Company name]

By ________________________________
[Name and title]
Form 18-9

Unconditional Partial Release During Construction

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Project:

Job No.:

The signer of this document has been paid and has received a progress payment in the sum of $[amount] for all labor, services, equipment, or materials furnished to the property or to [name of person with whom signer contracted] on the property of [name of owner] located at [specify location] to the following extent: [specify job description]. The signer therefore waives and releases any mechanic’s lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer’s position that the signer has on the above-referenced project to the following extent:

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to [name of person with whom signer contracted] as indicated in
the attached statement[s] or progress payment request[s], except for unpaid retention, pending modifications and changes, or other items furnished.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer’s laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project in regard to the attached statement[s] or progress payment request[s].

__________________________________________________________________________________________________________________________ ...
__________________________________________________________________________________________________________________________ ... 

Date

[Company name]

By ________________________________
[Name and title]
Conditional Final Release

Project:

Job No.:

On receipt by the signer of this document of a check from [name of maker of check] in the sum of $[amount] payable to [name[s] of payee[s] of check], and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic’s lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer’s position that the signer has on the property of [name of owner] located at [specify location] to the following extent: [specify job description].

This release covers the final payment to the signer for all labor, services, equipment, or materials furnished to the property or to [name of person with whom signer contracted].

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer’s laborers, subcontractors, material-
men, and suppliers for all work, materials, equipment, or services provided for or to the 
above-referenced project up to the date of this waiver and release.

Date

[Company name]

By

[Name and title]
Unconditional Release on Final Payment

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Project:

Job No.:

The signer of this document has been paid in full for all labor, services, equipment, or materials furnished to the property or to [name of person with whom signer contracted] on the property of [name of owner] located at [specify location] to the following extent: [specify job description]. The signer therefore waives and releases any mechanic’s lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer’s position.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer’s laborers, subcontractors, material-men, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project up to the date of this waiver and release.
Unconditional Release on Final Payment

Date

[Company name]

By ________________________________

[Name and title]
Form 18-12

[Final] Bills-Paid Affidavit

Basic Information

Date:

Owner:

Owner’s Mailing Address:

Contractor:

Contractor’s Mailing Address:

Affiant: [include relationship to contractor]

Affiant’s Mailing Address:

Property: [include legal description]

Improvements:

Affiant swears individually and on behalf of Contractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Contractor.
2. Affiant understands that Owner has required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

3. Contractor has paid each of Contractor’s subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

<table>
<thead>
<tr>
<th>Name:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address:</td>
</tr>
<tr>
<td>Telephone number:</td>
</tr>
<tr>
<td>Amount owed:</td>
</tr>
</tbody>
</table>

List all subcontractors, laborers, and materialmen and amounts owed to each. If there are no unpaid subcontractors, laborers, or materialmen, state “None.”

Contractor warrants and represents that the following specified bills or classes of bills will be paid by Contractor from the funds paid to Contractor by Owner in reliance on this affidavit:

<table>
<thead>
<tr>
<th>Name of payee or description of class:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount:</td>
</tr>
</tbody>
</table>

Contractor agrees to indemnify and hold Owner harmless from any loss or expense resulting from false or incorrect information in this affidavit.
Continue with the following.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _________________ by [name of affiant].

____________________________________
Notary Public, State of Texas
Chapter 19
Commercial Construction Contract Documents

§ 19.1 Nature of Contract ......................................................... 19-1
§ 19.2 Architect and Engineering Services .................................. 19-1
§ 19.3 Role of Architect/Engineer ............................................. 19-1
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Forms

Form 19-1 Commercial Construction Contract ............................ 19-1-1 to 19-1-74
Chapter 19

Commercial Construction Contract Documents

Note: The State Bar of Texas Real Estate Forms Committee is grateful to Bill Locke, shareholder with Graves, Dougherty, Hearon & Moody, in Austin, Texas, and Charles Comiskey, senior vice president of Brady Chapman Holland & Associates, Inc., an insurance brokerage firm with offices in Houston, Texas, and president of RiskTech, Inc., a risk management consulting firm in Houston, Texas, for their assistance in preparing exhibit D of form 19-1 in this chapter.

§ 19.1  Nature of Contract

Form 19-1 in this chapter is intended to be used for commercial construction projects that are designed by an architect with participation by the architect’s engineering consultant(s). The term Architect/Engineer as used in the contract designates the design professional for the project.

§ 19.2  Architect and Engineering Services

The statutes applicable to architects and engineers govern the types of design and professional services that may be provided by each. Some professional services may be performed by either an architect or an engineer, including the preparation of site plans and the depiction of building systems. See, e.g., Tex. Occ. Code §§ 1001.0031(d), (e), 1051.0016(b), (c). Certain plans and specifications may be prepared only by a licensed architect or a licensed engineer. See Tex. Occ. Code §§ 1001.0031(c), 1051.703. Some projects may be designed by persons who are not licensed architects or engineers. See, e.g., Tex. Occ. Code §§ 1051.606, 1001.056–.057.

§ 19.3  Role of Architect/Engineer

The commercial construction contract (form 19-1 in this chapter) designates the Architect/Engineer (A/E) as the owner’s representative and anticipates that the A/E will provide design services prior to construction and contract administration services during the construction phase. As part of the contract administration services, the A/E will, among other duties, carry out the following: give the notice to proceed, approve payment applications from the contractor, respond to submittals and requests for clarification, review the contractor’s construction schedule, determine whether delay is excused, approve or make reasonable objection to proposed subcontractors, review the contractor’s draw requests for payment, determine whether the project is substantially complete, prepare the list of correction items required (punch list) for final completion, determine whether to recommend the owner’s final payment, and receive information and documents on behalf of the owner, such as lien releases and affidavits of bills paid. The A/E is designated in the contract as the initial decision maker for claims made by the owner or the contractor.

The contract administration services specified in the contract are typical of those in industry-standard forms, such as American Institute of Architects construction contracts. However, the A/E is not a party to the construction contract. Therefore, the terms of the architect’s contract should be made consistent with the A/E provisions in form 19-1. Alternatively, the architect’s contract can be drafted to incorporate the provisions of form 19-1 by reference in describing the A/E’s obligations.
§ 19.4 Contract Price

The cost of construction is calculated on the basis of the actual cost of the work, plus the contractor’s fee, not to exceed a stated guaranteed maximum price.

Section F. of the contract specifies the types of construction costs that are reimbursable as the cost of the work.

Paragraph F.5. requires the contractor to provide a schedule of values for the owner’s approval. The approved schedule of values will be used to determine progress payments, as provided in section J.

The contract price, allowances, contractor’s contingency, owner’s contingency, and the amount of liquidated damages, if required by the owner, are to be set out in exhibit C of the contract.

§ 19.5 Retainage

The contract provides for 10 percent retainage to be withheld in accordance with the provisions of chapter 53 of the Texas Property Code.

§ 19.6 Payment and Performance Bonds

The owner may require the contractor to provide payment and performance bonds by designating the requirement on exhibit D of the contract.

§ 19.7 Insurance

The insurance requirements for the contractor and, if applicable, the subcontractors are to be set out in exhibit D, which contains sample insurance requirements.

§ 19.8 Default and Remedies

Sections M. and N. contain the default and remedies provisions. Paragraph N.7. also includes a waiver of consequential damages. Before selecting the liquidated damages option or determining the liquidated damages amount, the practitioner should consider the enforceability of such clauses. See Phillips v. Phillips, 820 S.W.2d 785, 789 (Tex. 1991); Garden Ridge, L.P. v. Advance International, Inc., 403 S.W.3d 432, 440 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). In Garden Ridge, L.P., the court described the test set out in Phillips as follows:

“The test for determining whether a provision is valid and enforceable as liquidated damages is (1) if the damages for the prospective breach of the contract are difficult to measure; and (2) the stipulated damages are a reasonable estimate of actual damages.” Chan v. Montebello Dev. Co., No. 14-06-00936-CV, 2008 WL 2986379, at *3 (Tex. App.—Houston [14th Dist.] July 31, 2008, pet. denied) (citing Phillips, 820 S.W.2d at 788). Further, we stated:

In order to meet this burden, the party asserting the defense is required to prove the amount of the other parties’ actual damages, if any, to show that the liquidated damages are not an approximation of the stipulated sum. If the liquidated damages are shown to be disproportionate to the actual damages, then the liquidated damages must be declared a penalty. . . .

Id. at *3–4 (citations omitted).
Also, liquidated damages must be in lieu of and not coupled with or in addition to actual damages. A contract provision that "fixes liquidated damages without excluding additional liability for actual damages is not a reasonable forecast of just compensation and therefore a penalty." *Phillips*, 820 S.W.2d at 789.

Paragraph J.10. authorizes the owner to withhold payment based on conditions that could result in loss or damages to the owner as long as the conditions remain uncured. The practitioner should consult the provisions of chapter 28 of the Texas Property Code, requiring prompt payment to contractors and subcontractors.

§ 19.9  Warranties

The contractor’s warranties are set out in section P. In addition to the customary one-year warranty against defects in labor and materials, section P expressly provides a ten-year warranty on structural components, including the foundation.

§ 19.10  Choice of Law and Venue

If a contract that provides for the construction of new improvements to real property located in Texas contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation in the courts of another state, or to arbitration in another state, that provision is voidable by the party obligated to perform the construction. *Tex. Bus. & Com. Code §§ 272.001–.002.*
Form 19-1

Commercial Construction Contract
[Short Form—Guaranteed Maximum Price]

Basic Information

Effective Date:

Owner:

Address:

Phone:

E-mail:

Architect/Engineer (“Owner Rep”):

Address:

Phone:

E-mail:

Contractor:

Contractor’s Representative for Project:

Address:

Phone:

E-mail:

Lender:
Address:

Phone:

E-mail:

Project: [include general description of improvements to be constructed]

Project Site: [state physical address of site and attach legal description as identified in exhibit A]

Contract Price: [the sum of the costs of construction, contractor's contingency, owner's contingency, and contractor's fee as identified in exhibit C]

Guaranteed Maximum Price:

Substantial Completion Date:

Insurance and Bond Requirements: [see exhibit D]

Plans: [specifications and drawings as identified in exhibit B]

Owner and Contractor agree to the following terms and conditions.

A. Definitions

A.1. “Allowance” means a dollar amount specified to be used for portions of the Work that have not been fully defined in the Plans or where a range of options is available for Owner’s selection.

A.2. “Applicable Law” means all federal, state, and local laws, rules, and regulations applicable to the Project, the Work, or the Contractor, as indicated by the context.
A.3. “Bid” means a response to a request for bids. The term includes proposals submitted in response to a request for proposals.

A.4. “Business Day” means a day other than a Saturday, Sunday, or national holiday. As used in this Contract, the term “days” means calendar days. All periods are measured in calendar days unless business days are specified.

A.5. “Change Order” means a description of changes in the Work, and any increase or decrease in the Guaranteed Maximum Price and extension or reduction of Contract Time resulting from such changes, that has been signed by Owner and Contractor.

A.6. “Claim” means a demand or assertion by one of the parties seeking, as a matter of right, payment of money or other relief with respect to the terms of the Construction Documents, and also includes other disputes and matters in question between Owner and Contractor arising out of or relating to the Construction Documents.

A.7. “Commencement Date” means the date on which a written notice to proceed is delivered by Owner Rep to Contractor.

A.8. “Concealed Conditions” means physical conditions in existence on the Effective Date located beneath the surface of the ground, or concealed or unknown conditions in an existing structure, that are at variance with the conditions indicated in the Construction Documents or are substantially different from those conditions shown in the Construction Documents and that Contractor could not have discovered by the exercise of reasonable diligence.

A.9. “Conditions to Final Payment” means the conditions required by this Contract that must be satisfied by Contractor or waived by Owner in writing for Owner to be obligated to make the Final Payment to Contractor.

A.10. “Construction Documents” mean the documents identified in paragraph B.1.
A.11. “Contractor’s Contingency” means the amount identified in Exhibit C that is for Contractor’s exclusive use in connection with unanticipated increases to the Costs of Construction. The Contractor’s Contingency is not intended to be used to cover increases to the Costs of Construction due to changes in the Scope of Work resulting from errors in the Owner Information or changes to the Scope of Work requested by Owner.

A.12. “Contract Time” means the period provided in this Contract for reaching Substantial Completion, and, if specified, the period for achieving Final Completion.

A.13. “Cost Savings” means the amount equal to the Guaranteed Maximum Price less the total amount paid by Owner to Contractor under this Contract. It does not include savings that result from Owner’s failure to use all of the Owner’s Contingency or to fully use an Allowance or trade discounts, or from Owner’s decisions during construction to use less costly materials than called for in the Plans and Specifications, or to reduce the Scope of Work.

A.14. “Drawings” means the graphic and pictorial portions of the Construction Documents showing the design, location, and dimensions of the Work.

A.15. “Excused Delay” means a delay in Contractor’s performance under the terms of this Contract due to acts of God, strikes, lockouts, labor shortages, labor restrictions by any governmental authority, civil riot, floods, abnormal adverse weather conditions that exceed [number] days, unavoidable casualties, or any cause beyond the control of Contractor, a Subcontractor, or a Supplier of any tier, that could not have been avoided using reasonable diligence. “Excused Delay” does not include delay resulting from negligence, default, or any condition not constituting an Excused Delay.

A.16. “Final Completion” means all the Work required by the Plans has been completed, all punch list items from the Substantial Completion review have been completed, and all Conditions to Final Payment have been satisfied.
A.17. “Governmental Approvals” means all approvals required by governmental entities with jurisdiction over the Property or Improvements for the Project to be used for its intended purpose, including, if applicable, a Certificate of Occupancy.

A.18. “Improvements” means the buildings, structures, landscaping, and other improvements to be constructed on the Property by Contractor according to the Construction Documents.

A.19. “Liquidated Damages” means an estimate of the amount of damages, as shown on Exhibit C, that Owner is likely to incur as a result of the failure of the Project to be Substantially Complete by the Substantial Completion Date due to Contractor’s Unexcused Delay.

A.20. “Major Subcontractor” or “Major Sub-subcontractor” or “Major Supplier” means a Subcontractor, Sub-subcontractor, or Supplier whose contract price exceeds 10 percent of the Costs of Construction, or other amount agreed on by Owner and Contractor.

A.21. “Owner Information” means the survey of the Property or Project Site, reports from Owner’s consultants, Property restrictions, and other information provided by Owner with its request for Bids for the use of bidders in preparing their Bids. The term does not include Plans and Specifications.

A.22. “Owner’s Contingency” means the amount identified in Exhibit C that is for Owner’s exclusive use in connection with the Project. The Owner’s Contingency may be used by Owner to cover increases in the Costs of Construction resulting from errors in the Owner Information and changes in the Scope of Work.

A.23. “Plans” means the Drawings and Specifications approved by Owner and Contractor identified in Exhibit B and any amendments made after the Effective Date.
A.24. “Project Site” means the area(s) within the Property where the Improvements will be constructed.

A.25. “Property” means the real property described in Exhibit A.


A.27. Scope of Work means the Work covered by the Construction Documents.

A.28. “Specifications” means a detailed description of the building components and materials and installation requirements prepared by the Architect/Engineer for the Project.

A.29. “Subcontractor” means a person who contracts directly with Contractor to perform a portion of the Work for the Project.

A.30. “Substantial Completion” or “Substantially Complete” means that the Improvements have reached the stage at which they are usable for the purposes intended, all Governmental Approvals have been obtained, and only minor or cosmetic Work remains to be completed.

A.31. “Sub-subcontractor” means a person who contracts directly with a Subcontractor or Sub-subcontractor to perform a portion of the Work for the Project.

A.32. “Supplier” means a person who contracts with Owner, Contractor, a Subcontractor, or a Sub-subcontractor to furnish materials or equipment for the Project.

A.33. “Warranty Documents” means the written warranties on equipment, materials, labor, or the Work provided by Contractor, a Subcontractor, or a Supplier of any tier or a manufacturer.
A.34. “Work” means the labor, coordination, management, materials, equipment, and other materials and services required to construct the Project.

Terms not defined in this Contract or in the other Construction Documents have the meanings ascribed to them by common usage.

B. Construction Documents

B.1. This Commercial Construction Contract between Owner and Contractor consists of the following Construction Documents:

- Drawings
- Specifications
- Addenda to this Contract
- Change Orders
- Warranty Documents
- Approved Construction Schedule
- This Contract and its Exhibits

Include the following if applicable.

Owner’s Request for Bids/Proposals
Contractor’s Bid/Proposal and Bid Qualifications and Exclusions

Continue with the following.

B.2. If there is an ambiguity or conflict, the Construction Documents are to control in the following order:
Change Orders

Addenda

This Contract

Drawings

Specifications

Schedule

Warranty Documents

Owner’s Request for Bids/Proposals

Contractor’s Bid/Proposal and Bid Qualifications and Exclusions

C. The Work

C.1. Contractor will furnish all Work necessary to construct the Project as stated in, or reasonably inferable from, the Construction Documents.

C.2. Owner Rep will reasonably interpret the Construction Documents in accordance with the intention of the parties as expressed in the Construction Documents. Owner Rep will take into consideration industry and trade custom and usage only in the case of ambiguity in or conflict between the Construction Documents. Contractor will follow Owner Rep’s interpretation. Contractor may make a Claim if Contractor disputes the interpretation.

C.3. Contractor represents to Owner that it has made an inspection of the Property and the conditions existing at and in the vicinity of the Project Site, has determined normal weather conditions for the Project Site, has reviewed the Construction Documents and the
Owner Information, and agrees to construct the Project for the Contract Price and within the Contract Time. Time is of the essence of this Contract.

C.4. Before proceeding with the Work, Contractor will field check and verify all dimensions, grades, lines, levels, or other conditions or limitations at the Property to avoid construction or drainage errors.

C.5. Contractor has reported to Owner Rep all errors or omissions detected in the Plans and Owner Information before the Effective Date and will promptly report to Owner Rep any errors or omissions detected in the Owner Information after the Effective Date. Adjustments in the Contract Time and Contract Price may be made by Change Order resulting from errors or omissions that were detected and timely reported to Owner Rep.

C.6. Contractor will promptly notify Owner Rep if Contractor encounters Concealed Conditions. Contractor will provide Owner with an estimate of any additional costs and impact to the Construction Schedule resulting from the Concealed Conditions. Contractor and Owner will execute a Change Order for any agreed-on changes to the Work.

D. Contractor Obligations. Contractor agrees to perform its obligations under the Construction Documents, including the following:

D.1. Perform the Work in a good and workmanlike manner, free from defects in labor and materials, and in accordance with the Construction Documents and Applicable Law.

D.2. Provide Owner Rep with the following within ten days after the Effective Date and before the commencement of the Work:

   a. Construction Schedule as described in paragraph G.1.;

   b. Schedule of Values as described in paragraph F.5.; and

   c. performance and payment bonds and insurance required under Exhibit D.
D.3. Cooperate with any contractor or supplier engaged by Owner to perform Work at the Project Site to minimize delay and disruption to the Project.

D.4. Comply with the terms of its subcontracts.

D.5. Pay Subcontractors and Suppliers within seven days after receipt from Owner of payment for their Work.

D.6. Provide and periodically update a list of Subcontractors as described in paragraph H.5.

D.7. Promptly report errors or omissions in the Plans and Owner Information to Owner Rep.

D.8. Maintain as-built drawings at the Project Site as described in paragraph J.6.c.xii.

E. **Owner Obligations.** Owner agrees to perform its obligations under the Construction Documents, including the following:

E.1. Provide Contractor with timely access to the Project Site.

E.2. Provide utility connections necessary for the Work to the Property line, unless utility extension is part of the Work.

E.3. Require Owner Rep to respond to submissions, including shop drawings, Draw Requests, and requests for clarification, in a timely manner so as not to cause undue delay to the Project.

E.4. Make decisions on Allowances, changes, selections, and other decisions in a timely manner so as not to cause undue delay.

E.5. Make timely payments of amounts owed to Contractor in accordance with section J.
E.6. Require third-party contractors and vendors performing Work at the Project Site to cooperate with Contractor and to be liable for damages caused to Contractor’s Work.

F. Contract Price

F.1. The Contract Price is the sum of the (a) Costs of Construction, (b) Contractor’s Contingency, (c) Owner’s Contingency, and (d) Contractor’s Fee, provided that the Contract Price shall not exceed the Guaranteed Maximum Price. The Contract Price includes the Allowances shown on Exhibit C. The Guaranteed Maximum Price may be changed only by Change Order.

F.2. The Costs of Construction include the following actual costs:

a. Subcontracts—the price of approved subcontracts;

b. Contractor’s Labor—the cost of Contractor’s direct labor for performance of the Work, whether on-site or at fabrication shops off-site assembling or manufacturing materials to be installed on the Project; the wages paid must not be materially higher than the standard paid for similar work by other contractors in the location of the Project;

c. Contractor’s Supervision—Contractor’s superintendent, Project management, and administrative staff on-site devoting full time and attention to managing the Project; off-site Project managers’ costs will be paid upon written agreement with Owner based on their time devoted to the Project;

d. Fringe Benefits—the cost of standard labor fringe benefits for Contractor’s Labor and Contractor’s Supervision for on-site personnel; Fringe Benefits means costs for Contractor’s Labor and Contractor’s Supervision for on-site personnel in addition to wages for the employer’s required contributions for employment taxes, insurance, and other employer labor cost required by
applicable labor agreement or by law; Fringe Benefits also includes employer contributions for qualified retirement plans, health insurance, and paid leave, provided such costs are standard in the industry and are based on wages or salaries included in the Costs of Construction; however, the Costs of Construction will not include employee profit sharing or bonuses (except qualified retirement plans);

e. Materials/Equipment—materials and equipment installed as a part of the Project as specified in the Construction Documents, including freight for delivery to the Project, a reasonable standard allowance for waste, and sales or use taxes paid by Contractor unless Owner has furnished Contractor with a certificate of exemption from the payment of such taxes; unreturned excess materials are owned by Owner;

f. Construction Equipment Costs—costs for machinery, equipment, tools, and temporary structures and outbuildings on the Project; these costs will be at standard rental rates for the location of the Project, whether owned by or rented by Contractor;

g. Demolition and Site Clearing—the cost of clearing the site and demolition and removal of existing structures and vegetation required for performance of the Work;

h. Site Office—office supplies, copy charges, delivery charges, and other reasonable direct costs of maintaining a job site office;

i. Bonds and Insurance Premiums—the percentage of Contractor’s insurance premiums allocated to this Project for the insurance required in this Contract and the cost of providing any required payment and performance bonds;
j. Building Permit—fees for the building permit, licenses, and inspections by governmental authorities required for the Work;

k. Royalties/Licenses—costs of use of designs, products, or processes required by the Construction Documents as part of the Work; and

l. General Conditions—reasonable job site costs incurred in performing the Work, including costs such as for utilities not paid by Owner, a job site trailer if needed due to the scope of construction, temporary restrooms used at the site, on-site security, construction fencing, and site cleanup.

F.3. The following costs are excluded from the Costs of Construction:

a. Contractor management and other employees or personnel not located full-time on the Project site, unless Owner’s advance written approval is obtained;

b. Contractor’s principal office overhead;

c. Contractor’s general overhead including costs of borrowing;

d. costs not included in paragraph F.2.;

e. costs excluded under paragraph F.3.;

f. costs and expenses of any kind that, when added to the rest of the Costs of Construction and Contractor’s Fee would be in excess of the Guaranteed Maximum Price, as adjusted by Change Order; and

g. costs to correct Work to bring it into conformance with the Construction Documents.
F.4. Discounts. Owner will be notified if material or equipment price discounts are available for advance cash payments. If so notified, and if Owner advances the funds for such purchases, Owner is entitled to the associated discount.

F.5. Schedule of Values. Contractor will prepare a Schedule of Values. The Schedule of Values must be approved in writing by Owner Rep before commencement. The Schedule of Values will apportion the Guaranteed Maximum Price between each constituent element of the Work.

F.6. Entitlement to Savings. Upon Final Payment by Owner to Contractor and provided Contractor is not in default of this Contract, Owner shall pay Contractor the percentage of Cost Savings, if any, shown on Exhibit C, provided that Owner retains the right to withhold payment for any outstanding Claims related to the Project in an amount reasonably determined by Owner to protect Owner from liability.

F.7. Allowances. Contractor shall include in the Contract Price the Allowances shown in Exhibit C. Items covered by Allowances shall be supplied for such amounts and by such persons or entities as Owner may direct, but Contractor is not required to employ persons or entities to whom Contractor has reasonable objection. Unless otherwise provided in the Construction Documents—

a. allowances shall cover the cost to Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;

b. Contractor’s costs for unloading and handling at the site, labor, installation costs, overhead, profit, and other expenses contemplated for stated Allowances amounts shall be included in the Costs of Construction but not in the Allowances;
c. whenever costs are more than or less than Allowances, the Guaranteed Maximum Price shall be modified by Change Order; the amount of the Change Order shall reflect the difference between actual costs and the Allowances; and

d. Owner shall select materials and equipment under an Allowance with reasonable promptness.

G. Contract Time

G.1. Contractor will promptly prepare and submit to Owner Rep for approval a Construction Schedule, using the critical path method, detailing how Substantial Completion will be achieved by the Substantial Completion Date. Contractor will periodically revise and resubmit the Construction Schedule to Owner Rep upon change orders, Excused Delays, or other events that cause the critical path or the Substantial Completion Date to change.

G.2. If the Work is damaged or destroyed before its final completion, Contractor will bear the risk of loss and will diligently proceed with restoration or replacement and completion of the Work.

G.3. If there is a delay in the Work that is not an Excused Delay, and in the determination of Owner Rep the Work will not reach Substantial Completion by the Substantial Completion Date, Owner Rep may direct Contractor to accelerate the Work at no cost to Owner by means of overtime, additional crews, additional shifts, or resequencing of the Work to achieve Substantial Completion by the Substantial Completion Date.

G.4. Owner may, with or without cause, by written directive, require Contractor to suspend or delay commencement of the Work in whole or in part for a length of time as desired by Owner. The Guaranteed Maximum Price and Contract Time are to be equitably adjusted for increases in the Costs of Construction and for the time caused by such delay or
suspension under this paragraph. However, no such equitable adjustment shall be made if Owner has the right to order delay or suspension of the Work under another provision of the Construction Documents or if an Unexcused Delay by Contractor would have caused such suspension or delay.

H. Subcontracts

H.1. Contractor may subcontract all or any part of the Work.

H.2. Subcontracts with Subcontractors and Suppliers must—

a. be in writing;

b. require the Subcontractor to assume toward Contractor all of the obligations and responsibilities that Contractor owes to Owner under the Construction Documents;

c. be consistent with the terms of this Contract;

d. require compliance with the terms of this Contract applicable to Subcontractors, including requirements for insurance and lien waivers;

e. require that the Subcontractor provide a copy of the subcontract to Owner if Contractor’s right to perform under this Contract has been terminated;

f. be assignable to Owner or to Contractor’s surety for the Project on the same terms; and

g. prohibit assignment of the Subcontractor’s obligations.

H.3. Contractor will provide each Subcontractor with a copy of the Construction Documents, or a copy of the portions to which Subcontractor will be bound, before entering into subcontracts.
H.4. Owner may require Contractor to provide Bids from Major Subcontractors, Major Sub-subcontractors, and Major Suppliers. Owner, Owner Rep, and Contractor will review the Bids and agree on selection. Contractor will not use a subcontractor or supplier to whom Owner has a reasonable objection. Contractor will not be required to enter into a subcontract or other agreement if Contractor reasonably objects to use of such subcontractor or supplier. If Owner requires Contractor to use a specific subcontractor or supplier instead of the subcontractor or supplier recommended by Contractor who has submitted a lower Bid, the Guaranteed Maximum Price will be increased by the additional amount of the Bid from Owner’s required subcontractor or supplier.

H.5. Contractor will provide Owner Rep with a written list of all its Subcontractors and Suppliers, and the Major Sub-subcontractors and Major Suppliers of any tier, with the address and telephone number of each. An updated list will be provided to Owner Rep within fifteen days after any change. A final list will be provided to Owner Rep on or before the date of Final Completion of the Project.

H.6. Contractor will not use any Subcontractor to whom Owner or Owner Rep has a reasonable objection. If the replacement of the Subcontractor due to Owner’s objection results in an increase in cost over the Contractor’s anticipated total Costs of Construction, reasonable adjustment to the Guaranteed Maximum Price will be made by Change Order.

H.7. Owner has the right to contact any Subcontractor or Sub-subcontractor to obtain information on payments made by Contractor under the subcontract and to obtain lien waivers and bills-paid affidavits.

I. Contingent Assignment of Subcontracts

I.1. Each subcontract agreement is assigned by Contractor to Owner and the surety under a performance bond provided by Contractor, contingent on the occurrence of all of the following:
a. Contractor is in default under the Construction Documents;

b. Owner has terminated Contractor under this Contract pursuant to paragraph N.3. or section O.; and

c. Owner has notified Contractor and the Subcontractor in writing that it assumes the subcontract or that it has made demand on the surety and the surety has so notified the Subcontractor.

I.2. Owner and the surety have the right to contact any Subcontractor or Supplier to obtain a copy of the subcontract, to determine if Contractor is in default under the Subcontract, and to confirm or negotiate the terms for assumption.

I.3. Upon assumption by Owner—

a. if the Work has been suspended for more than thirty days, the Subcontract price will be equitably adjusted for increases in cost caused by the suspension; contractor will be liable for the additional Costs of Construction;

b. Owner may assign a subcontract that it has assumed to a replacement contractor but will remain liable for the obligations under the subcontract; and

c. Contractor will remain liable to Owner and the Subcontractor or Supplier for any unpaid amounts due to the Subcontractor or Supplier, and for any increases in the Costs of Construction described in paragraph F.2., even if the increase does not result in the total Contract Price exceeding the Guaranteed Maximum Price.
J. Payment

J.1. The Contract Price is payable through Progress Draws and Final Payment as described in this section. Owner will have the right to withhold Retainage from each Progress Draw. Retainage due to Contractor will be included in the Final Payment.

J.2. Progress Payments. On or before the twenty-fifth day of each month after the commencement of Construction (the “Draw Date”), Contractor will assemble and present to Owner Rep a Draw Request for payment for conforming Work performed since the previous Draw Date. The amount of each Draw will be computed as follows, in the following order of operations:

a. for each item in the Schedule of Values (“Scheduled Value Item”) the Contractor will assign a percentage for the conforming Work accomplished through the Draw Date;

b. multiply each item on the Schedule of Values by its assigned percentage of completion (“Draw Individual Scheduled Value Amount”);

c. determine the Costs of Construction for the Draw period and separate such Costs of Construction by Scheduled Value Item and calculate the subtotal of the Costs of Construction for each Scheduled Value Item;

d. compare each Draw Individual Scheduled Value Amount with the assembled Costs of Construction for each item in the Schedule of Values and include the lesser of the two figures in the amount of the Draw Request;

e. the total Draw will be the sum of the lesser of the two figures for each Scheduled Value;
f. calculate Contractor’s Fee earned through the Draw Date by multiplying the Contractor’s Fee percentage by the total calculated in subparagraph e., above;

g. deduct Retainage from the sum of subparagraphs e. and f., above;

h. deduct payments previously made to Contractor;

i. deduct amounts paid by Owner to Contractor’s suppliers or subcontractors; and

j. deduct amounts that Owner Rep has determined to withhold as provided in paragraph J.10.

J.3. Each Progress Draw Request must include the following supporting documents:

a. the receipts, invoices, delivery tickets, subcontractor draws, and other documentation reasonably required by Owner Rep substantiating the Costs of Construction for the Draw Period for which payment is sought;

b. Bills-Paid Affidavit by Contractor in the form attached as Exhibit E;

c. Bills-Paid Affidavit by each Subcontractor in the form attached as Exhibit F;

d. Contractor’s Conditional Partial Release in the form attached as Exhibit G;

e. Contractor’s Unconditional Partial Release in the form attached as Exhibit H;

f. Subcontractor’s Conditional Partial Release from each Subcontractor to be paid from the Draw in the form attached as Exhibit G; and

g. Subcontractor’s Unconditional Partial Release from each Subcontractor for which Contractor received payment as a part of the prior month’s Progress Draw in the form attached as Exhibit H.
J.4. Owner Rep will review the Draw Request and advise Owner whether to pay it in full or in part. Contractor will promptly provide any additional documentation reasonably requested and answer any questions on the Draw Request. Owner Rep will promptly notify Contractor of any disputed items in the Draw Request. Owner will have thirty days after the later of (a) the Draw Date or (b) the date that Owner Rep received the Draw Request and required documentation, to pay undisputed items. Undisputed items not paid when due will bear interest until paid at the rate specified in the Texas Prompt Payment Act, Texas Property Code chapter 28.

J.5. Either party may make a Claim in connection with a payment dispute.

J.6. Final payment will be made according to the following job inspection and closeout process, and is subject to the conditions precedent to final payment, as follows:

a. When Contractor determines that the Work has progressed to the point of reaching Substantial Completion, Contractor will give written notice to Owner Rep, and Owner Rep will promptly inspect the Work. If Owner Rep determines that the Work is Substantially Complete, Owner Rep will issue a certificate of substantial completion and prepare a punch list for Work that needs to be completed along with an agreed-on time for completion. If Owner Rep determines that the Work is not acceptable or is not Substantially Complete, Owner Rep will prepare a written list of Work that needs to be remedied or completed to achieve Substantial Completion. Contractor shall perform the Work to achieve Final Completion of the Work, including completion of all punch list items, within thirty days after receipt of Owner Rep’s list or within an agreed-on period for completion. Owner Rep will determine the dates for Substantial and Final Completion.
b. Upon Owner Rep’s written acknowledgement that the punch list has been completed, Contractor will submit a Final Draw Request. The amount of the final draw ("Final Payment") will be the balance of the Contract Price, after deducting amounts paid by Owner to Suppliers, Subcontractors, and Sub-subcontractors, amounts for unreleased mechanic’s liens, amounts withheld by Owner pursuant to paragraph J.10., and previous payments to Contractor.

c. The following are Conditions Precedent to Final Payment:

i. receipt and approval by Owner, upon recommendation of Owner Rep, of a Final Draw Request;

ii. receipt by Owner Rep of Contractor’s final and accurate list of Subcontractors and Suppliers in compliance with paragraph H.5.;

iii. executed and acknowledged Conditional Final Releases from Contractor and all Subcontractors, in the form attached as Exhibit I; the amounts contained in these Releases must match amounts stated as owed in the Final Bills-Paid Affidavits;

iv. executed and acknowledged Final Bills-Paid Affidavits from Contractor, Subcontractors, and Suppliers, in the forms attached as Exhibits J and K;

v. Unconditional Partial Releases (Exhibit H) and Unconditional Final Releases (Exhibit L) from Subcontractors who have been previously paid;

vi. Unconditional Partial Releases (Exhibit H) and Unconditional Final Releases (Exhibit L) from Suppliers and Sub-subcontractors of all tiers who have been previously paid;
vii. Conditional Final Releases from all Subcontractors, Sub-subcontractors, and Suppliers of all tiers who have not been previously paid, in the form attached as Exhibit I;

viii. receipt by Owner Rep of executed, acknowledged releases of all filed mechanic’s liens against the Project, or Contractor will provide satisfactory evidence that Contractor has bonded around such lien claims pursuant to Chapter 53 of the Texas Property Code;

ix. if a Subcontractor or Supplier of any tier refuses to provide a Conditional or Unconditional Release for the applicable amount stated in the Bills-Paid Affidavits, or if there is otherwise a dispute about payment, satisfactory evidence that Contractor has bonded around such lien claims pursuant to chapter 53 of the Texas Property Code or has provided other arrangements accepted by Owner in writing as sufficient to secure indemnity from such lien or claim;

x. Conditional Final Releases from each Subcontractor, Sub-subcontractor, or Supplier from whom Owner has received a notification of nonpayment or the right to assert a claim, unless Contractor has provided Owner with satisfactory evidence that Contractor has bonded around such a lien claim pursuant to chapter 53 of the Texas Property Code or has provided other arrangements accepted by Owner in writing as sufficient to secure indemnity from such lien or claim;

xi. Contractor has assigned and delivered to Owner all required warranty documents required that have been assigned to Owner;

xii. as-built drawings have been delivered to Owner Rep; and
xiii. all Owner Manuals and keys have been delivered to Owner Rep, and Project control/security and other systems checkout and training contemplated by the Construction Documents has been performed.

J.7. The Final Payment, including release of all Retainage payable to Contractor, is due within fifty days after the Conditions Precedent to Final Payment have been satisfied or waived by Owner in writing.

J.8. Owner will file in the real property records of each county in which the Project is located and provide notice to Contractor of its Affidavit of Final Completion within three Business Days after both of the following have occurred: (a) the Conditions Precedent to Final Payment have been met, and (b) Owner Rep has received Contractor’s Final Draw Request.

J.9. Any notice of lien claims or lien affidavits filed after notice and recordation of the Owner Affidavit will be resolved by Contractor and Owner Rep in accordance with one of the methods described in paragraph J.6.c.viii., ix., or x. above, at Owner’s sole discretion.

J.10. Withholding Payment. Owner has the right to withhold from payments otherwise due to Contractor amounts deemed reasonably necessary, on advice from Owner Rep, to protect Owner from damage or liability due to—

a. uncorrected defective work;

b. reasonable evidence that the Contract Price will exceed the Guaranteed Maximum Price before Final Completion;

c. claims of injury or property damage to Owner, a third party, or another contractor;

d. reasonable evidence that Substantial Completion will not be reached according to the Construction Schedule, as revised;
e. repeated failure by Contractor to perform the Work according to the Construction Documents; or

f. mechanic’s liens filed or noticed on the Project not removed by Contractor’s furnishing a bond acceptable to Owner pursuant to chapter 53 of the Texas Property Code or other Contractor arrangements accepted by Owner in writing as sufficient to secure indemnity from such lien or claim.

When the basis for withholding has been resolved, Owner will promptly pay to Contractor any amounts not needed to protect Owner from damage or liability.

J.11. Owner Payment to Subcontractors. Owner will promptly notify Contractor if Owner receives a notice of nonpayment from a Subcontractor or Supplier of any tier. If Contractor does not provide Owner Rep with an Unconditional Release for the amount owed, or satisfactory evidence that Contractor has bonded around the claim within fifteen days after notification, Owner may make payment by joint check to Contractor and the claimant, unless a payment bond has been provided for the Project.

J.12. Final Payment will be deemed accepted by Contractor when the check has been deposited or wire transfer received. Acceptance of Final Payment by Contractor constitutes a waiver of all claims by Contractor not previously received in writing by Owner Rep.

K. Change Orders and Required Changes

K.1. Owner, without invalidating the Contract, may order changes in the Work. All changes will be made by written Change Order, signed by Owner and Contractor, that states the adjustment in the Guaranteed Maximum Price and the Contract Time.

K.2. If Owner and Contractor cannot agree on the adjustment to the Guaranteed Maximum Price, Owner may require Contractor to proceed with the Work by written
Required Change signed by Owner. The Guaranteed Maximum Price will be adjusted on a
time and materials basis.

L. Claims

L.1. Contractor’s Claims for extensions of time or changes to the Guaranteed Maxi-
mum Price must be submitted to Owner Rep in writing within seven days after the date when
the events giving rise to the Claim occurred. Within fourteen days after the submission of such
Claim, Contractor will furnish Owner Rep with Contractor’s calculations of additional time
needed to complete the Work and, if applicable, the anticipated increase to the Costs of Con-
struction and documentation supporting Contractor’s Claim. Contractor will furnish addi-
tional information in support of such Claim(s) as reasonably required by Owner or Owner
Rep. Contractor will proceed with the Work during the pendency of any such Claims.

L.2. Notwithstanding anything to the contrary in the Construction Documents, Con-
tractor agrees that it will not attempt in any way to recover or pursue a Claim for delay if Con-
tractor or a Subcontractor, Sub-subcontractor, or Supplier to Contractor has, before the
claimed Delay, materially breached any contractual duty or obligation in the Construction
Documents, or any duty or obligation at common law or created by statute, to the extent such
breach causes, affects, or otherwise contributes to such delay, and such breach remains
uncured at the time a Claim accrues.

L.3. Owner agrees to notify Contractor of any Claim, including Claims for Unex-
cused Delay and defects in the Work, within five Business Days after Owner becomes aware
of the basis for the Claim.

L.4. Initial Decision Maker Process. All Claims arising under this Contract will be
first submitted to Owner Rep as the Initial Decision Maker. Owner Rep’s decision is a condi-
tion precedent to proceeding with mediation, as provided for in paragraph L.5. Owner Rep
will issue a decision within thirty days after receiving the Claim and supporting documenta-
tion. Owner Rep may extend the initial decision deadline for up to an additional thirty days in order to receive supporting documentation and data and replies from the opposing party. If Owner Rep is unable to render a decision within the allotted period, or if either party is dissatisfied with the decision, either party may request mediation.

L.5. Mediation. If the dispute is not resolved by the decision of the Initial Decision Maker, either party may request mediation of the dispute using a neutral mediator to be agreed on by the parties. Contractor will continue to perform the Work during the pendency of mediation.

L.6. Litigation. If a resolution is not reached through mediation, either party may pursue litigation.

M. Material Breach

M.1. Owner’s Default. Each of the following constitutes a material breach of this Contract by Owner:

a. failure to timely render or otherwise furnish responses, decisions, or selections according to the Construction Documents;

b. failure to comply with Owner’s payment obligations under the Construction Documents; or

c. substantial breach of any of Owner’s obligations under this Contract.

M.2. Contractor’s Default. Each of the following constitutes a material breach of this Contract by Contractor:

a. failure by Contractor to commence the Work in accordance with the provisions of this Contract;
b. failure by Contractor to prosecute the Work to completion in a diligent, efficient, timely, workmanlike, skillful, and careful manner and in strict accordance with the provisions of the Contract;

c. failure by Contractor to use an adequate number of qualified personnel or adequate amount of equipment to complete the Work without causing Unexcused Delay;

d. Contractor’s persistent failure to perform any of its material obligations under the Contract;

e. Contractor’s persistent failure to make prompt payments when due to its Subcontractors and Suppliers, unless Contractor has a bona fide dispute with any such Subcontractor or Supplier;

f. Contractor creates any situation or state of facts that would authorize or permit an involuntary petition in bankruptcy to be filed against Contractor; or

g. Contractor has not met, or in Owner Rep’s and Owner’s reasonable opinion, based on the schedules required by the Construction Documents, will not meet the dates of Substantial Completion set forth in the Construction Documents.

N. Remedies

N.1. Owner Remedies

a. Owner’s Right to Suspend Work. If Contractor fails, after notice to correct Work that is defective or not in conformance with the requirements of the Construction Documents, or repeatedly fails to perform the Work in accordance with the Construction Documents, Owner or Owner Rep may issue a
written notice to Contractor to suspend the Work, in whole or part, until Contractor cures the reasons for issuance of the suspension notice. Owner’s right in this section does not create a duty by Owner to suspend work for the benefit of Contractor or Subcontractors of any tier.

b. **Owner Cure.** If Contractor is in default and does not within ten Business Days after receipt of Owner’s or Owner Rep’s written notice to commence and continue diligent, continuous effort to correct the default, Owner may cure such default and withhold payment from Contractor for the reasonable cost and expenses incurred for Owner’s cure. If insufficient amounts remain to be paid to Contractor, Contractor must pay Owner the reasonable costs and expenses to cure in excess of the remaining funds to be paid to Contractor.

**N.2. Contractor Remedies.** Contractor will give written notice to Owner or Owner Rep if Owner is in material breach of Owner obligations under the Construction Documents. The notice will state the specific items of Owner default and notify Owner that Owner must cure the items within ten Business Days of receipt of the notice or Contractor may suspend Work until Owner’s material breach is cured or corrected. Contractor may terminate the Contract in accordance with paragraph N.3. if suspension of the Work by Contractor under this section continues without Owner cure for thirty or more days.

**N.3. Termination.** If one party defaults and the default is not cured by exercise of the remedies specified in paragraphs N.1. or N.2., upon an additional ten Business Days’ prior written notice specifically describing the default, and provided the defaulting party has not commenced diligent, good-faith, continuous, and effective action to cure the default within the ten-day period, this Contract may be terminated by an additional written notice from the nondefaulting party to the defaulting party. If there is such a termination, the following for-
mula is agreed on as a reasonable and fair way to assess the actual damages, without the expense and delay associated with other forms of dispute resolution:

a. **Damages to Contractor.** If termination resulted from an act of default of Owner, Owner will pay to Contractor, within thirty days after written notice from Contractor, an amount equal to all amounts due and owing for the Work performed in accordance with the Construction Documents at the time of the termination, plus 10 percent of the remaining Guaranteed Maximum Price to compensate Contractor for the lost profit.

b. **Damages to Owner.** If termination resulted from an act of default of Contractor, Owner may—

   i. use all materials, equipment, tools, and construction equipment owned by Contractor and occupy the Project site;

   ii. accept assignment of Subcontracts and assume, in Owner’s sole discretions, any agreements with Suppliers and Sub-subcontractors;

   iii. finish the Work as expeditiously as reasonably possible provided the costs for completion and correction of the Work are reasonable and necessary; if requested, Owner will furnish Contractor a statement of costs in correcting and completing the Work, along with reasonable documentation of such costs; if Owner terminates according to this paragraph, no further payments will be due Contractor until final completion is reached; if, at that time, Owner’s costs to complete and correct the Work exceed the unpaid balance of the Guaranteed Maximum Price, Contractor will pay the difference to Owner upon written demand; and
iv. assess liquidated damages if Substantial Completion has not been achieved as provided in Exhibit C.

c. **Recourse to Performance Bond.** Upon the occurrence of a Contractor default, Owner may make demand on the surety to perform its obligations under a Performance Bond provided for the Project.

**N.4. Damages for Contractor’s Unexcused Delay.** If the Work is not Substantially Complete by the Substantial Completion Date due to Contractor’s Unexcused Delay, Owner may assess liquidated damages as provided in Exhibit C.

**N.5. Excused Delay.** If it is determined that Contractor has been delayed by an Excused Delay, the time to complete the Work will be extended by one day for each day of an Excused Delay. This extension of the Contract Time will be Contractor’s sole remedy for an Excused Delay and no monetary damage or other compensation is due Contractor for such delay.

**N.6. Damages for Owner’s Delay.** If it is determined that Contractor has been delayed by an Excused Delay, the time to complete the Work will be extended by one day for each day of an Excused Delay. This extension of the Contract Time will be Contractor’s sole remedy for an Excused Delay, unless the delay is due to acts of Owner constituting unreasonable interference with Contractor’s ability to perform the Work that continues after notice of the interference is given by Contractor. The exercise by Owner of any right provided by this Contract, including suspension of Work, does not constitute unreasonable interference with Contractor’s ability to perform the Work. Contractor will be entitled to the General Conditions and other direct Costs of Construction described in paragraph F.2. for each day of delay due to Owner’s interference.

**N.7. Waiver of Consequential Damages.** Except as provided in this section N., Owner and Contractor each waive the right to recover consequential damages in a suit or
action brought against the other arising out of a default under the Construction Documents, regardless of whether the claim for recovery is based in contract or tort.

O. **Owner’s Right to Terminate for Convenience.** Owner has the right to terminate this Contract for Owner’s convenience by giving Contractor thirty days’ prior written notice of termination. Upon such termination, Contractor will be entitled to payment as described in paragraph N.3.a.

P. **Warranties.** Contractor warrants to Owner that labor, materials, and equipment furnished under the Contract will be new and of high quality and will be free from defects and that all Work will be performed in a good and workmanlike manner and will conform to the Construction Documents. Work will be considered defective if it does not conform to the Construction Documents. Contractor additionally expressly warrants all structural components of the Project, including the foundation, for ten years following Substantial Completion. For a period of one year following Substantial Completion, Contractor will repair or replace any defective Work at no charge if Owner provides written notice to Contractor of a warranty claim during the one-year warranty period. Contractor hereby assigns all equipment, roofing, and other vendor warranties to Owner and will deliver all manuals, books, and instructions and warranty policy documentation to Owner as part of the Conditions to Final Payment. The warranties set forth in this paragraph are cumulative of, and in addition to, all other warranties or remedies available at law or by this Contract, and can be assigned by Owner.

Q. **Safety**

   Q.1. Owner will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences, or procedures used or for safety precautions and programs in connection with the Work, since these are solely Contractor’s responsibility.
Q.2. Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury, or loss. Contractor shall promptly remedy damage and loss to property at the site, or off-site, if caused in whole or in part by Contractor, a Subcontractor, or anyone directly or indirectly employed by any of them or by anyone for whose acts they may be liable and for which Contractor is responsible.

Q.3. **Reasonable Precautions and Reasonable Protection.** As between Contractor and Owner, Contractor shall be responsible for all safety at the Project Site, including safety of personnel, material, and the Work. Contractor shall be responsible for providing any security necessary to prevent damage or loss to materials, equipment, the Improvements, and other property in the vicinity of the Project until Final Completion.

R. **Indemnity**

R.1. **To the fullest extent permitted by applicable law, Contractor shall indemnify, defend, and hold harmless Lender, Owner, Owner’s members, managers, partners, affiliated companies of Owner, and any partner, and their respective officers, directors, shareholders, employees, and agents (collectively, the “Indemnitees”) from all claims, suits, actions, proceedings, damages, losses, and expenses whatsoever, including attorney’s fees, connected with performance of this Contract or the construction contemplated by this Contract to the extent caused by the breach of contract, negligence, or other act or omission of Contractor, its Subcontractors, Sub-subcontractors of any tier, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable.**

Include the following employee claim indemnity paragraph if applicable.
R.2. In addition, regarding claims for the bodily injury or death of an employee of Contractor, its agent(s), or its Subcontractors of any tier (hereinafter referred to as “Employee Claim” or “Employee Claims”), Contractor will indemnify, defend, and hold harmless Indemnities from all such Employee Claims, suits, actions, proceedings, damages, losses, and expenses whatsoever connected with performance of this Contract, including such Employee Claims, damages, losses, or expenses actually or allegedly arising in whole or in part from the negligence of Indemnities. It is the expressed intent of Contractor and Owner that in the case of an Employee Claim, the indemnity provided for in this section is an indemnity extended by Contractor to indemnify and protect Indemnities from the consequences of Indemnities’ own negligence whether or not that negligence is the sole or contributing cause of the resultant Employee Claims. Contractor further agrees in this connection to defend at its own expense Indemnities from any claims or litigation in connection with any such Employee Claims.

[R.2./R.3.] In claims against any person or entity indemnified under this section by an employee of Contractor, a Subcontractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this agreement shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for Contractor or a Subcontractor under workers’ compensation acts, disability benefit acts, or other employee benefit acts.
S. **Miscellaneous**

**S.1. Effect of Invalid Provision.** Should any clause in this Contract be found invalid by a court of law, the remainder of the Contract shall not be affected thereby, and all other provisions of this Contract shall remain valid and enforceable.

**S.2. Entire Agreement; Modification.** The Construction Documents contain the entire agreement between the parties for the construction of the Project and cannot be modified except by written Change Order or modification.

**S.3. Nonassignment.** This Contract shall not be assigned by Contractor without the written consent of Owner. This limitation shall not apply to Contractor’s right to retain Subcontractors for the prosecution of portions of the Work in the normal course of its construction business.

**S.4. Execution of Other Documents; Further Action.** Each party shall, on demand, execute or obtain such other documents or instruments and corrective filings or instruments and use all commercially reasonable efforts to do or cause such other things as may be reasonably necessary or desirable to effect the provisions and purposes of this Contract.

**S.5. Fees and Expenses of Actions.** If any litigation (an “Action”) is commenced, including an Action for declaratory relief, to enforce or interpret the terms of this Contract, or any document or instrument executed in connection with or pursuant to this Contract, or involving any controversy or Claim between or among the parties to this Contract, whether sounding in contract, tort, or statute, whether through arbitration, probate, bankruptcy, receivership, or other judicial or administrative proceeding, the prevailing party in such Action (the “Prevailing Party”) shall be entitled to recover reasonable attorney’s fees, paralegal costs, expert witness and consulting expert fees and costs, and other expenses, costs, and necessary disbursements incurred by the Prevailing Party in the investigation, preparation, pursuit, or defense of any claim asserted by any party in such Action in addition to any other relief to
which the Prevailing Party may be otherwise entitled, at law or hereunder, in the amount
determined by the fact finder(s) or the court.

S.6. Gender and Number. Unless otherwise required by context, the genders shall
include each other and the singular shall include the plural and the plural the singular.

S.7. Headings. Headings, tables of contents, captions, titles, and marginal nota-
tions are for convenience only and shall not limit or restrict the interpretation or construction
of the passage(s) to which such headings, tables of contents, captions, titles, and notations
may relate.

S.8. Notices. Any notice to be given or to be served on any party hereto, in connec-
tion with this instrument, must be in writing and may be given in person or by courier, over-
night delivery service, e-mail, or certified or registered mail. Such notice shall be deemed to
have been given and received when actually received, in the case of hand delivery, overnight
delivery service, or express mail; when a certified or registered letter containing such notice,
properly addressed, with postage prepaid, is deposited in the United States mail; and, if given
by e-mail, when received by the party to whom it is addressed. Notice shall be given to
Owner, Owner Rep, and Contractor at the addresses set forth at the beginning of this Contract.
Any party hereto may at any time by giving five days’ written notice to the other party hereto
designate any other address, phone number, or e-mail address in substitution of the address,
phone number, or e-mail address set forth at the beginning of this Contract to which such
notice shall be given. Owner Rep must be copied on any notice given to Owner.

S.9. Schedules, Addenda, Exhibits, and Attachments. All schedules, addenda,
exhibits, and attachments and other documents or items identified as being attached hereto
(the “Exhibits”) shall be a part of this Contract for all purposes. Exhibits may be changed from
time to time as the parties may agree. When Exhibits are changed, they shall be redrafted in
accordance with agreed changes, dated as of the effective date of such changes, and signed by
the parties. Copies of changed Exhibits shall be furnished to each party, and such changed
Exhibits shall become a part of this Contract for all purposes. An Exhibit that has been
changed shall cease to be a part of this Contract, and the most recently dated Exhibit, signed
by all parties, shall govern.

S.10. Third-Party Beneficiaries; None Created. Nothing express or implied in this
Contract is intended to confer, nor shall anything herein confer, on any person other than the
parties hereto and the respective successors or assigns of the parties hereto, any rights, reme-
dies, obligations, or liabilities whatsoever.

S.11. Waiver. No waiver of any term of this Contract shall be valid unless it is in
writing and signed by both parties. The failure of any party at any time or times to require per-
formance of any provision hereof shall in no manner affect the right to enforce the provision.
No waiver by any party of any condition contained in this Contract, or of the breach of any
term, provision, representation, warranty, or covenant contained in this Contract, in any one or
more instances, shall be deemed to be or construed as a further or continuing waiver of any
such condition or breach or as a waiver of any other condition or of the breach of any other
term, provision, representation, warranty, or covenant.

S.12. Lender Cooperation. Contractor agrees to cooperate, and cause its Subcon-
tractors to cooperate, with the reasonable requirements of any Lender that Owner may elect to
obtain financing from, including the requirement that Contractor subordinate, and cause its
Subcontractors to subordinate, any lien they may have by statute against the Property to the
lien of the Lender.

S.13. Independent Contractor. Contractor occupies the status of an independent
contractor, as that term is defined in the construction industry.

[Name of owner]
Commercial Construction Contract

[Name of contractor]
Exhibit A

Project Site Legal Description

Attach project site legal description.
Exhibit B

Plans and Specifications

1. Specifications:

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Date</th>
<th>Pages</th>
</tr>
</thead>
</table>

List the specifications or refer to an exhibit attached to this contract.

2. Drawings:

<table>
<thead>
<tr>
<th>Number</th>
<th>Title</th>
<th>Date</th>
</tr>
</thead>
</table>

List the drawings or refer to an exhibit attached to this contract.

3. Addenda including Supplemental Conditions, if any:

<table>
<thead>
<tr>
<th>Number</th>
<th>Date</th>
<th>Pages</th>
</tr>
</thead>
</table>

Addenda relating to bidding/proposal requirements are not part of the Contract Documents unless the bidding/proposal documents are also listed as Construction Documents in paragraph B.1. of this Contract.
Exhibit C

Contract Price; Guaranteed Maximum Price; Allocation of Savings; Liquidated Damages

The Contract Price for the Project is the sum of the following amounts:

Costs of Construction, including—

- Allowance for [specify] $[amount]
- Allowance for [specify] $[amount]

Contractor’s Contingency: $[amount]

Owner’s Contingency: $[amount]

Contractor’s Fee: $[amount]

Total Contract Price: $[amount]

Total Contract Price not to exceed $[amount], the Guaranteed Maximum Price

Cost Savings (as defined in section A) shall be allocated between Owner and Contractor as follows:

Owner: [percent]%

Contractor: [percent]%

Check if applicable:

☐ Liquidated Damages
Owner has the right to assess Liquidated Damages in the amount of $[amount] per day for each day after the Substantial Completion Date that Substantial Completion has not been achieved due to Contractor’s Unexcused Delay. Owner has the right to withhold Liquidated Damages from the amounts due to Contractor. Owner and Contractor stipulate that the damages for the prospective breach of the Contract are difficult to measure and the Liquidated Damages amount is a reasonable estimate of actual damages.
Exhibit D

Insurance and Bond Requirements

Exhibit - Bond and Insurance Requirements

This Exhibit (the “Insurance Specifications”) is attached as an Exhibit as part of the Agreement. In the event of conflict between any of the following Insurance Specifications with any provision in the Agreement, these Insurance Specifications control, amend and supplement the conflicting provision.

A. Specifications, Coverages, Limits & Other Requirements

<table>
<thead>
<tr>
<th>No.</th>
<th>Specifications</th>
<th>Coverages, Limits and Other Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.</td>
<td>LIABILITY INSURANCE</td>
<td></td>
</tr>
<tr>
<td>§ 1.</td>
<td>Commercial General Liability.</td>
<td>To the extent permitted by law, Contractor is to maintain commercial general liability (“CGL”) insurance and, if necessary, commercial umbrella/excess insurance (see Spec. 4 below), issued on an occurrence basis meeting at least the following specifications.</td>
</tr>
<tr>
<td>§ 1.1</td>
<td>Minimum Limits</td>
<td>The limits of coverage shall not be less than the following amounts:</td>
</tr>
<tr>
<td></td>
<td>a.</td>
<td>$__,000,000</td>
</tr>
<tr>
<td></td>
<td>b.</td>
<td>$__,000,000</td>
</tr>
<tr>
<td></td>
<td>c.</td>
<td>$__,000,000</td>
</tr>
<tr>
<td></td>
<td>d.</td>
<td>$__,000,000</td>
</tr>
<tr>
<td>§ 1.2</td>
<td>General Aggregate</td>
<td>The General Aggregate shall apply separately to this Project.</td>
</tr>
<tr>
<td>§ 1.3</td>
<td>Post-Completion Coverage</td>
<td>Contractor agrees to maintain Products-Completed Operations coverage with respect to the Work performed under the Agreement in identical coverage, form and amount, including required endorsements, for the full term of the Statute of Repose following Date of Substantial Completion of the Work. Contractor shall provide written representation to Owner stating Work completion date.</td>
</tr>
<tr>
<td>§ 1.4</td>
<td>Form</td>
<td>This insurance is to be issued on an ISO CG 00 01 and shall coverage liability arising from premises, ongoing and completed operations, hire of Subcontractors (independent contractors coverage), and incidental design liability arising from the contractor’s construction means and methods.</td>
</tr>
<tr>
<td>§ 1.5</td>
<td>Insured Contracts</td>
<td>Coverage shall include but not be limited to liability assumed by Contractor under the Agreement to which this Exhibit is attached, including the tort liability of another assumed in a business contract, and shall include unmodified Separation of Insureds coverage.</td>
</tr>
<tr>
<td>§ 1.6</td>
<td>Additional Insureds</td>
<td>Additional insured status shall be provided in favor of Owner Parties and such other personas as are designed by Owner to Contractor to be additional insureds on a combination of ISO forms CG 20 10 01 and CG 20 37 10 01.</td>
</tr>
<tr>
<td>§ 1.7</td>
<td>Primary and Noncontributionary</td>
<td>This insurance shall be endorsed to provide primary and noncontributing liability coverage by ISO CG 20 01 04 13. It is the specific intent of the parties to the Agreement that all insurance required herein shall be primary to and shall seek no contribution from all insurance held by Owner Parties, with Owner Parties’ insurance being excess, secondary and noncontributing.</td>
</tr>
<tr>
<td>§ 1.8</td>
<td>Waiver of Subrogation</td>
<td>This insurance is to be endorsed with an ISO CG 24 04 05 09 Waiver of Transfer of Rights of Recovery Against Others Endorsement, or equivalent, to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor as additional insureds.</td>
</tr>
<tr>
<td>§ 1.9</td>
<td>Electronic Data</td>
<td>This insurance is to include an Electronic Data Liability Endorsement ISO CG 04 37 with coverage to the full limits of the policy.</td>
</tr>
<tr>
<td>§ 1.10</td>
<td>Notice</td>
<td>This insurance is to contain a provision for 30 days’ prior written notice by insurance carrier to Owner required for cancellation or material change.</td>
</tr>
</tbody>
</table>
§ 1.11 Personal Injury Contractual Liability

The personal injury contractual liability exclusion shall be deleted.

§ 1.13 Certificate of Insurance

A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Contractor to Owner as Certificate Holder at the following address: _________________.

§ 1.12 Prohibitions

The following exclusions/limitations or their equivalents are not permitted:

- c. Limitation of Coverage to Designated Premises or Project ISO CG 21 44.
- d. Exclusion-Damage to Work Performed by Subcontractors On Your Behalf ISO CG 22 94 or CG 22 95.
- e. Exclusion-Explosion, Collapse and Underground Property Damage Hazard ISO CG 21 42 or CG 21 43.
- f. Any classification limitation.
- g. Any construction defect completed operations exclusion.
- h. Any endorsement modifying the employer’s liability exclusion or deleting the exception to it.
- i. Any endorsement modifying or deleting explosion, collapse or underground coverage.
- j. Any habitational or residential exclusion.
- k. Any insured vs. insured exclusion except named insured vs. named insured.
- l. Any punitive, exemplary or multiplied damages exclusion.
- m. Any subsidence exclusion.

§ 2. Business Auto Liability

Contractor is to maintain business auto insurance meeting at least the following specifications.

§ 2.1 Minimum Limits

The limits of liability shall be no less than $ __,000,000 per accident.

§ 2.2 Form

This insurance is to be issued on the current edition of the ISO CA 00 01

§ 2.3 Scope

This insurance is to coverage damages because of bodily injury or property damages caused by an accident and resulting from the ownership, maintenance or use of any auto, including owned, hired and non-owned autos.

§ 2.4 Additional Insureds

Additional insured status shall be provided in favor of Owner Parties and such other persons as are designated by Owner to Contractor as additional insureds, on ISO CA 20 48 10 13.

§ 2.5 Waiver of Subrogation

This insurance is to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor on ISO CA 04 44 10 13.
§ 3. **Workers’ Compensation and Employer’s Liability.** Contractor is to maintain workers’ compensation and employer’s liability insurance meeting at least the following specifications.

### § 3.1 Workers’ Compensation Limits
The minimum limits of this insurance shall be no less than the statutory limits.

### § 3.2 Employer’s Liability Limits
The minimum limits of this insurance shall be no less than $___.000,000 each accident and disease.

### § 3.3 Territory
The state in which the Work is to be performed must be listed under Item 3.A. on the Information Page of the policy.

### § 3.4 Scope
This insurance is to cover liability arising out the Contractor’s employment of workers and anyone for whom the contractor may be liability for workers’ compensation claims. Worker’s compensation insurance is required and no “alternative” form of insurance is permitted.

### § 3.5 Prohibitions
Employees leased through a Professional Employment Organization (“PEO”) are not permitted.

### § 3.6 Stop Gap
Stop Gap coverage must be provided if Work is to be performed in a monopolistic state, listing the state in which Work is to be performed.

### § 3.7 USL&H
United States Longshoremen and Harborworkers ("USL&H") coverage must be provided where such exposure exists listing the state in which Work is to be performed.

### § 3.8 Waiver of Subrogation
This insurance is to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor, on form WC 42 03 04.

§ 4. **Excess Liability.** To the extent permitted by law, if any of the required coverages are to be maintained by and through excess liability insurance, Contractor is to maintain excess liability insurance meeting at least the following specifications.

### § 4.1 Scope
This insurance shall be excess over and be no less broad than all coverages and conditions described above. The policy limits required herein may be provided by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one occurrence or accident by less than the amount required herein.

### § 4.2 Concurrency
Such coverage shall have the same inception date as the commercial general liability and employer’s liability coverages.

### § 4.3 Primary
This insurance shall be primary and non-contributing liability coverage. It is the specific intent of the parties to the Agreement that all insurance held by the Owner Parties shall be excess, secondary and non-contributory.

### § 4.4 Drop Down Coverage
Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits.

### § 4.5 Defense Costs
This insurance is to include a duty to defend any insured.

### § 4.6 Waiver of Subrogation
This insurance is to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor.

### § 4.7 Notice
This insurance shall be endorsed to provide a 30 days’ notice of cancellation to Owner.

§ 5. **Professional Liability.** Contractor is to maintain Professional Liability insurance meeting at least the following specifications.

### § 5.1 Minimum Limits
Limits of coverage shall be no less than:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>$ ___.000,000 Each Loss</td>
</tr>
<tr>
<td>b.</td>
<td>$ ___.000,000 Annual Aggregate</td>
</tr>
</tbody>
</table>

If a combined Contractor’s Pollution Liability and Professional Liability policy is utilized, the limits shall be $___.000,000 Each Loss and Annual Aggregate.
| § 5.2 | Scope | Such insurance shall cover all services rendered by the Contractor and its Subcontractors under the Agreement, including but not limited to design or design/build services. |
| § 5.3 | Retroactive Date | Any retroactive date must be effective prior to beginning of services for the Owner. |
| § 5.4 | Prohibitions | This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from: |
| | | a. Bodily injury or property damage where coverage is provided in behalf of design professionals or design/build contractors; |
| | | b. Habitational or residential operations; |
| | | c. Mold or microbial matter and fungus or biological substance; or |
| | | d. Punitive, exemplary or multiplied damages. |
| § 5.5 | Term | Policies written on a claims-made basis shall be maintained for at least __ years beyond termination of the Agreement. The purchase of an extended discovery period or an extended reporting period on a claims-made policy will not be sufficient to meet the terms of this provision. |
| § 5.6 | Waiver of Subrogation | Contractor shall cause this insurance to be endorsed to waive all rights of subrogation in favor of Owner Parties. |
| § 5.7 | Notice | This insurance shall be endorsed to provide a 30 days’ notice of cancellation to Owner. |
| § 6. | Pollution Liability | Contractor is to maintain Contractor’s Pollution Liability insurance meeting at least the following specifications. |
| § 6.1 | Minimum Limits | Limits of coverage shall be no less than: |
| | a. $ ,000,000 | Each Loss |
| | b. $ ,000,000 | Annual Aggregate |
| | If a combined Contractor’s Pollution Liability and Professional Liability policy is utilized, the limits shall be $__,000,000 Each Loss and Annual Aggregate. |
| § 6.2 | Scope | The policy must provide coverage for: |
| | a. The full scope of the named insured’s operations (on-going and completed) as described within the scope of work for the Agreement. |
| | b. Loss arising from pollutants including but not limited to fungus, bacteria, biological substances, mold, microbial matter, asbestos, lead, silica and contaminated drywall. |
| | c. Third party liability for bodily injury, property damage, clean up expenses, and defense arising from the operations. |
| | d. Diminution of value and natural resources damages; |
| | e. Contractual liability. |
| | f. Claims arising from owned and non-owned disposal sites utilized in the performance of the Agreement. |
| § 6.3 | Additional Insured and Primary and Noncontributory | The policy must insure contractual liability, name Owner Parties as additional insureds and such other personas as are designed by Owner to Contractor to be additional insureds, and be primary and noncontributory to all coverage available to the additional insureds. |

| § 6.4 | Retroactive Date | If coverage is provided on a claims made basis, coverage will at least be retroactive to the earlier of the date of the Agreement or the commencement of contractor services relation to the Work. |

| § 6.5 | Prohibitions | This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from: |

  a. Insured vs. insured actions. However, exclusion for claims made between insured within the same economic family are acceptable. |

  b. Impaired property that has not been physically injured. |

  c. Materials supplied or handled by the named insured. However, exclusions for the sale and manufacture of products are allowed. Exclusionary language pertaining to materials supplied by the insured shall be reviewed by the certificate holder for approval. |

  d. Property damage to the work performed by the contractor. |

  e. Faulty workmanship as it relates to clean up costs. |

  f. Punitive, exemplary or multiplied damages. |

  g. Work performed by Subcontractors. |

  h. Contractual liability incurred as a result of an injury to an employee of the insured. |

| § 6.6 | Term | Completed operations coverage shall be maintained for a minimum of __ years after the completion of Work. (The extended reporting period on a claims-made based policy does not fulfill this requirement). Contractor’s pollution liability insurance policies insuring a specific job shall have completed operations coverage for at least the duration of the Work plus __ years. |

| § 7. | Subcontractor’s Insurance. |

| § 7.1 | Coverage | Contractor shall cause each first tier subcontractor employed by Contractor to purchase and maintain insurance of the types listed above; provided, however, Employers Liability Limits on such subcontractors are not to be less than $500,000 each Accident or Disease, and such subcontractors’ excess policy limit shall be no less than $1,000,000. |

| § 7.2 | Additional Insureds | This insurance is to be endorsed with an ISO CG 20 10 07 04, or equivalent form, Additional Insured Endorsement listing the Owner Parties and such other persons as are designated by Owner to Contractor, as additional insureds. |

| § 7.3 | Waiver of Subrogation | This insurance is to be endorsed with an ISO CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement, or equivalent, to include a waiver of subrogation by insurer as to the Owner Parties, and such other persons as are designated by Owner to Contractor, as additional insureds. |

| § 7.4 | Evidence of Insurance | Contractor shall provide Owner certificates of insurance as to each subcontractor performing Work prior to the subcontractor’s entry on the Property certified to Owner as Certificate Holder at the following address: _________________. |

B. PROPERTY INSURANCE |

| § 1. | Builder’s Risk | Contractor is to maintain builder’s risk insurance meeting at least the following specifications; but at Owner’s option, Owner may in lieu of Contractor maintaining builder's risk insurance, Owner may obtain and maintain the builder's risk insurance. If |
Owner obtains the builder's risk insurance, the Contract Price is to be reduced by the amount of the premium and any Contractor markup cost that otherwise was included within the Contract Price.

<table>
<thead>
<tr>
<th>§ 1.1</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limits of coverage are to be the initial Contract Price as increased by amount of subsequent modification of the Contract Price. Coverage shall be provided in amount equal at all times to the full replacement value and cost of debris removal for any single occurrence.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>§ 1.2</th>
<th>Covered Property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Such insurance shall cover:</td>
<td></td>
</tr>
<tr>
<td>a. All structures under construction, including retaining walls, paved surfaces and roadways, bridges, glass, foundations, footings, underground pipes and wiring, excavations, grading, backfilling or filling.</td>
<td></td>
</tr>
<tr>
<td>b. All temporary structures (e.g., fencing, scaffolding, cribbing, false work, forms, site lighting, temporary utilities and buildings) located at the site.</td>
<td></td>
</tr>
<tr>
<td>c. All property including materials and supplies on site for installation.</td>
<td></td>
</tr>
<tr>
<td>d. All property including materials and supplies at other locations but intended for use at the site.</td>
<td></td>
</tr>
<tr>
<td>e. All property including materials and supplies in transit to the site for installation by all means of transportation other than ocean transit.</td>
<td></td>
</tr>
<tr>
<td>f. Other property for which an insured is liable regarding the project.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>§ 1.3</th>
<th>Insureds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Insureds shall include:</td>
<td></td>
</tr>
<tr>
<td>a. Owner, Contractor, and all Loss Payees and Mortgagees as Named Insureds; and</td>
<td></td>
</tr>
<tr>
<td>b. Subcontractors of all tiers.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>§ 1.4</th>
<th>Deductibles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deductibles shall not exceed:</td>
<td></td>
</tr>
<tr>
<td>a. All risks of direct damage, per Occurrence, except Flood, per Occurrence or excess of maximum available through National Flood Insurance Program $10,000</td>
<td></td>
</tr>
<tr>
<td>b. Delayed opening waiting period 5 days</td>
<td></td>
</tr>
<tr>
<td>c. Earthquake and earthquake sprinkler leakage, per Occurrence $50,000</td>
<td></td>
</tr>
<tr>
<td>d. Flood, per Occurrence or excess of maximum available through National Flood Insurance Program $50,000</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>§ 1.5</th>
<th>Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coverage shall be at least as broad as an unmodified ISO Special Causes of Loss form and shall include coverage for theft, collapse, flood and earthquake. All exclusions must be pre-approved by Owner. This insurance is to be written on a Completed Value, non-reporting form basis and shall be primary to any other insurance coverage available to the named insureds, with that other insurance being excess, secondary and noncontributing.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>§ 1.6</th>
<th>Prohibition</th>
</tr>
</thead>
<tbody>
<tr>
<td>No protective safeguard warranty is permitted.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>§ 1.7</th>
<th>Coverage and Minimum Sublimits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coverage</td>
<td>Minimum Sublimit</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>a.</td>
<td>Additional expenses due to delay in completion of project (where applicable)</td>
</tr>
<tr>
<td>b.</td>
<td>Agreed Value</td>
</tr>
<tr>
<td>c.</td>
<td>Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse and ensuing loss</td>
</tr>
<tr>
<td>d.</td>
<td>Debris removal additional limit</td>
</tr>
<tr>
<td>e.</td>
<td>Earthquake and earthquake sprinkler leakage</td>
</tr>
<tr>
<td>f.</td>
<td>Flood, per Occurrence, excess of maximum available through National Flood Insurance Program</td>
</tr>
<tr>
<td>g.</td>
<td>Freezing</td>
</tr>
<tr>
<td>h.</td>
<td>Mechanical breakdown including hot and cold testing (where applicable)</td>
</tr>
<tr>
<td>i.</td>
<td>Occupancy pre-completion</td>
</tr>
<tr>
<td>j.</td>
<td>Ordinance or law</td>
</tr>
<tr>
<td>k.</td>
<td>Pollutant clean-up and removal</td>
</tr>
<tr>
<td>l.</td>
<td>Preservation of property</td>
</tr>
<tr>
<td>m.</td>
<td>Replacement cost</td>
</tr>
<tr>
<td>n.</td>
<td>Theft</td>
</tr>
</tbody>
</table>

**§ 1.8 Occupancy**
The termination of coverage provision shall be endorsed to permit occupancy of the coverage property being constructed.

**§ 1.9 Term and Termination**
This insurance shall be maintained in effect, unless otherwise provided for in the Agreement, until the earliest of the following dates:

a. The date on which all persons and organizations who are insureds under the policy agree that it shall be terminated;

b. The date of final payment, as provided for in the Agreement; or

c. The date on which the insurable interests in the Covered Property of all insureds other than Contractor have ceased.
§ 1.10 Waiver of Subrogation
This insurance shall include a waiver of subrogation by insurer as to the insureds.

§ 1.11 Notice
This insurance shall be endorsed to provide 30 days’ notice of cancellation to Owner.

§ 2. Contractor’s Equipment.

§ 2.1 Amount
Contractor shall obtain and maintain property insurance on Contractor’s equipment and personal property insured to 100% of its replacement cost. This insurance will have an equipment floater.

§ 2.2 Waiver of Subrogation
This insurance will be endorsed to waive subrogation in favor of Owner Parties.

C. BONDS

§ 1. General
Contractor is required to arrange and furnish separate performance and payment bonds, each for the full amount of the Guaranteed Maximum Price plus Contractor’s Fee guaranteeing the faithful performance of all of the provision of the Agreement as well as payment to all persons for labor and material used in the performance of the Agreement. The bonds shall be executed by a surety company acceptable to Owner, on a form acceptable to Owner, and shall become a part of the Agreement. Owner may withhold payments on account until such time as said bonds have been furnished and accepted. No change, alteration or modification in the terms and conditions of the Agreement, or in the terms or manner of payment shall in any way exonerate or release, in whole or in part, any surety on any bond furnished on behalf of Contractor. The cost of the bonds is included in the Contract Price.

§ 2. Payment Bond
The Payment Bond is to conform to the following requirements.

§ 2.1 Form
The Payment Bond is to be in statutory form. The AIA form is not acceptable.

§ 2.2 Coverage
The Payment Bond is to include coverage for consequential and delay damages due to Contractor’s default.

§ 2.3 Rating
The issuer must be at least a Best’s Key Rating Guide A/VII company and listed on the United States Department of the Treasury’s List of Acceptable Sureties and Reinsurers (the “T” list) and duly licensed and authorized to issue surety bonds in Texas.

§ 2.4 Term
The Payment Bond is to be in effect for the period required by the Texas Property Code.

§ 2.5 Multiple Obligees
The Payment Bond is to name as additional obligees such persons as designated by the Owner, including its lender.

§ 2.6 Recorded
The Payment Bond and all required attachments (issuer’s agent’s power of attorney and memorandum of the Agreement) is to be recorded in the County’s Official Public Records.

§ 3. Performance Bond
The Performance Bond is to conform to the following requirements.

§ 3.1 Form
The Performance Bond is to be on the AIA form or equivalent. The Performance Bond is to cover Contractor’s express warranty and obligations to correct defective Work arising under the Agreement.

§ 3.2 Rating
The issuer must be at least a Best’s Key Rating Guide A/VII company and listed on the United States Department of the Treasury’s List of Acceptable Sureties and Reinsurers (the “T” list) and duly licensed and authorized to issue surety bonds in Texas.

§ 3.3 Extended Coverages
The Performance Bond is to cover risk of contract penalties and delay damages.

§ 3.4 Term
The Performance Bond is to be in effect for a period of not less than one year following Final Completion.

§ 3.5 Multiple Obligees
The Performance Bond is to name as additional obligees such persons as designated by Owner including its lender.
B. GENERAL INSURANCE REQUIREMENTS

1. Definitions. For purposes of this Exhibit:
   b. Owner Parties. “Owner Parties” means (a) __________________ (“Owner”), (b) the project manager, (c) any lender whose loan is secured by a lien against the Property, (d) their respective shareholders, members, partners, joint venturers, affiliates, subsidiaries, successors and assigns, (e) any directors, officers, employees, or agents of such persons or entities, and (f) others as required by the Agreement.
   d. ISO. “ISO” means Insurance Services Office.

2. Policies.
   a. Insurer Qualifications. All insurance required to be maintained by Contractor must be issued by carriers having a Best’s Rating of A or better, and a Best’s Financial Size Category of VIII, or better, and/or Standard & Poor Insurance Solvency Review A-, or better, and authorized to engage in the business of insurance in the State in which the Improvements are located.
   b. No Waiver. Failure of Owner to demand such certificates or other evidence of full compliance with these insurance requirements or failure of Owner to identify a deficiency from evidence that is provided shall not be construed as a waiver of Contractor’s obligation to maintain such insurance. Commencement of Work without provision of the required certificate of insurance, evidence of insurance and/or required endorsements, or without compliance with any other provision of this Contract, shall not constitute a waiver by any Owner Party of any rights. The Owner shall have the right, but not the obligation, of prohibiting the Contractor or any Subcontractor from performing any Work until such certificate of insurance, evidence of insurance and/or required endorsements are received and approved by the Owner.
   c. Delivery Deadlines. Contractor shall provide Owner within 10 days of Owner’s request with certified copies of all insurance policies. Renewal policies, if necessary, shall be delivered to the Owner prior to the expiration of the previous policy.
   d. Waiver of Subrogation. All policies maintained by Contractor, whether required herein or not, shall contain a waiver of subrogation in favor of the Owner Parties.
   e. Notice. All policies maintained by Contractor shall provide for 30 days’ prior written notice of cancellation to Owner.
   f. Compliance With Laws. If any insurance requirements are deemed to violate any law, statute or ordinance, the insurance requirements shall be reformed to provide the maximum amount of protection to Owner as allowed under the law.

3. Limits, Deductibles and Retentions.
   a. Coverage Limits. The limits of liability may be provided by a single policy of insurance or by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one Occurrence or accident be less than the amount required herein.
   b. Deductible and Retention Limits. No deductible or self-insured retention shall exceed $____ without the prior written approval of the Owner, except as otherwise specified herein. All deductibles and retentions shall be paid by, assumed by, for the account of, and at the Contractor’s sole risk. The Contractor shall not be reimbursed for same.
   c. Policy Limits. “Limits” set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If Contractor or its contractors maintain greater limits, then these specifications shall not limit the amount of recovery available to Owner and Owner the limits specified below as the minimum limits are increased to the greater limits.
   d. Post Completion Coverage. With respect to the insurance to be maintained after final payment to Contractor, an additional certificate evidencing such coverage shall be provided to Owner with final application for payment if the prior certificate has expired, and thereafter upon renewal or replacement of such insurance until the expiration of the time period for which such insurance must be maintained.
   e. Use of the Owner’s Equipment. The Contractor, its agents, employees, Subcontractors or suppliers shall use the Owner’s equipment only with express written permission of the Owner’s designated representative and in accordance with the Owner’s terms and condition for such use. If the Contractor or any of its agents, employees, Subcontractors or suppliers utilize any of the Owner’s equipment for any purpose, including machinery, tools, scaffolding, hoists, lifts or similar items owned, leased or under the control of the Owner, the Contractor shall defend, indemnify and be liable to the Owner Parties for any and all loss or damage which may arise from such use.

4. Forms.
   a. Approved Revisions and Substitutions. If the forms of policies, endorsements, certificates, or evidence of insurance required by these specifications are superseded or discontinued, Owner will have the right to require other equivalent forms.
   b. Approved Forms. Any policy or endorsement forms other than a form specified in this Exhibit must be approved in advance by Owner.
5. **Evidence of Insurance.** Insurance must be evidenced as follows:


   b. **Delivery Deadlines.** Evidence to be delivered to Owner prior to entry on the Property and thereafter at least 30 days prior to the expiration of current policies or on replacement of each certified coverage and within 10 days of Owner’s request for an updated certificate.

   c. **Certificate Requirements.** Certificates must:

      (1) **Insured.** State the insured’s name and address.

      (2) **Insurer.** State the name of each insurance company affording each coverage, policy number of each coverage, policy dates of each coverage, all coverage limits and sublimits, if any, by type of coverage, and show the signature of the authorized representative signing the certificate on behalf of the insurer.

      (3) **Additional Insured Status and Subrogation Waiver.** Specify the additional insured status and waivers of subrogation as required by these specifications.

      (4) **Primary Status.** State the primary and non-contributing status required herein.

      (5) **Deductibles and Self-Insured Retentions Stated.** State the amounts of all deductibles and self-insured retentions.

      (6) **Copy of Endorsements and Policy Declaration Page.** Be accompanied by certified copies of all required endorsements and policy declaration page reflecting issuance of the endorsements.

      (7) **Notices.** Be accompanied by insurer certified copy of notice of cancellation endorsement providing that 30 days’ notice of cancellation and material change will be sent to the certificate holder.

      (8) **Certificate Holder.** Be addressed to the Owner as the certificate holder and show Owner’s correct address. A separate certificate is to be addressed and delivered to Owner’s lender.

      (9) **Producer.** State the producer of the certificate with correct address and phone number listed.

      (10) **Authorized Representative.** Be executed by a duly authorized representative of the insurers.

   d. **Suspension.** Owner shall have the right, but not the obligation, of suspending Contractor’s services, without an increase in the sum payable by Owner to Contractor due to such suspension, until such certificates or other evidence that the required insurance has been placed in compliance with these requirements is received and approved by Owner.

6. **Contractor Insurance Representations to Owner Parties.**

   a. **Minimum Requirements.** The insurance coverages required herein (1) represent Owner Parties’ minimum requirements and are not to be construed to void or limit the Contractor’s indemnity obligations as contained in the Agreement nor represent in any manner a determination of the insurance coverages the Contractor should or should not maintain for its own protection; and (2) are being, or have been, obtained by the Contractor in support of the Contractor’s liability and indemnity obligations under this Contract. Irrespective of the requirements as to insurance to be carried as provided for herein, the insolvency, bankruptcy or failure of any insurance company carrying insurance of the Contractor, or the failure of any insurance company to pay claims accruing, shall not be held to affect, negate or waive any of the provisions of the Agreement.

   b. **Defaults.** Failure to obtain and maintain the required insurance shall constitute a material breach of, and default under, the Agreement. If the Contractor shall fail to remedy such breach within five business days after notice by the Owner, the Contractor will be liable for any and all costs, liabilities, damages and penalties resulting to the Owner Parties from such breach, unless a written waiver of the specific insurance requirement is provided to the Contractor by the Owner. In the event of any failure by the Contractor to comply with the provisions of this Contract, the Owner may, without in any way compromising or waiving any right or remedy at law or in equity, on notice to the Contractor, purchase such insurance, at the Contractor’s expense, provided that the Owner shall have no obligation to do so and if the Owner shall do so, the Contractor shall not be relieved of or excused from the obligation to obtain and maintain such insurance amounts and coverages.

   c. **Survival.** This Exhibit is an independent contract provision and shall survive the termination or expiration of the Agreement.

9. **RELEASE AND WAIVER.** TO THE EXTENT PERMITTED BY LAW, EACH OF CONTRACTOR AND OWNER (THE “RELEASING PARTY”) RELEASES AND WAIVES ANY CLAIMS IT MAY HAVE AGAINST THE OTHER PARTY OR ITS PARTNERS, OFFICERS, DIRECTORS, EMPLOYEES OR AGENTS (THE “RELEASED PERSONS”) FOR BUSINESS INTERRUPTION OR DAMAGE TO PROPERTY SUSTAINED BY THE RELEASING PARTY AS THE RESULT OF ANY ACT OR OMISSION OF THE RELEASED PERSON IN ANY WAY CONNECTED WITH ANY LOSS COVERED BY INSURANCE, WHETHER REQUIRED HEREIN OR NOT, OR WHICH SHOULD HAVE BEEN COVERED BY INSURANCE REQUIRED HEREIN, INCLUDING THE DEDUCTIBLE AND UNINSURED
10. Insurance Requirements of Contractor's Subcontractors.
   
   a. Coverage. Insurance similar to that required of the Contractor shall be provided by all Subcontractors (or provided by the Contractor on behalf of Subcontractors) to cover operations performed under any subcontract agreement. The Contractor shall be held responsible for any modification in these insurance requirements as they apply to Subcontractors. The Contractor shall maintain certificates of insurance from all Subcontractors containing provisions similar to those listed herein (modified to recognize that the certificate is from Subcontractor) enumerating, among other things, the waivers of subrogation, additional Insured status, and primary liability as required herein, and make them available to the Owner upon request.

   b. Allocation of Risk. The Contractor is fully responsible for loss and damage to its property on the site, including tools and equipment, and shall take necessary precautions to prevent damage to or vandalism, theft, burglary, pilferage and unexplained disappearance of property. Any insurance covering the Contractor’s or its Subcontractor’s property shall be the Contractor’s and its Subcontractor’s sole and complete means or recovery for any such loss. To the extent any loss is not covered by said insurance or subject to any deductible or co-insurance, the Contractor shall not be reimbursed for same. Should the Contractor or its Subcontractors choose to self-insure this risk, it is expressly agreed that the Contractor hereby waives, and shall cause its Subcontractors to waive, any claim for damage or loss to said property in favor of the Owner Parties.
Exhibit E

Contractor Bills-Paid Affidavit

Basic Information

Date:

Owner:

Owner’s Mailing Address:

Contractor:

Contractor’s Mailing Address:

Affiant: [include relationship to contractor]

Affiant’s Mailing Address:

Property: [include legal description]

Improvements:

Affiant swears individually and on behalf of Contractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Contractor.

2. Affiant understands that Owner has required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.
3. Contractor has paid each of Contractor’s subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

List all subcontractors, laborers, and materialmen and amounts owed to each. If there are no unpaid subcontractors, laborers, or materialmen, state “None.”

Name:

Address:

Telephone number:

Amount owed:

Contractor warrants and represents that the following specified bills or classes of bills will be paid by Contractor from the funds paid to Contractor by Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Contractor agrees to indemnify and hold Owner harmless from any loss or expense resulting from false or incorrect information in this affidavit.

Continue with the following.
SUBSCRIBED AND SWORN TO before me on ______________ by [name of affiant].

Notary Public, State of Texas
Exhibit F

Subcontractor Bills-Paid Affidavit

Basic Information

Date:

Owner:

Owner’s Mailing Address:

Subcontractor:

Subcontractor’s Mailing Address:

Contractor:

Contractor’s Mailing Address:

Affiant: [include relationship to subcontractor]

Affiant’s Mailing Address:

Property: [include legal description]

Improvements:

Affiant swears individually and on behalf of Subcontractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Subcontractor.
2. Affiant understands that Owner and Contractor have required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

3. Subcontractor has paid each of Subcontractor’s subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor or to Subcontractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

<table>
<thead>
<tr>
<th>Name:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address:</td>
</tr>
<tr>
<td>Telephone number:</td>
</tr>
<tr>
<td>Amount owed:</td>
</tr>
</tbody>
</table>

List all subcontractors, laborers, and materialmen and amounts owed to each. If there are no unpaid subcontractors, laborers, or materialmen, state “None.”

Subcontractor warrants and represents that the following specified bills or classes of bills will be paid by Subcontractor from the funds paid to Subcontractor by Contractor or Owner in reliance on this affidavit:

| Name of payee or description of class: |
| Amount: |

Repeat above information as needed.

Include the following if applicable.
Subcontractor agrees to indemnify and hold Owner and Contractor harmless from any loss or expense resulting from false or incorrect information in this affidavit.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _________________ by [name of affiant].

Notary Public, State of Texas
Exhibit G

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(b). If a contractor (or other potential lien claimant) is required to execute a waiver and release in exchange for or to induce payment of a progress payment and is not paid in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must read as follows.

Conditional Partial Release During Construction

Project:

Job No.:

On receipt by the signer of this document of a check from \textbf{[name of maker of check]} in the sum of \$\textbf{[amount]} payable to \textbf{[name[s] of payee[s] of check]}, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic’s lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer’s position that the signer has on the property of \textbf{[name of owner]} located at \textbf{[specify location]} to the following extent: \textbf{[specify job description]}.

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to \textbf{[name of person with whom signer contracted]} as indicated in the attached statement[s] or progress payment request[s], except for unpaid retention, pending modifications and changes, or other items furnished.

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.
The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer’s laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project in regard to the attached statement[s] or progress payment request[s].

________________________________________________________

Date

[Company name]

By ________________________________

[Name and title]
Exhibit H

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(c). If a contractor (or other potential lien claimant) is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a progress payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the progress payment, the waiver and release must read as follows. The waiver and release must include the notice at the top of the document.

Unconditional Partial Release During Construction

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Project:

Job No.:

The signer of this document has been paid and has received a progress payment in the sum of $[amount] for all labor, services, equipment, or materials furnished to the property or to [name of person with whom signer contracted] on the property of [name of owner] located at [specify location] to the following extent: [specify job description]. The signer therefore waives and releases any mechanic’s lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer’s position that the signer has on the above-referenced project to the following extent:

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to [name of person with whom signer contracted] as indicated in
the attached statement[s] or progress payment request[s], except for unpaid retention, pending modifications and changes, or other items furnished.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer’s laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project in regard to the attached statement[s] or progress payment request[s].

__________________________________________________________________________________________________________________________ ...

Date

[Company name]

By ________________________________

[Name and title]
Exhibit I

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(d). If a contractor (or other potential lien claimant) is required to execute a waiver and release in exchange for or to induce payment of a final payment and is not paid in good and sufficient funds in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must read as follows.

Conditional Final Release

Project:

Job No.:

On receipt by the signer of this document of a check from [name of maker of check] in the sum of $[amount] payable to [name[s] of payee[s] of check], and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic’s lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer’s position that the signer has on the property of [name of owner] located at [specify location] to the following extent: [specify job description].

This release covers the final payment to the signer for all labor, services, equipment, or materials furnished to the property or to [name of person with whom signer contracted].

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer’s laborers, subcontractors, material-
men, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project up to the date of this waiver and release.

Date

[Company name]

By ______________________________

[Name and title]
Exhibit J

This form may be used as written by an original contractor to fulfill the requirements of Tex. Prop. Code §§ 53.085, 53.258, 53.259.

Contractor [Final] Bills-Paid Affidavit

Date:

Owner:

Owner’s Mailing Address: [include county]

Contractor:

Contractor’s Mailing Address: [include county]

Affiant: [include relationship to contractor]

Affiant’s Mailing Address: [include county]

Property: [include legal description]

Improvements:

Affiant swears individually and on behalf of Contractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Contractor.

2. Affiant understands that Owner has required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.
3. Contractor has paid each of Contractor’s subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

<table>
<thead>
<tr>
<th>Name:</th>
<th>Address:</th>
<th>Telephone number:</th>
<th>Amount owed:</th>
</tr>
</thead>
</table>

List all subcontractors, laborers, and materialmen and amounts owed to each. If there are no unpaid subcontractors, laborers, or materialmen, state “None.”

Contractor warrants and represents that the following specified bills or classes of bills will be paid by Contractor from the funds paid to Contractor by Owner in reliance on this affidavit:

<table>
<thead>
<tr>
<th>Name of payee or description of class:</th>
<th>Amount:</th>
</tr>
</thead>
</table>

Include the following if applicable.

Contractor agrees to indemnify and hold Owner harmless from any loss or expense resulting from false or incorrect information in this affidavit.

Continue with the following.
SUBSCRIBED AND SWORN TO before me on ________________ by [name of affiant].

Notary Public, State of Texas
Exhibit K

Subcontractor [Final] Bills-Paid Affidavit

Date:

Owner:

Owner’s Mailing Address: [include county]

Subcontractor:

Subcontractor’s Mailing Address: [include county]

Contractor:

Contractor’s Mailing Address: [include county]

Affiant: [include relationship to subcontractor]

Affiant’s Mailing Address: [include county]

Property: [include legal description]

Improvements:

Affiant swears individually and on behalf of Subcontractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Subcontractor.
2. Affiant understands that Owner and Contractor have required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

3. Subcontractor has paid each of Subcontractor’s suppliers and sub-subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor or to Subcontractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

<table>
<thead>
<tr>
<th>Name:</th>
<th>Address:</th>
<th>Telephone number:</th>
<th>Amount owed:</th>
</tr>
</thead>
</table>

List all sub-subcontractors, suppliers, laborers, and materialmen and amounts owed to each. If there are no unpaid sub-subcontractors, suppliers, laborers, or materialmen, state “None.”

Subcontractor warrants and represents that the following specified bills or classes of bills will be paid by Subcontractor from the funds paid to Subcontractor by Contractor or Owner in reliance on this affidavit:

<table>
<thead>
<tr>
<th>Name of payee or description of class:</th>
<th>Amount:</th>
</tr>
</thead>
</table>

Repeat above information as needed.

Include the following if applicable.
Subcontractor agrees to indemnify and hold Owner harmless from any loss or expense resulting from false or incorrect information in this affidavit.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on ______________ by [name of affiant].

__________________________________________
Notary Public, State of Texas
Unconditional Release on Final Payment

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Project:

Job No.:

The signer of this document has been paid in full for all labor, services, equipment, or materials furnished to the property or to [name of person with whom signer contracted] on the property of [name of owner] located at [specify location] to the following extent: [specify job description]. The signer therefore waives and releases any mechanic’s lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer’s position.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer’s laborers, subcontractors, material-men, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project up to the date of this waiver and release.
Date

[Company name]

By ________________________________

[Name and title]
Chapter 20

Contractual Mechanic’s Lien Documents

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Chapter 20

Contractual Mechanic’s Lien Documents

§ 20.1 General Considerations

§ 20.1:1 Use of Forms

This chapter outlines common transactions for the creation and documentation of mechanic’s liens on homesteads.

The Texas Constitution distinguishes between “work and material used in constructing new improvements” and “work and material used to repair or renovate existing improvements” on homestead property. Several requirements are added if the contractor or lender is obtaining a lien for repair or renovation of a homestead. See Tex. Const. art. XVI, § 50(a)(5)(A)–(D). This chapter contains forms suggested for use in new construction projects and for repair or renovation construction. The forms include a mechanic’s lien contract (form 20-1), a mechanic’s lien note (form 20-2), and closing certificates (forms 20-6 and 20-7), which confirm owner compliance with the homestead requirements for transactions involving new construction or renovation or repair of existing homesteads.

Section 20.6 below suggests other forms that may be necessary in various transactions, and chapter 12 in this manual discusses truth-in-lending notices and disclosure statements, which are required in several kinds of transactions. Chapter 18 contains a residential construction contract form. The forms and procedures contained in chapter 18 must be reviewed to ensure compliance with the terms of the residential construction contract, the loan disclosure requirements, and the closing procedure requirements of sections 53.255 through 53.260 of the Texas Property Code, although failure to follow these requirements for residential contracts might not invalidate the lien securing the residential construction loan. See Tex. Prop. Code §§ 53.255(c), 53.256(c), 53.257(c), 53.258(e). The residential construction contract (form 18-4) should be referenced in the mechanic’s lien contract (form 20-1). The residential construction contract addresses many construction contract terms not addressed by the mechanic’s lien contract.

The forms in this chapter are designed to function interdependently to create and document liens arising from the credit financing of building a home located on homestead property. The choice of which forms to use and which optional provisions to include in the forms for a given transaction depends on several factors, such as which party is extending credit, who owns the property, whether the project is for construction of a new residence or is for renovation or repair of an existing homestead, and whether the lien is primary or subordinate. The mechanic’s lien note, form 20-2, should not be used without the supporting documents suggested in this chapter.

If the construction loan does not affect homestead property, attorneys usually use the deed of trust (see chapter 8) and note (see chapter 6) instead of the mechanic’s lien documents.

If the mechanic’s lien contract is used for new improvements to a homestead, the property owner may not be able to refinance any payments made to the contractor or any amount owed to the contractor (other than with a home equity loan) if construction begins before appropriate documentation is executed, acknowledged, and filed. If the owner intends to finance or refinance any part of the consideration, the appropriate documents and procedures prescribed in this chapter must be implemented before construction begins. Tex. Const. art. XVI, § 50(a)(5); Tex. Prop. Code § 53.254.
Caution: Only fixed-rate, simple interest may be charged in transactions using these forms. Mechanic’s lien transactions face the cumulative and complex restrictions imposed by federal and state consumer protection laws, Texas homestead laws, and the Texas Finance Code. See sections 20.1:2 and 20.1:3 below. For this reason, transactions documented by the forms in this chapter must not use add-on interest or variable interest rates, either of which would require significant revision of the documents.

§ 20.1:2 Homestead Considerations

The Texas homestead exemption generally does not preclude a contractual lien for improvements from attaching to the homestead. However, contractors, laborers, and materialmen must create such a lien in strict compliance with constitutional, statutory, and regulatory formalities. *Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796, 807 (Tex. App.—Austin 2004, pet. denied).

**Source of Requirements for Contractual Liens for Improvements:** The basic requirements for all contractual liens for improvements to the homestead are found at Tex. Const. art. XVI, § 50(a)(5). These constitutional requirements are in certain cases supplemented by additional requirements found at Tex. Prop. Code §§ 41.001, 53.254. Additionally, the Texas Finance Commission has issued regulations interpreting these constitutional and statutory formalities found at 7 Tex. Admin. Code ch. 152.

The formalities necessary for a valid contractual lien for improvements against the homestead are different depending on whether the contract is for new improvements or for repairs or renovations to existing improvements. Tex. Const. art. XVI, § 50(a)(5). Additionally, statutory requirements differ depending on whether the property improved is a business or residential homestead. See Tex. Prop. Code § 53.251(a). Practitioners must be attentive to these variables when drafting a contractual lien for improvements made to the homestead.


**Contract Must Set Forth Terms of Agreement:** A contractual lien for improvements to a residential homestead must set forth the terms of the agreement between the owner and the contractor. This requirement is not applicable to improvements made to a business homestead. Tex. Prop. Code §§ 41.001(b)(3), 53.254(a). The written contract between the owner and the contractor must at a minimum recite (1) the principal amount of the loan, (2) the interest rate, (3) the date that the final payment is due, (4) a description of the property, (5) a general description of the materials to be supplied or labor performed, and (6) that a lien is granted to secure payment. *In re Burnett*, 120 B.R. 839, 841–42 (Bankr. N.D. Tex. 1990). The contract need only provide the general nature of the improvements. It is not necessary that the contract contain a detailed itemized statement of the work performed or materials furnished. *Gomez v. Riddle*, 334 S.W.2d 197, 200 (Tex. Civ. App.—San Antonio 1960, no writ).

**Contract Must Be Executed before Commencement of Work:** A contractual lien for improvements to a homestead must be executed before the contractor furnishes any materials or performs any labor. Tex. Prop. Code §§ 41.001(b)(3), 53.254(b).
**Contract Must Be Executed by Both Spouses:** Generally, in the case of a family homestead, a contractual lien for improvements must be executed by both spouses in the manner required for the sale or conveyance of the homestead. Tex. Const. art. XVI, § 50(a)(5)(A); Tex. Prop. Code §§ 41.001(b)(3), 53.254(c). This joinder requirement apparently does not apply to new improvements made to a business homestead. See Spradlin v. Jim Walter Homes, 34 S.W.3d 578, 580–81 (Tex. 2000). See also Tex. Prop. Code §§ 41.001(b)(3), 53.251(a), 53.254(c).

**Required Five-Day Waiting Period:** If the extension of credit is to secure the repair or renovation of existing improvements to the homestead, whether with a contractor or third-party lender, the owner must complete a credit application for the extension of credit, and a five-day waiting period must expire between the date that the homeowner makes application for the extension of credit and the date that the contractual lien is executed. Any lien instrument executed before the expiration of the five-day waiting period is invalid. Tex. Const. art. XVI, § 50(a)(5)(B). To count the five days, the day after the application for the extension of credit is made is day one. If the fifth calendar day falls on a Sunday or a federal legal public holiday, the contractual lien may not be executed until the next calendar day that is not a Sunday or a federal legal public holiday. 7 Tex. Admin. Code § 152.9.

The five-day waiting period is not required if the work or materials are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health and safety of the owner or person residing in the homestead and the owner acknowledges this exigency in writing. Tex. Const. art. XVI, § 50(a)(5)(B). This written acknowledgment must at a minimum (1) describe the conditions of the homestead property, (2) describe how the conditions of the homestead property affect the health and safety of the owner or person residing in the homestead, and (3) state that the owner is waiving the five-day waiting period required by Tex. Const. art. XVI, § 50(a)(5)(B). Printed forms for this purpose are prohibited. 7 Tex. Admin. Code § 152.13.

**Required Preclosing Disclosures:** When the owner obtains third-party financing for the construction of improvements to a residential homestead, the lender must deliver to the owner all documentation relating to the closing of the loan not later than one business day before the date of the closing. If a bona fide emergency or other good cause exists and the lender obtains the written consent of the owner, the lender may provide the documentation or modify previously provided documentation on the date of closing. Tex. Prop. Code § 53.257(a).

In addition, the lender must deliver to the owner before the date of closing the extensive statutory disclosure specified at Tex. Prop. Code § 53.255. If a bona fide emergency or other good cause exists and the lender obtains the written consent of the owner, the lender may provide the required statutory disclosure at closing. The lender must retain a signed and dated copy of this disclosure with the closing documents for the loan. Tex. Prop. Code § 53.257(b).

A failure by the lender or contractor to provide these disclosures does not invalidate the lien. Tex. Prop. Code §§ 53.255(c), 53.257(c).

**Right of Rescission:** A contract for work or materials for repairs or renovations to existing homestead improvements must provide that the contract may be rescinded by the owner or the owner’s spouse without penalty within three calendar days after execution of the contract by the parties. Tex. Const. art. XVI, § 50(a)(5)(C). To count the three days, the day after the contract is executed is day one. If the third calendar day falls on a Sunday or a federal legal public holiday, the right of rescission is extended to the next calendar day that is not a Sunday or a federal legal public holiday. 7 Tex. Admin. Code § 152.11.

The three-day right of rescission is not required if the work or materials are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health and safety of the owner or person residing in the homestead.
and the owner of the homestead acknowledges this exigency in writing. Tex. Const. art. XVI, § 50(a)(5)(C). This written acknowledgment and waiver must at a minimum (1) describe the conditions of the homestead property, (2) describe how the condition of the homestead property affects the health and safety of the owner or person residing in the homestead, and (3) state that the owner is waiving the three-day right of rescission. Printed forms for this purpose are prohibited. 7 Tex. Admin. Code § 152.13.

**Restriction on Place of Closing:** A contractual lien for improvements to repair or renovate existing improvements on the homestead must be executed in the offices of a third-party lender making the extension of credit, an attorney at law, or a title company. Tex. Const. art. XVI, § 50(a)(5)(D). There is no exception to this requirement for exigent circumstances as with the five-day waiting period or right of rescission.

**Required Disclosures:** A contract for improving an existing residential homestead must contain the following conspicuous disclosure next to the owner’s signature line:

> IMPORTANT NOTICE: You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract and you fail to meet the terms and conditions of this contract, you may lose your legal ownership rights in your home. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.

Failure to include the notice constitutes an actionable violation of the Texas Deceptive Trade Practices Act. Tex. Prop. Code § 41.007.

**§ 20.1:3 Usury Laws and Regulations**

The usury statutes and regulations that apply to a loan vary with the type of loan and lender. Regardless of the structure of the transaction, the creditor must comply with the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f.

**Third-Party Lenders and First Liens:** State usury law has been preempted by federal statute for first liens on residential real property. This preemption eliminates the rate ceiling for this type of loan for most creditors, including all federally insured financial institutions and other creditors that make or invest in residential real property loans aggregating more than $1 million per year. 12 U.S.C. §§ 1735f–7, 1735f–7a; Seiter v. Veytia, 756 S.W.2d 303 (Tex. 1988). See also Tex. Fin. Code § 302.103 (late charges are interest for purpose of federal preemption). Other third-party lenders may rely on Code section 302.001 as the usury law.

Texas usury law is located primarily in title 4 of the Texas Finance Code. The maximum legal interest rate, except as otherwise fixed by law, is set at 10 percent. Tex. Fin. Code § 302.001. Floating interest rate ceilings for written contracts are established by chapter 303 of the Code. Tex. Fin. Code ch. 303.

**Contractor–Creditors and First Liens:** A contractor–creditor may be limited to Code section 302.001 as the applicable usury law for a complete structure.

**§ 20.1:4 Other Consumer Protection Laws**

**Federal Disclosure Laws and Regulations:** Federal consumer credit laws require disclosures designed to allow informed decision making. The most important of these are the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, and Federal Reserve
Board Regulation Z, 12 C.F.R. pt. 226, both of which require certain creditors to disclose loan terms and rights of rescission to potential borrowers. See chapter 12 in this manual for forms and further discussion.

Other federal consumer protection laws that might affect mechanic’s lien transactions include—


2. The Federal Trade Commission anti-holder-in due-course rule, 16 C.F.R. pt. 433. A prescribed notice must be included in the instrument evidencing the debt if the contractor either (a) receives the proceeds of a loan made to the owner by a third-party creditor for the acquisition of goods or services by sale or lease and either refers customers to the third-party creditor or is affiliated with the third-party creditor by common control, contract, or business arrangement; or (b) extends credit to the owner in connection with a “credit sale” under the Truth in Lending Act or Regulation Z. 16 C.F.R. §§ 433.1(d), (e), (i), 433.2.

The contractor and the third-party creditor have a referral relationship if the contractor cooperates with the third-party creditor to channel customers to the third-party creditor on a continuing basis. A referral relationship may arise from a pattern of cooperative activity directly related to the arranging of financing. To fall within the rule, the contractor and the third-party creditor must be engaged in cooperative or concerted activity conducted to channel consumers to the third-party creditor, and this conduct must occur on a continuing basis. Once a referral relationship is established, the instruments evidencing debts owed to the third-party creditor arising out of referrals from the contractor must include the prescribed notice. However, a referral relationship does not include situations in which the contractor merely suggests credit sources to its customers or sends its customers to a third-party creditor without the express or implied agreement of the creditor or without any concerted or cooperative activity between the contractor and the creditor.

The contractor and the third-party creditor may be affiliated by common control. For example, common control exists if two companies are owned by a holding company or by substantially the same individuals or if one is a subsidiary of the other. The contractor and the third-party creditor may also be affiliated by a contract or business arrangement, which includes any agreement (oral or written), understanding, procedure, course of dealing, or arrangement between the contractor and the creditor to engage in cooperative or concerted activity in connection with the contractor’s sale to customers or the financing thereof. However, the creditor can issue checks payable jointly to the contractor and the owner, and the creditor can cooperate with the contractor to perfect the mechanic’s lien without creating an affiliation by contract or other arrangement under the FTC rule.

If the contractor and the third-party creditor are not affiliated by common control or by a contract or business arrangement and if the contractor does not refer customers to the third-party creditor, FTC notices are not required and may be deleted from the forms. Federal Trade Commission Statement of Enforcement Policy, 41 Fed. Reg. 34,594 (1976).

3. Right of Rescission. The contractor may need to comply with the Federal Trade Commission rule on cooling-off periods for door-to-door sales. Exceptions exist if the agreement is entered into at the contractor’s place of business or under prior negotiations during a visit by the owner to the contractor’s fixed, permanent business establishment, at which the contractor’s services are offered for sale on a continual basis. 16 C.F.R. pt. 429.

Texas Consumer Protection Law: The Texas Constitution provides several consumer protection provisions related to construction on homestead property. These requirements are described in this chapter specifically in section 20.1:2 above. Forms 20-6 and 20-7 in this chapter are certificates of closing used to confirm compliance with these requirements.

Texas Consumer Protection Laws for Home Solicitations: The Texas Home Solicitations Transaction Act may apply if the consumer’s obligation is entered into at a location other than the contractor’s place of business. If the Act applies, additional notices are required. Tex. Bus. & Com. Code ch. 601. See the notice of cancellation attached to the mechanic’s lien contract (form 20-1).

Texas Finance Code Chapter 343—Home Loan Requirements: In addition to the foregoing, the transactions described in this chapter may be subject to the disclosure and other requirements of chapter 343 of the Texas Finance Code. See sections 10.14 through 10.14:3 in this manual.

Confidentiality Notice: Instruments, meaning deeds and deeds of trust, transferring an interest in real property to or from an individual may be required to include the confidentiality notice required by Tex. Prop. Code § 11.008. See section 3.16 in this manual.

Texas Mechanic’s Lien Claims: The perfection of involuntary mechanic’s liens is covered in chapter 21 in this manual. Before contracting for residential construction, owners should become familiar with their potential liability for mechanic’s liens. Mechanic’s lien liability and related procedures are outlined for owners in section 18.3:4.

§ 20.2 Procedures for Various Fact Situations

This section describes typical construction projects on homesteads. Procedures are given for new construction and for repair or renovation construction projects.

§ 20.2:1 First Lien to Third-Party Lender to Secure Interim and Permanent Financing

The owner has title to the real property on which the contractor is building a home or repairing or renovating an existing home, and the third-party lender obtains a first lien to secure both interim and permanent construction financing. See section 20.2:2 below for the procedure to be followed if the third-party lender is not providing interim construction financing.

Along with the forms suggested below, other forms used to document the construction process and establish the parties’ rights may be found in chapter 18 in this manual. Chapter 18 also offers suggestions for completing those forms.

Following are the steps to create and document the mechanic’s lien.

1. For repair or renovation construction projects, all the owners (both spouses) must sign a written application for extension of credit at least five days before signing the mechanic’s lien contract. Tex. Const. art. XVI, § 50(a)(5)(B).

2. The contractor delivers the required disclosure statement (form 18-1) and the list of subcontractors and suppliers (form 18-2) to the owners. See Tex. Prop. Code §§ 53.255, 53.256. Also, a third-party lender is required to give the disclosure in form 18-1 under section 53.257(a) of the Texas Property Code and must deliver all documentation related to the loan not later than one business day before the date of the closing. Tex. Prop. Code § 53.257.
3. The contractor, the owner, and the owner’s spouse sign the mechanic’s lien contract. For repair or renovation construction, this contract must be signed only at the offices of the third-party lender, a lawyer, or a title company. 

4. A certificate of closing is signed. Form 20-6 in this chapter is for new construction projects, and form 20-7 is for repair or renovation projects.

5. The owner executes the mechanic’s lien note payable to the contractor; the note should bear no interest and be payable in a single payment on completion of construction. The contractor thus is not a creditor under the federal Truth in Lending Act because no finance charge is involved and the obligation is payable in four or fewer installments. 15 U.S.C. § 1602(f).

Because the mechanic’s lien note payable to the contractor bears no interest and is payable in a single installment, there is no retail installment transaction under Texas Finance Code chapter 345, and that chapter does not apply. Tex. Fin. Code § 345.001(7).

The contractor must comply with the FTC anti-holder-in-due-course rule if the contractor has a referral relationship or affiliation with the third-party lender. 16 C.F.R. pt. 433. (See section 20.1:4 above for additional discussion.) The FTC anti-holder-in-due-course notice should be included in the mechanic’s lien note payable to the third-party creditor and may also be included in the mechanic’s lien contract and the mechanic’s lien note payable to the contractor. If no referral relationship or affiliation exists, the notice may be deleted from these documents.

6. The contractor gives the required notices under the FTC rule on cooling-off periods for door-to-door sales (unless an exception exists). In addition, for renovation or repair construction, a three-day right to rescind following execution of the mechanic’s lien contract by all parties is required unless the project is for immediate repairs to conditions on the homestead property that materially affect the health or safety of the owner and the owner of the homestead acknowledges such in writing. Tex. Const. art. XVI, § 50(a)(5)(C). The contractor then waits to be sure the foregoing rights of cancellation or rescission are not exercised. The owner executes the election regarding right of rescission (form 20-8) and checks the box indicating the owner’s election not to rescind the contract.

7. The contractor endorses the mechanic’s lien note to the third-party lender and assigns the lien with a transfer of lien, which is filed with the county clerk of the county in which the property is located. See section 10.1 and form 10-1.

8. The third-party lender renews and extends the mechanic’s lien note by having the owner execute a note payable to the third-party lender; it bears interest and is payable as agreed between the owner and the third-party lender.

Only fixed-rate, simple interest may be charged in transactions using the forms in this chapter. If fixed interest rates are used, the adjustable-rate mortgage regulations do not apply. These forms are not designed for use with loans subject to the adjustable-rate mortgage regulations and must be significantly revised if used for that purpose.

9. The third-party lender extends the lien with the deed of trust executed by the owner, naming the trustee chosen by the third-party lender. The deed of trust is filed with the county clerk of the county in which the property is located. See chapter 8.

10. The third-party lender is a truth-in-lending creditor and must give the owner a truth-in-lending (loan) disclosure form and a right-of-rescission form. See 12 C.F.R. § 226.23. See chapter 12 for forms and further discussion.

11. Construction begins. The affidavit of commencement is executed (see form 18-5). Normally, the third-party lender then advances funds in stages as the construction is completed, according to terms of the mechanic’s lien contract and any incorporated residential construction contract. In some cases the lender will require its own construction loan agreement providing interim payments or draws. The owner pays interest to the third-party lender only on
amounts advanced during construction and normally begins making payments on the principal of the renewal note only after completion of the construction.

A disbursement disclosure may be found at form 18-3. See section 18.7:3 for discussion of the balance of the construction process, including descriptions of change orders, affidavits of completion, and the all-bills-paid affidavits.

12. On final completion, the contractor executes the affidavit of completion and indemnity (form 20-3), and the owner executes the affidavit of acceptance (form 20-4). The owner has the option of executing and filing the affidavit of completion (form 18-7) (see sections 18.3:4 and 18.7:7).

§ 20.2:2 First Lien to Contractor; No Interim Financing; Permanent Financing by Third-Party Lender

The owner has title to the real property on which the contractor is building a home or repairing or renovating an existing home, and the third-party lender obtains a first lien to secure permanent financing. The third-party lender is not providing interim construction financing. See section 20.2:1 above for the procedure to be followed if the third-party lender also provides interim construction financing.

Along with the forms suggested below, other forms used to document the construction process and establish the parties’ rights may be found in chapter 18 in this manual. Chapter 18 also offers suggestions for completing those forms.

Following are the steps to create and document the mechanic’s lien.

1. For repair or renovation construction projects, all the owners (both spouses) must sign a written application for extension of credit at least five days before signing the mechanic’s lien contract. Tex. Const. art. XVI, § 50(a)(5)(B).

2. The contractor delivers the required disclosure statement (form 18-1) and the list of subcontractors and suppliers (form 18-2) to the owners. See Tex. Prop. Code §§ 53.255, 53.256.

3. The contractor, the owner, and the owner’s spouse sign the mechanic’s lien contract. For repair or renovation construction, this contract must be signed only at the offices of the third-party lender, a lawyer, or a title company. Tex. Const. art. XVI, § 50(a)(5)(D).

4. A certificate of closing is signed. Form 20-6 is for new construction projects, and form 20-7 is for repair or renovation projects.

5. The owner executes the mechanic’s lien note payable to the contractor; the note should bear no interest and be payable in a single payment on completion of construction. The contractor thus is not a creditor under the federal Truth in Lending Act because no finance charge is involved and the obligation is payable in four or fewer installments. 15 U.S.C. § 1602(f).

Because the mechanic’s lien note payable to the contractor bears no interest and is payable in a single installment, there is no retail installment transaction under Texas Finance Code chapter 345, and that chapter does not apply. Tex. Fin. Code § 345.001(7).

The contractor must comply with the FTC anti-holder-in-due-course rule if the contractor has a referral relationship or affiliation with the third-party lender. 16 C.F.R. pt. 433. The FTC anti-holder-in-due-course notice should be retained in the mechanic’s lien note if the contractor has a referral relationship or affiliation with the third-party lender. 16 C.F.R. pt. 433. (See section 20.1:4 above for additional discussion.) Otherwise the notice may be deleted.
6. The contractor gives the required notices under the FTC rule on cooling-off periods for door-to-door sales (unless an exception exists). In addition, for renovation or repair construction, a three-day right to rescind following execution of the mechanic’s lien contract by all parties is required unless the project is for immediate repairs to conditions on the homestead property that materially affect the health or safety of the owner and the owner of the homestead acknowledges such in writing. Tex. Const. art. XVI, § 50(a)(5)(C). The contractor then waits to be sure the foregoing rights of cancellation or rescission are not exercised. The owner executes the election regarding right of rescission (form 20-8) and checks the box indicating the owner’s election not to rescind the contract.

7. Construction begins and the affidavit of commencement (form 18-5) is executed. Construction must then be completed before the next step in this procedure.

8. The contractor executes the affidavit of completion and indemnity (form 20-3), and the owner executes the affidavit of acceptance (form 20-4). The owner has the option of executing and filing the affidavit of completion (form 18-7) (see sections 18.3:4 and 18.7:7).

9. The contractor endorses the mechanic’s lien note to the third-party lender and assigns the lien with a transfer of lien, which is filed with the county clerk of the county in which the property is located. See section 10.1 and form 10-1.

10. The third-party lender renews and extends the mechanic’s lien note by having the owner execute another note payable to the third-party lender; it bears interest and is payable as agreed between the owner and the third-party lender.

§ 20.2:3 Second Lien to Third-Party Lender to Secure Interim and Permanent Financing

The owner has title to the real property on which the contractor is building a home or repairing or renovating an existing home, and the third-party lender obtains a second lien to secure both interim and permanent construction financing.

Along with the forms suggested below, other forms used to document the construction process and establish the parties’ rights may be found in chapter 18 in this manual. Chapter 18 also offers suggestions for completing those forms.

Following are the steps to create and document the mechanic’s lien.

1. For repair or renovation construction projects, all the owners (both spouses) must sign a written application for extension of credit at least five days before signing the mechanic’s lien contract. Tex. Const. art. XVI, § 50(a)(5)(B).

2. The contractor delivers the required disclosure statement (form 18-1) and the list of subcontractors and suppliers (form 18-2) to the owners. See Tex. Prop. Code §§ 53.255, 53.256. Also, a third-party lender is required to give the disclosure in form 18-1 under section 53.257(a) of the Texas Property Code and must deliver all documentation related to the loan not later than one business day before the date of the closing. Tex. Prop. Code § 53.257.

3. The contractor, the owner, and the owner’s spouse sign the mechanic’s lien contract. See form 20-1 in this chapter. Additional clauses 20-5-9, 20-5-10, and 20-5-11 are added to the mechanic’s lien contract as part of the general provisions, section F. If a residential construction contract is to be executed, see form 18-4. If the project is for repair or renovation of an existing homestead, the contract must be signed only at the offices of the third-party lender, a lawyer, or a title company. Tex. Const. art. XVI, § 50(a)(5)(D).

4. A certificate of closing is signed. Form 20-6 is for new construction projects, and form 20-7 is for repair or renovation projects.
5. The owner executes the mechanic’s lien note payable to the contractor; the note should bear no interest and be payable in a single payment on completion of construction. The contractor thus is not a creditor under the federal Truth in Lending Act because no finance charge is involved and the obligation is payable in four or fewer installments. 15 U.S.C. § 1602(f).

Under Texas homestead laws, when the contractor and the owner sign the mechanic’s lien contract and the owner executes the mechanic’s lien note payable to the contractor, an obligation is established in favor of the contractor and is secured by a mechanic’s lien. Tex. Prop. Code § 53.254.

Because the mechanic’s lien note payable to the contractor bears no interest and is payable in a single installment, there is no retail installment transaction under Texas Finance Code chapter 345, and that chapter does not apply. Tex. Fin. Code § 345.001(7).

The contractor must comply with the FTC anti-holder-in-due-course rule if the contractor has a referral relationship or affiliation with the third-party lender. 16 C.F.R. pt. 433. (See section 20.1:4 above for additional discussion.) The FTC anti-holder-in-due-course notice should be included in the mechanic’s lien note payable to the third-party creditor and may also be included in the mechanic’s lien contract and the mechanic’s lien note payable to the contractor. If no referral relationship or affiliation exists, the notice may be deleted from these documents.

6. The contractor gives the required notices under the FTC rule on cooling-off periods for door-to-door sales (unless an exception exists). For renovation or repair construction projects, a three-day right to rescind following execution of the mechanic’s lien contract by all parties is required unless the project is for immediate repair to conditions on the homestead property that materially affect the health or safety of the owner and the owner of the homestead acknowledges such in writing. Tex. Const. art. XVI, § 50(a)(5)(C). The contractor then waits to be sure the right of cancellation is not exercised and otherwise complies with the rule, unless an exception exists and the FTC rule does not apply. See section 20.1:4. The owner executes the election regarding right of rescission (form 20-8) and checks the box indicating the owner’s election not to rescind the contract.

7. The contractor endorses the mechanic’s lien note to the third-party lender and assigns the lien with a transfer of lien, which is filed with the county clerk of the county in which the property is located. See section 10.1 and form 10-1.

8. The third-party lender renews and extends the mechanic’s lien note by having the owner execute a note payable to the third-party lender; it bears interest and is payable as agreed between the owner and the third-party lender. Only fixed-rate, simple interest may be charged in transactions using the forms in this chapter. If fixed interest rates are used, the adjustable-rate mortgage regulations do not apply. These forms are not designed for use with loans subject to the adjustable-rate mortgage regulations and must be significantly revised if used for that purpose.

9. The third-party lender extends the lien with the deed of trust executed by the owner, naming the trustee chosen by the third-party lender. The deed of trust is filed with the county clerk of the county in which the property is located. See chapter 8.

10. The third-party lender may be a truth-in-lending creditor and may be required to give the owner the truth-in-lending (loan) disclosure form. See 12 C.F.R. § 226.23. See chapter 12 for forms and further discussion.

11. Construction begins. The affidavit of commencement is executed (see form 18-5). Ordinarily, the third-party lender then advances funds in stages as the construction is completed, according to terms of the mechanic’s lien contract and any incorporated residential construction contract. In some cases the lender will require its own construction loan agreement providing interim payments or draws. The owner pays interest to the third-party lender only on
amounts advanced during construction and usually begins making payments on the principal of the renewal note only after completion of the construction.

During construction additional forms are used. A disbursement disclosure may be found at form 18-3. See section 18.7:3 for discussion. Other forms used during construction are change-order forms, affidavits of completion, and all-bills-paid affidavits. These forms are included in chapter 18.

12. On final completion, the contractor executes the affidavit of completion and indemnity (form 20-3), and the owner executes the affidavit of acceptance (form 20-4). The owner has the option of executing and filing the affidavit of completion (form 18-7) (see sections 18.3:4 and 18.7:7).

**Precautions for Subordinate Mechanic’s Lien Contracts:** Subordinate lien financing involves a number of considerations for all the parties involved: the borrower, the prior lender, and the subordinate lender. The borrower should ascertain that the creation of a subordinate lien will not be a default under the prior deed of trust, as subordinate encumbrances are expressly prohibited in many deeds of trust. The prior lender may have concerns about the ability of the borrower to service both the superior and subordinate lien debts. If the borrower should default on the subordinate lien debt and the subordinate lender should foreclose, the borrower, although still liable on the debt, will no longer be the owner of the property, and the incentive to repay the senior loan will obviously be diminished.

The party at greatest risk in subordinate lien financing transactions is the subordinate lender. Foreclosure of a superior lien extinguishes all subordinate liens. *See Exchange Savings & Loan Ass’n v. Monocrete Proprietary, Ltd.*, 629 S.W.2d 34 (Tex. 1982). In Texas, unlike many other jurisdictions, a subordinate lienholder is not entitled by law to notice of default on the prior lien debt or notice of foreclosure proceedings. The subordinate lienholder is likewise not entitled to share in the foreclosure proceeds, unless there is an excess after payment of costs and expenses in connection with the foreclosure and satisfaction of the prior lien debt. The subordinate lienholder may therefore want to obtain the prior lienholder’s agreement to provide notice of any default by the borrower under the first-lien note and deed of trust and the opportunity to cure such default or require the borrower to provide continuing proof that payments on the prior lien debt have been made.

A subordinate lien transaction may be subject to chapter 342 of the Texas Finance Code if the property is a dwelling designed for occupancy by four or fewer families and the interest rate exceeds 10 percent per year. *Tex. Fin. Code §§ 342.001(4), 342.005*. Chapter 342 applies to a secondary mortgage loan made by a person in the business of making, arranging, or negotiating those types of loans. *Tex. Fin. Code § 342.005*. The chapter does not apply to a secondary mortgage loan made by a seller of property to secure all or part of the unpaid purchase price. *Tex. Fin. Code § 342.006*. If a lender is in the business of making, arranging, or negotiating secondary mortgage loans, the lender must obtain a license from the Office of Consumer Credit Commissioner (OCCC) unless the lender is a bank, savings bank, savings and loan association, credit union, or a residential mortgage loan originator licensed under chapter 156. *Tex. Fin. Code §§ 124.005, 339.004, 341.103–104, 342.051*. Unless exempt under section 180.003, an individual who acts as a residential mortgage loan originator in the making, transacting, or negotiating of a secondary mortgage loan subject to chapter 342 must be individually licensed under chapter 342, be enrolled with the Nationwide Mortgage Licensing System and Registry as required by section 180.052, and comply with other applicable requirements of the Texas Secure and Fair Enforcement of Mortgage Licensing Act of 2009. *Tex. Fin. Code ch. 180*. Chapter 342 loans are highly specialized and regulated, and thus if a subordinate lien transaction is subject to chapter 342, the attorney must carefully review the chapter to make sure all requirements have been met. Texas Finance Code section 341.502 provides that “[a] contract for a loan under Chapter 342, a retail installment transaction under Chapter 348, or a home equity loan regulated by the Office of Consumer Credit Commissioner must be . . . written in plain language designed to be easily understood by the average consumer . . . .” *Tex. Fin. Code § 341.502(a)*. The Finance Commission of Texas is autho-
rized to adopt model contracts for loans subject to that section. A lender may not use a contract other than a model contract unless the lender has submitted the contract to the OCCC for its approval. If the OCCC issues an order disapproving a submitted contract, the lender may not use the contract after the order takes effect. *Tex. Fin. Code § 341.502.* Plain-language model contracts and related rules for chapter 342, subchapter G, second-lien home improvement contracts are codified at *7 Tex. Admin. Code §§ 90.601–.604.*

The attorney general of Texas has determined that section 341.502(a) is applicable only to those loan transactions for which the consumer credit commissioner is the appointed regulating official and has no application to loan transactions subject to the regulatory authority of the banking commissioner, the savings and mortgage lending commissioner, the credit union commissioner, and federal regulatory officials. *Tex. Att’y Gen. Op. No. JC-0513 (2002).*

Banks, savings and loan associations, and credit unions accordingly are not required to comply with the section 341.502 “plain language” contract requirements or to obtain a license to engage in the business of making subordinate lien loans subject to chapter 342. *Tex. Fin. Code § 342.051(c)(1).* These institutional lenders nevertheless are thought to be subject to other substantive law provisions of chapter 342, including, for example, the limitations of that chapter on the collection of authorized fees and charges, as enforced by the policies of their respective regulatory agencies. *See Tex. Fin. Code §§ 342.308, 342.502.*

Before using the forms in this chapter for a loan subject to chapter 342 of the Texas Finance Code, the attorney should determine whether the lender is subject to the plain-language model contract provisions of Code section 341.502. The forms in this chapter have not been submitted to or approved by the OCCC.

If the attorney decides that the forms contained in this chapter may nevertheless be used for a loan regulated by chapter 342, the forms still must be modified to comply with the requirements of that chapter. For example, the secondary mortgage loan documents for a loan made by a licensed lender must contain the name, mailing address, and telephone number of the OCCC. *Tex. Fin. Code § 14.104.* See clause 8-9-24. Neither the mechanic’s lien contract forms nor the note forms in this manual contain that information. The attorney should include that information in both the mechanic’s lien contract form and the note form when documenting a secondary mortgage loan if the lender has a license from the OCCC. Additionally, if a subordinate lien transaction is subject to chapter 342, the printed language in the mechanic’s lien contract must be modified slightly. In paragraph B.6., the phrase “in a form acceptable to Contractor or its transferees” must be struck so that the obligation reads “maintain at Owner’s sole cost and expense insurance policies containing the following coverages . . . .” This change is necessary because Finance Code sections 342.404 through 342.405 and 342.413 prohibit a lender from approving the selection of insurance. *See Tex. Fin. Code §§ 342.404, 342.405, 342.413.* Also, Finance Code section 342.404 provides that when insurance is required in connection with a loan made under that chapter, the lender must furnish the borrower a statement like the one in clause 20-5-9, which may be added to the mechanic’s lien contract as a numbered paragraph under “General Provisions.” *Tex. Fin. Code § 342.404.*

The same chapter imposes other requirements if the lender sells or procures insurance related to the loan at a rate not fixed or approved by the State Board of Insurance. *See Tex. Fin. Code § 342.405.*

Finance Code section 342.307 limits the enforcement fees that may be included in secondary mortgage loan documents. To comply with this section, the attorney’s fee provisions in the note, form 6-1, and the mechanic’s lien contract should be modified if used in transactions subject to chapter 342 of the Finance Code. *See Tex. Fin. Code § 342.307.* In the note, the third paragraph, concerning attorney’s fees, should be replaced with clause 6-6-15. See section 6.2:7.
An institutional third-party lender may be required to provide the borrower a truth-in-lending disclosure (loan) form. An example of this form is included in chapter 12.

It is essential that a subordinate deed of trust contain terms and provisions identifying the prior lien and obligating the borrower to keep the prior note and deed of trust current and not in default. Clauses 20-5-10 and 20-5-11 may be used for this purpose. The parties may wish to attempt to obtain an estoppel letter or intercreditor agreement from the prior lienholder. An example of such an instrument may be found at form 10-10.

§ 20.3 Cautions

§ 20.3:1 No Variable Interest Rate Loans

The forms in this chapter are designed for use with loans charging simple interest rates only; they must be carefully revised for use with adjustable-rate mortgages. Variable rates, balloon payments, and variable payment schedules require truth-in-lending disclosures and additional disclosures under the Texas Credit Title and Texas Finance Code.

The mechanic’s lien note, form 20-2 in this chapter, makes no provision for credit life insurance.

See section 20.7 below for suggestions if one spouse will not become liable on the debt secured by the mechanic’s lien contract.

§ 20.3:2 No Out-of-State Venue or Choice of Law

If a contract that provides for the construction of new improvements to real property located in Texas contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation in the courts of another state, or to arbitration in another state, that provision is voidable by the party obligated to perform the construction. Tex. Bus. & Com. Code §§ 272.001–.002.

§ 20.3:3 Prompt Payment Act

Texas Property Code chapter 28 provides that an owner has thirty-five days from the date the owner receives a written request for payment from a contractor to pay the invoiced amount (less the retainage required by law) if the work covered was properly performed or materials delivered are suitably stored. Tex. Prop. Code § 28.002. Unpaid bills earn interest at the rate of 1.5 percent per month. Tex. Prop. Code § 28.004. Exceptions to this requirement are—

1. if there is a good-faith dispute about the amount owed (including a good-faith dispute about whether the work was done properly), no more than 110 percent of the amount in dispute may be withheld, Tex. Prop. Code § 28.003; or

2. if the lender does not fund the owner for a reason that is not the fault of the owner. See Tex. Prop. Code § 28.008.

§ 20.3:4 Construction Trust Fund Statute

Texas Property Code section 162.001 is generally referred to as the “Construction Trust Fund Statute.” This statute, among other provisions, states that loan receipts are trust funds if they are borrowed by an owner for the purpose of improving specific real property in Texas and are secured in whole or in part by a lien on the property. Tex. Prop. Code § 162.001(b). The
owner is designated as a trustee of loan funds the owner receives. Tex. Prop. Code § 162.002. As trustee, the owner is obligated to the “beneficiaries” of the construction trust funds, including the contractor, subcontractors, mechanics, and laborers on the project. Tex. Prop. Code § 162.003(a). The owner is also a beneficiary. Tex. Prop. Code § 162.003(b). A trustee who intentionally, knowingly, or with intent to defraud directly or indirectly diverts construction trust funds without first paying the current and past-due obligations on the project has misapplied the trust funds. Tex. Prop. Code § 162.031. Criminal penalties apply to such diversion. See Tex. Prop. Code § 162.032. Also, diversion constitutes the basis for a civil action against the trustee. See Tacon Mechanical Contractors v. Grant Sheet Metal, Inc., 889 S.W.2d 666 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

§ 20.3:5    Texas Finance Code Chapter 343

A residential construction loan may be subject to the home loan disclosure and other requirements of chapter 343 of the Texas Finance Code. See sections 10.14 through 10.14:3 in this manual.

§ 20.4    Instructions for Completing Forms

§ 20.4:1    Generally

Chapter 3 of this manual offers useful information about designations of parties, property descriptions, and other matters generally related to completing the forms.

§ 20.4:2    Mechanic’s Lien Contract

The mechanic’s lien contract, form 20-1 in this chapter, closely resembles the deed of trust; reference to chapter 8 in this manual may be useful for completing the contract. For remarks about prior liens, see section 8.2:4. For discussion about other exceptions to conveyance and warranty, see section 5.2:7.

The mechanic’s lien contract must be executed before the construction begins and must be filed with the county clerk of the county in which the property is located. Tex. Prop. Code § 53.254. In case of repair or renovation construction the contract must contain, and the parties must comply with, optional section G. See Tex. Const. art. XVI, § 50(a)(5)(A)–(D), and the explanation at section 20.1:1 above. Also in this case, the owners must be provided the election regarding right of rescission (see form 20-8).

The residential construction contract provides details about description of the work, schedules for completion, changes, termination of the contractor, and other matters. See form 18-4 for applicable clauses.

A force majeure and “time is of the essence” clause may be included in the additional provisions following paragraph F.13. of the mechanic’s lien contract form. An example of such a clause appears as clause 20-5-2.

The contract contains the anti-holder-in-due-course notice required by the Federal Trade Commission for consumer credit contracts made in connection with the sale or lease of goods or services to consumers for personal, family, or household use. See 16 C.F.R. pt. 433. For transactions not covered by this FTC regulation, the notice may be deleted.

The contract contains the right-of-cancellation notice required by Tex. Bus. & Com. Code ch. 601 and 16 C.F.R. § 429.1. For transactions not covered by those provisions, the notice may be deleted. Section G. of the contract contains the right of rescis-
sion required by Tex. Const. art. XVI, § 50(a)(5)(C), applicable to repair or renovation construction. These notices and cancel-
lation forms may be deleted if an exception exists or if the sections are not applicable.

**RCLA Notice Required:** The notice statement required by the Texas Residential Construction Liability Act (RCLA, Tex. Prop. Code ch. 27) is included at the end of the contract, above the owner signatures. See Tex. Prop. Code § 27.007.

The RCLA notice is required in addition to the Tex. Prop. Code § 41.007 notice.

### § 20.4:3 Mechanic’s Lien Note

The mechanic’s lien note, form 20-2 in this chapter, is similar to the note discussed in chapter 6, which suggests payment clauses and other clauses that may also be appropriate for this note.

The mechanic’s lien note should not be used alone. Interdependent uses of the forms are suggested in section 20.2 above.

Payment clauses should be drafted in accordance with the provision for statutory retainage contained in the mechanic’s lien contract in paragraph D.4.: 

> Notwithstanding anything to the contrary in this contract, during progress of the Construction, Owner may retain the amounts required by sections 53.101 and 53.081 of the Texas Property Code. Retainage will be withheld until the last business day of the third month after the month of final completion of the project, unless otherwise pro-
vided in the residential construction contract between the parties.

The mechanic’s lien note contains the anti-holder-in-due-course notice required by the Federal Trade Commission for con-
sumer credit contracts made in connection with the sale or lease of goods or services to consumers for personal, family, or household use. See 16 C.F.R. pt. 433. For transactions not covered by this FTC regulation, the notice may be deleted. The notice appears on the last page of the mechanic’s lien note immediately preceding the signature line.

Often the note is drafted to become due on completion of construction. Alternatively, the parties may prefer to specify that partial payments are due on completion of distinct phases of construction. Installment payments may cause the Truth in Lend-
ing Act to apply. See chapter 12. Examples of both types of payment clauses appear in form 20-5.

### § 20.5 Additional Clauses

The mechanic’s lien contract, form 20-1 in this chapter, may include additional clauses concerning contract price. See form 20-5 for examples of these clauses.

If payment is based on costs, the attorney should include a carefully drafted definition of costs in the contract.

For transactions subject to chapter 345 of the Texas Finance Code, the “cost-plus” clauses (20-5-6 and 20-5-7) are not appro-
priate. See section 20.1:3 above.

If payment will be based on the cost of labor and material plus a fixed fee, not to exceed a certain amount, use clause 20-5-6. If payment will be based on the cost of labor and material plus a percentage of the cost, not to exceed a certain amount, use clause 20-5-7.
If the contractor’s profit is calculated by fixed fee or percentage and the parties do not wish to limit the total cost, the examples suggested in clauses 20-5-6 and 20-5-7 could be modified by omitting the sentence limiting total contract price. However, this practice is discouraged because a contract that does not limit total costs to a certain amount arguably may not create a valid lien against a homestead, because it might not satisfy the constitutional requirement for a complete precommencement contract that includes the price.

§ 20.6 Additional Documents

Chapter 12 in this manual contains documents that may be required for mechanic’s lien transactions in accordance with the Truth in Lending Act and its accompanying regulations. Chapter 12 also offers suggestions for completing those forms.

In mechanic’s lien transactions the owner and the contractor should either execute a detailed construction contract like form 18-4 in this manual, describing plans and specifications for the construction, or include those details in the mechanic’s lien contract. The American Institute of Architects’ standard form is also commonly used for this purpose if a separate contract is desired. Any separate contract used for this purpose should be incorporated by reference in the mechanic’s lien contract.

Other forms used to document the construction process and establish the parties’ rights may be found in chapter 18. Chapter 18 also offers suggestions for completing those forms.

If the mechanic’s lien is subordinate to a prior lien, the lender ordinarily requires as a condition of the loan that the holder of the prior lien sign a third-party estoppel agreement. An example of this agreement appears as form 10-10.

If a cosigner, guarantor, or the like is not the spouse of the loan applicant and will not benefit from the credit transaction, federal regulations require creditors to provide a specified notice for consumer credit transactions other than the purchase of real property. The notice, which must be given as a separate statement to each cosigner, guarantor, or the like, may be found at form 6-7.

The transaction described in section 20.2:2 above suggests the use of an affidavit of completion of construction and indemnity as part of the procedure. A model for this purpose is provided as form 20-3 in this chapter and is accompanied with a form for the owner’s affidavit of acceptance of the construction, form 20-4.

§ 20.7 Required Signatures

If the spouse of the owner of record of the homestead subject to the mechanic’s lien will not become liable on the underlying debt, the transaction must be structured accordingly. To avoid becoming liable on the debt, the spouse may execute only the lien instrument (mechanic’s lien contract or deed of trust), not the mechanic’s lien note.

If a homestead is the separate property of one spouse, both spouses must sign and acknowledge the mechanic’s lien contract to create a valid mechanic’s lien, but only the spouse liable on the debt need sign the note. In this case, a clause like clause 20-5-8 in this chapter should be added to the general provisions section of the mechanic’s lien contract.

Although creditors often prefer that both spouses sign the note, regulations accompanying the Equal Credit Opportunity Act generally prohibit creditors from requiring an applicant’s spouse to cosign or guarantee a note if the applicant is creditworthy. 12 C.F.R. § 202.7(d). Even if not liable on the debt secured by the lien on the property, a spouse may sign the instrument cre-
ating the lien if state law requires the signatures of both spouses; this compliance with state law does not violate the Equal Credit Opportunity Act.

A creditor may request a cosigner, guarantor, or the like on an extension of credit if the applicant does not meet the creditor’s creditworthiness standard for individual credit. However, the creditor may not specify that the applicant’s spouse be the cosigner or guarantor. Under some conditions creditors must provide cosigners a notice warning them of their liabilities. See section 6.5:2 and form 6-7.

§ 20.8 Foreclosure

Foreclosure of the voluntary contract lien granted in a mechanic’s lien contract is similar to foreclosure under a deed of trust. See chapter 14 in this manual for foreclosure instruments that may be adapted for use in foreclosing a mechanic’s lien.
Additional Resources


Mechanic’s Lien Contract

Basic Information

Date:

Owner:

Owner’s Mailing Address:

Contractor:

Contractor’s Mailing Address:

Trustee:

Trustee’s Mailing Address:

Property

Address:

Legal description:

Exceptions to Conveyance and Warranty:

Construction: [see clause 20-5-1 in this chapter]

Completion Date:
Consideration

Cash:

Note

Date:

Amount:

Maker:

Payee:

Maturity date:

[Terms of payment:]

For the Consideration, Contractor agrees to furnish the materials and labor and to complete the Construction on the Property on or before the Completion Date in a good and workmanlike manner according to the [residential construction contract between/plans and specifications agreed on by] Owner and Contractor, incorporated herein by reference.

To secure payment of the Note, Owner grants to Contractor a mechanic’s, artisan’s, and materialman’s lien on the Property and on all improvements and fixtures on the Property at any time.

To enforce the lien and to further secure payment of the Note, Owner conveys the Property to Trustee in trust. Owner warrants and agrees to defend the title to the Property subject to the Other Exceptions to Conveyance and Warranty. If Owner performs all the covenants and pays the Note according to its terms, this conveyance will have no further effect, and at Owner’s expense Contractor will execute a release of the liens created by this contract.
A. Owner’s Representations and Rights

Owner makes the following representations and has the following rights:

A.1. Owner owns the Property in fee simple, subject only to the Exceptions to Conveyance and Warranty.

A.2. If Owner and Contractor agree in writing to alter plans for the Construction, on completion of the Construction Owner will pay for all extra work done and material furnished as a result of the alterations, and that amount will be a part of the Consideration and the debt secured by this contract.

A.3. If Owner receives notice of or may become liable for a lien or claim for labor or materials furnished to Contractor and primarily chargeable to Contractor, Owner may retain from payments on the Note an amount sufficient to completely indemnify Owner against the lien or claim.

A.4. Notwithstanding anything to the contrary in this contract, during progress of the Construction, Owner may retain the amounts required by sections 53.101 and 53.081 of the Texas Property Code. Retainage will be withheld until the last business day of the third month after the month of final completion of the project, unless otherwise provided in the residential construction contract between the parties.

A.5. If a loss occurs before the Construction is completed and delivered to Owner, Owner may use any insurance proceeds to restore the destroyed or damaged property without affecting the lien created in this contract.

A.6. OWNER MAY FURNISH THE INSURANCE REQUIRED OF Owner by this con-
tract either through existing policies owned or controlled by Owner or through equivalent coverage from any insurance company authorized to trans-
act business in Texas.
B. Owner’s Obligations

[Include if applicable: In addition to the obligations of Owner in the residential construction contract,] Owner agrees to—

B.1. pay all taxes and assessments on the Property when due, not authorize a taxing entity to transfer its tax lien on the Property to anyone other than Contractor, and not request a deferral of the collection of taxes pursuant to section 33.06 of the Texas Tax Code;

B.2. preserve the lien’s priority as it is established in this contract;

B.3. if this is not a first lien, pay all prior lien notes that Owner is liable to pay and abide by all prior lien instruments;

B.4. if this contract is for improvements to the Property, keep the Property other than those improvements in good repair and condition during the Construction and keep all of the Property in good repair and condition after the Construction is completed;

B.5. if this contract is for new construction, keep the Property in good repair and condition after the Construction is completed;

B.6. except to the extent that Contractor is required to insure the Construction during its progress, maintain at Owner’s sole cost and expense, and in a form acceptable to Contractor or its transferees, insurance policies containing the following coverages issued by an insurance company or companies authorized to engage in the insurance business in Texas with a financial rating acceptable to Contractor or its transferees:

a. property insurance covering all improvements located on the Property in an amount equal to their full replacement cost or such lesser amount as Lender may agree, containing a standard mortgagee clause, provided that
the amounts of coverage comply with all coinsurance requirements of the policy;

b. flood insurance, if the Property is located in a flood hazard area; and

c. any other insurance coverages that may be reasonably required by Contractor or its transferees;

**B.7.** comply at all times with the requirements of the 80 percent coinsurance clause;

**B.8.** deliver the insurance policy to Contractor within ten days of the date of the contract and deliver renewals to Contractor at least fifteen days before expiration;

**B.9.** obey all laws, ordinances, and restrictive covenants applicable to the Property;

and

**B.10.** keep any buildings occupied as required by the insurance policy.

**C. Contractor’s Obligations**

In addition to Contractor’s obligations in the residential construction contract, Contractor agrees that—

Include the following if applicable.

**C.1.** Until the Construction is completed and delivered to Owner, Contractor will insure the Construction and all related materials against loss or damage from all perils included in “causes of loss—special” forms in an amount equal to the Consideration. The policy will be payable to the parties to this contract according to their respective interests. If Contractor does not provide this insurance, Contractor will bear any loss to the Construction and materials.
C.2. Contractor will neither make nor charge for any alterations in the Construction described in the plans and specifications unless Contractor and Owner agree otherwise in writing. Any alterations made without a written agreement will be considered performed under the original contract at no additional charge.

C.3. Contractor will pay all costs of the Construction, including labor, materials, and subcontractors, and will furnish Owner receipts for and releases from these costs.

C.4. If any other lien claims are filed, Contractor will pay for their removal or else provide a statutory bond.

D. Contractor’s Rights

In addition to Contractor’s rights in the residential construction contract, Contractor has the following rights:

D.1. Contractor may appoint in writing a substitute trustee, succeeding to all rights and responsibilities of Trustee.

D.2. After completion of the Construction, Contractor may apply any proceeds received under the insurance policy either to reduce the Note or to repair or replace damaged or destroyed improvements covered by the policy.

D.3. If Owner fails to perform any of Owner’s obligations other than providing insurance, Contractor may perform those obligations and be reimbursed by Owner on demand for any amounts so paid, including attorney’s fees, plus interest on those amounts from the dates of payment at the rate stated in the Note for matured, unpaid amounts. Any amounts to be reimbursed will be secured by this contract.
D.4. If Owner is required to furnish insurance and fails to do so, Contractor may procure it and add the premium advanced by Contractor to the amount due under the Note and may charge interest on the amount added from the time of its addition until it is paid, at a rate not exceeding the rate that the Note would produce over its full term if each scheduled payment were paid on the date due.

D.5. If Owner defaults in any payment on the Note or if this lien is foreclosed, Owner will reimburse Contractor for reasonable fees paid to an attorney who is not an employee of Contractor and court and other costs for collection of payments or foreclosure of the lien. The amount to be reimbursed will be secured by this contract.

D.6. If a default exists or Owner fails to perform any of Owner’s obligations and the default continues after Contractor gives Owner written notice of the default and a twenty-day period in which to cure the default (or longer if required by law or by written agreement), Contractor may—

a. declare the unpaid principal balance and earned interest on the Note immediately due;

b. request Trustee to foreclose this lien, in which case Contractor or Contractor’s agent will give notice of the foreclosure sale as provided by the Texas Property Code as then in effect; and

c. purchase the Property at any foreclosure sale by offering the highest bid and then have the bid credited on the Note.

Notice of default is deemed given when deposited with the United States Postal Service (certified mail, return receipt requested), addressed to Owner at Owner’s Mailing Address or to Owner’s last address as shown in the records of the holder of the debt.
E. **Trustee’s Duties**

If requested by Contractor to foreclose this lien, Trustee will—

*E.1.* either personally or by agent give notice of the foreclosure sale as required by the Texas Property Code as then in effect;

*E.2.* sell and convey all or part of the Property “AS IS” to the highest bidder for cash with a general warranty binding Owner, subject to the Prior Lien and to the Other Exceptions to Conveyance and Warranty and without representation or warranty, express or implied, by Trustee;

*E.3.* from proceeds of the sale, pay, in this order:
   a. expenses of foreclosure, including a reasonable commission to Trustee;
   b. to Contractor, the full amount of principal, interest, attorney’s fees, and other charges due and unpaid;
   c. any amounts required by law to be paid before payment to Owner; and
   d. to Owner, any balance; and

*E.4.* be indemnified by Contractor against all costs, expenses, and liabilities incurred by Trustee for acting in the execution or enforcement of the trust created by this contract, which includes all court and other costs, including attorney’s fees, incurred by Trustee in defense of any action or proceeding taken against Trustee in that capacity.

F. **General Provisions**

*F.1.* [If Contractor is terminated according to the residential construction contract due to Contractor’s default/If the Construction is not completed as agreed between Owner and Contractor], the amount of the Consideration subject to Contractor’s lien will be reduced by
the amount reasonably necessary to complete the Construction as agreed. If Contractor is not
the holder of the Note, the holder may complete the Construction, and the lien created in this
contract will inure to the benefit of the holder.

F.2. This contract is executed, acknowledged, and delivered before any labor has
been performed or any material has been delivered to the Property for the Construction. This
contract is entered into by all Owners with the consent of each Owner’s spouse, as evidenced
by the signatures below.

F.3. If any of the Property is sold under this contract, Owner will immediately sur-
render possession to the purchaser. If Owner does not, Owner will be a tenant at sufferance of
the purchaser, subject to an action for forcible detainer.

F.4. Recitals in any trustee’s deed conveying the Property will be presumed to be
true.

F.5. The lien created in this contract will remain superior to liens later created even
if the time of payment of all or part of the Note is extended or part of the Property is released.

F.6. If any portion of the Note cannot be lawfully secured by this contract, payments
will be applied first to discharge that portion.

F.7. Owner assigns to Contractor all amounts payable to or received by Owner from
condemnation of all or part of the Property, from private sale in lieu of condemnation, and
from damages caused by public works or construction on or near the Property. After deduct-
ing any expenses incurred, including attorney’s fees and court and other costs, Contractor will
either release any remaining amounts to Owner or apply them to reduce the Note. Owner will
immediately give Contractor notice of any actual or threatened proceedings for condemnation
of all or part of the Property.
F.8. Proceeding under this contract, filing suit for foreclosure, or pursuing any other remedy will not constitute an election of remedies.

F.9. Interest on the debt secured by this contract will not exceed the maximum rate or amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be automatically credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the debt.

F.10. When the context requires, singular nouns and pronouns include the plural.

F.11. The term Note includes all amounts secured by this contract.

F.12. Contractor includes Contractor’s assignees or transferees. This contract binds, benefits, and may be enforced by the successors in interest of all parties.

F.13. If Owner and Maker are not the same person, the term Owner includes Maker.

If additional clauses like those suggested in form 20-5 are used, they should appear here as numbered paragraphs following paragraph F.13.

Include the following if the contract calls for renovation or repair of existing homestead improvements. See section 20.1:1 in this chapter.

G. Repair or Renovation Construction

If the work of this contract includes repair or renovation of existing improvements, the following provisions apply. Contractor and Owner certify and represent that they are aware of and have complied with the following legal rights and obligations:
G.1. Rescission. Owner may rescind this contract (and any other proposals, contracts, or agreements with Contractor regarding the repair or renovation of existing improvements) without penalty or charge within three days after the execution of the contract by all parties. See the “Notice of Cancellation” below.

G.2. Place of Signing Contract. Owner acknowledges that this contract was signed at one of the following offices and not elsewhere: (a) the office of a third-party lender making an extension of credit for the work and material to be furnished; (b) the office of an attorney at law; or (c) the office of a title company.

G.3. Five-Day Waiting Period. This mechanic’s lien contract and any other contract signed in connection with the repair and renovation work mentioned in this contract have not been executed by Owner or Owner’s spouse before the fifth day after Owner made written application for an extension of credit for the work and material contemplated.

Include the following if applicable. This notice, if required, must appear in a minimum of ten-point bold-faced type.

16 C.F.R. § 433.2.

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Continue with the following.

The following notice is required by Tex. Prop. Code § 41.007. This notice must appear in a minimum of ten-point bold-faced type or equivalent “next to” the owner’s signature line. Tex. Prop. Code § 41.007(a).
IMPORTANT NOTICE: YOU AND YOUR CONTRACTOR ARE RESPONSIBLE FOR MEETING THE TERMS AND CONDITIONS OF THIS CONTRACT. IF YOU SIGN THIS CONTRACT AND YOU FAIL TO MEET THE TERMS AND CONDITIONS OF THIS CONTRACT, YOU MAY LOSE YOUR LEGAL OWNERSHIP RIGHTS IN YOUR HOME. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.

The following notice is required by Tex. Prop. Code § 27.007.

RESIDENTIAL CONSTRUCTION LIABILITY ACT (RCLA) NOTICE

This contract is subject to Chapter 27 of the Texas Property Code. The provisions of that chapter may affect your right to recover damages arising from the performance of this contract. If you have a complaint concerning a construction defect arising from the performance of this contract and that defect has not been corrected through normal warranty service, you must provide the notice required by Chapter 27 of the Texas Property Code to the contractor by certified mail, return receipt requested, not later than the 60th day before the date you file suit to recover damages in a court of law or initiate arbitration. The notice must refer to Chapter 27 of the Texas Property Code and must describe the construction defect. If requested by the contractor, you must provide the contractor an opportunity to inspect and cure the defect as provided by Section 27.004 of the Texas Property Code.

__________________________________________________________

[Name of owner]

Include the following if applicable.

YOU, THE OWNER, MAY CANCEL THIS TRANSACTION AT ANY TIME BEFORE MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.
Notice of Cancellation

[Date]

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TEN BUSINESS DAYS FOLLOWING RECEIPT BY THE MERCHANT OF YOUR
CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.

IF YOU CANCEL YOU MUST MAKE AVAILABLE TO THE MERCHANT AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE MERCHANT REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE MERCHANT’S EXPENSE AND RISK.

IF YOU DO NOT AGREE TO RETURN THE GOODS TO THE MERCHANT OR IF THE MERCHANT DOES NOT PICK THEM UP WITHIN TWENTY DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [name of merchant], AT [address of merchant’s place of business] NOT LATER THAN MIDNIGHT OF [date].

I HEREBY CANCEL THIS TRANSACTION.

Dated: ______________________________.

[Name of purchaser]

Include any attachments.
Mechanic’s Lien Note

Basic Information

Date:

Maker:

Maker’s Mailing Address:

Payee:

Payee’s Mailing Address:

Place for Payment:

Principal Amount:

Annual Interest Rate on Unpaid Principal from Date of Funding:

Annual Interest Rate on Matured, Unpaid Amounts:

Terms of Payment (principal and interest): [insert applicable clause from form 20-5 in this chapter]

Security for Payment

Liens created in mechanic’s lien contract between Maker and Payee

Date:

Trustee:

Contractor:
Property: [include legal description]

Deed of trust renewing liens

Date:

Grantor:

Beneficiary:

Trustee:

This note incorporates and is subject to the mechanic’s lien contract.

**Promise to Pay**

Maker promises to pay to the order of Payee the Principal Amount plus interest at the Annual Interest Rate. This note is payable at the Place for Payment and according to the Terms of Payment. All unpaid amounts are due by the final scheduled payment date. If any amount is not paid either when due under the Terms of Payment or on acceleration of maturity, Maker promises to pay the unpaid amount plus interest from the date the payment was due to the date of payment at the Annual Interest Rate on Matured, Unpaid Amounts.

**Default and Remedies**

If Maker defaults in the payment of this note or in the performance of any obligation in any instrument securing or collateral to this note, Payee may declare the unpaid principal balance and earned interest on the note immediately due. Maker and each surety, endorser, and guarantor waive all demand for payment, presentation for payment, notice of intention to
accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

**Prepayment**

Maker may at any time make full or partial prepayments on the principal without paying any penalty, in addition to making regularly scheduled payments. Unless Payee agrees otherwise in writing, the making of partial prepayments will not alter the dates or amounts of regularly scheduled payments. Payee may require that any partial prepayments be in the same amount as regularly scheduled payments.

**Attorney’s Fees**

If any party retains an attorney to enforce this note, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and other costs.

**Usury Savings**

Interest on the debt evidenced by this note will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited to the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the debt.

**Other Clauses**

Each Maker is responsible for all obligations represented by this note.

When the context requires, singular nouns and pronouns include the plural.
NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Continue with the following.

[Name of maker]
Form 20-3

Affidavit of Completion and Indemnity

Basic Information

Date:

Mechanic’s Lien Contract

Date:

Owner:

Contractor:

Trustee:

Property (including improvements): [include legal description]

Completion Date: [date]

Affiant:

Third-Party Lender:

Title Insurance Providers:

Affidavit of Completion

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. Contractor is a [Texas corporation/Texas general partnership/Texas limited partnership/sole proprietorship/[specify other entity]].
2. Affiant is [the president/an authorized partner/a general partner/the sole proprietor/[describe other representative capacity]] of Contractor and is authorized to make this affidavit on behalf of Contractor.

3. The construction required by the Mechanic’s Lien Contract has been completed in accordance with the requirements of the Mechanic’s Lien Contract [include if applicable: and the residential construction contract between Owner and Contractor referred to in the Mechanic’s Lien Contract].

4. Contractor has paid each of Contractor’s subcontractors, laborers, and material-men in full for all labor and materials provided to Contractor for the construction of improvements on the Property, excepting only the amounts owed to the persons identified below:

   List all subcontractors, laborers, and materialmen and amounts owed to each. If there are no unpaid subcontractors, laborers, or materialmen, state "None."

   Name: 

   Address: 

   Telephone number: 

   Amount owed: 

   Repeat above information as needed.

5. This affidavit is made to induce Owner to accept the construction as completed, to induce Third-Party Lender to fund a loan to Owner to pay Contractor all or part of the consideration in the Mechanic’s Lien Contract, and to induce Title Insurance Providers to issue mortgagee [include if applicable: and owner] title insurance [policy/policies] without mechanic’s lien exceptions.
Affidavit of Completion and Indemnity

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on ______________ by [name of affiant].

Notary Public, State of Texas

Indemnity

For valuable consideration, including Owner’s acceptance of the construction as completed, Third-Party Lender’s funding of Owner’s loan to pay Contractor all or part of the consideration in the Mechanic’s Lien Contract, and Title Insurance Providers’s issuing of title insurance [policy/policies], Contractor warrants to those parties the truth of this affidavit of completion and agrees to indemnify, defend, and hold Owner, Third-Party Lender, and Title Insurance Providers harmless from all losses, damages, judgments, and expenses, including attorney’s fees and court and other costs, that any or all of them suffer, incur, or pay because any part of this affidavit of completion is not true or completely correct.

[Name of contractor]
Affidavit of Acceptance

Basic Information

Date:

Mechanic’s Lien Contract

Date:

Owner:

Contractor:

Trustee:

Property (including improvements): [include legal description]

Third-Party Lender:

Owner on oath swears that the following statements are true and are within the personal knowledge of Owner:

1. Relying on facts now known to Owner and on Contractor’s affidavit of completion and indemnity, Owner has accepted the construction required by the Mechanic’s Lien Contract as complete.

2. This affidavit is made to induce Third-Party Lender to fund a loan to Owner to pay Contractor all or part of the consideration in the Mechanic’s Lien Contract.

3. This affidavit is solely for the benefit of Third-Party Lender, and it does not waive or release any of Owner’s rights or remedies against Contractor.
Affidavit of Acceptance

[Name of owner]

SUBSCRIBED AND SWORN TO before me on _________________ by [name of affiant].

Notary Public, State of Texas
Additional Clauses for Contractual Mechanic’s Liens

Construction Clause for Mechanic’s Lien Contract

Clause 20-5-1

Project as described in [residential construction contract between/plans and specifications agreed on by] Owner and Contractor.

Force Majeure

Clause 20-5-2

Time is of the essence in the completion and delivery of the Construction. If the Construction is delayed by matters that are beyond the reasonable control of Contractor and that Contractor is unable to prevent or overcome by the exercise of reasonable diligence, the Completion Date will be extended one day for each day the Construction is so delayed, up to a maximum of thirty additional days, provided Contractor notifies Owner of the delay in writing within seven days after its occurrence.

Alternative Payment Terms for Mechanic’s Lien Note

Clause 20-5-3

This note, less the retainage required by statute, is payable on completion of the construction as provided in the mechanic’s lien contract of even date. Completion of construction is determined by [specify]. The retainage, plus interest, is payable as follows: [Contractor must first provide Owner with
a written list of all subcontractors and suppliers of any tier who have furnished labor, material, equipment, or other improvements for the Project, including each subcontractor and supplier’s name, address, and telephone number, updated and verified by Contractor as accurate as of the date of final completion of the Project, as a condition precedent to Owner action under this section. On receipt of the list, Owner will prepare, file, and send an affidavit of completion within ten days of the date of final completion of the Project. Retainage will then be released to Contractor the fiftieth day after the date of final completion as stated in the affidavit, provided no unreleased mechanic’s liens have been filed by that time.

Clause 20-5-4

This note is payable in the following installments during progress of the construction as provided in the mechanic’s lien contract [include if applicable: and residential construction contract] of even date:

1. $[amount], less retainage required by statute, on completion of foundation, slab, and preliminary rough plumbing;

2. $[amount], less retainage required by statute, on completion of rough framing;

3. $[amount], less retainage required by statute, on completion of roof and remainder of rough plumbing;

4. $[amount], less retainage required by statute, on completion and acceptance of all construction; and
5. retainage required by statute, which will be paid as follows: [Contractor must first provide Owner with a written list of all subcontractors and suppliers of any tier who have furnished labor, material, equipment, or other improvements for the Project, including each subcontractor and supplier’s name, address, and telephone number, updated and verified by Contractor as accurate as of the date of final completion of the Project, as a condition precedent to Owner action under this section. On receipt of the list, Owner will prepare, file, and send an affidavit of completion within ten days of the date of final completion of the Project. Retainage will then be released to Contractor the fiftieth day after the date of final completion as stated in the affidavit, provided no unreleased mechanic’s liens have been filed by that time/On the last business day of the third month after the month of final completion and acceptance of the construction].

Or

Clause 20-5-5

This note is payable in the following installments during progress of the construction as provided in the mechanic’s lien contract [include if applicable: and residential construction contract] of even date:

1. $[amount] on [date];

2. $[amount] on [date];

3. at the end of each two-week period after [date], an amount equal to 50 percent of the cost of all labor provided and material in place on the Property at that time, as estimated by [Contractor/the architect], and not already paid for by Owner, until the total amount paid is $[amount];
4. the balance, plus interest, less retainage required by statute, on or before [date], or on completion of the construction, whichever is later; and

5. retainage required by statute, which will be paid as follows: [Contractor must first provide Owner with a written list of all subcontractors and suppliers of any tier who have furnished labor, material, equipment, or other improvements for the Project, including each subcontractor and supplier’s name, address, and telephone number, updated and verified by Contractor as accurate as of the date of final completion of the Project, as a condition precedent to Owner action under this section. On receipt of the list, Owner will prepare, file, and send an affidavit of completion within ten days of the date of final completion of the Project. Retainage will then be released to Contractor the fiftieth day after the date of final completion as stated in the affidavit, provided no unreleased mechanic’s liens have been filed by that time/On the last business day of the third month after the month of final completion and acceptance of the construction].

Cost Plus Fixed Fee, Not to Exceed a Certain Amount

Clause 20-5-6

This clause may be placed under “Terms of Payment” or at the end of the mechanic’s lien contract before the notices.

Owner will pay Contractor the actual cost of all labor and materials furnished by Contractor and used in the Construction, plus a fixed fee of $[amount]. The total contract price, however, will not exceed $[amount not to exceed that of the mechanic’s lien note]. Contractor will keep an accurate record of the labor and material costs, including all original invoices and receipted bills, and on request will give Owner an accurate, documented accounting of these costs.
Cost Plus Percentage, Not to Exceed a Certain Amount

**Clause 20-5-7**

This clause may be placed under “Terms of Payment” or at the end of the mechanic’s lien contract before the notices.

Owner will pay Contractor the actual cost of all labor and materials furnished by Contractor and used in the Construction, plus [percent] percent of the actual cost of all labor and materials furnished by Contractor and used in the Construction. The total contract price, however, will not exceed $[amount not to exceed that of the mechanic's lien note]. Contractor will keep an accurate record of the labor and material costs, including all original invoices and receipted bills, and on request will give Owner an accurate, documented accounting of these costs.

**Liability Disclaimer**

**Clause 20-5-8**

If one spouse will not be liable on the debt, the following clause should be inserted in the mechanic’s lien contract before the signature lines.

[Name of spouse not liable on the debt] is signing this instrument solely to create a lien on the property, and [he/she] is not personally liable on the debt.

**Clause for Use with Subordinate/Second Lien Mechanic’s Lien Contract**

Insert in mechanic’s lien contract, form 20-1, section F.

**Clause 20-5-9**

Owner may furnish any insurance required by this mechanic’s lien contract either through existing policies owned or controlled.
BY OWNER OR THROUGH EQUIVALENT COVERAGE FROM ANY INSURANCE COMPANY AUTHORIZED TO TRANSACT BUSINESS IN TEXAS.

Clause 20-5-10

The lien created by this mechanic’s lien contract will be subordinate to the lien securing payment of the note, and any renewals, extensions, and modifications thereof, in the original principal amount of [amount] DOLLARS ($[amount]), dated [date], executed by [name], payable to the order of [name], and more fully described in a deed of trust recorded in [recording data] of the real property records of [county] County, Texas. If default occurs in payment of any part of principal or interest of that $[amount] note or in observance of any covenants of the deed of trust securing it, the entire debt secured by this mechanic’s lien contract will immediately become payable at the option of Contractor or its transferees.

Clause 20-5-11

If Owner fails to pay any part of principal or interest secured by a prior lien or liens on the Property when it becomes payable or defaults on any prior lien instrument, the entire debt secured by this mechanic’s lien contract will immediately become payable at the option of Contractor or its transferees.
New Home Closing Certificate

Basic Information

Owner[s]:

Contractor:

Closing Date:

Credit Account:

Credit Amount:

Property: [address]

1. [I am/We are] the only Owner[s] of the Property.

2. [I/We] have received all of the documents related to the closing of the loan for the new home construction by Contractor on the Property at least one business day before the Closing Date.

3. [I/We] received the residential construction contract disclosure statement at least one business day before the Closing Date.

4. As of this date, none of the improvements contracted for by Owner[s] are located on the Property and no construction has commenced, nor have any materials or supplies been delivered to the Property to be used in the construction of the improvements by Owner[s].
5. [I am/We are] signing this certificate at the same time as [I am/we are] signing the mechanic’s lien contract and mechanic’s lien note and documents related to construction of the new home by Contractor on the Property.

___________________________________________________________
Owner

Repeat signature line as needed.
Form 20-7

Home Improvement Closing Certificate

Basic Information

Owner[s]:

Contractor:

Closing Date:

Property: [address]

1. [I am/We are] the only Owner[s] of the Property.

2. [I/We] have made written application for an extension of credit for construction of improvements to the Property. The amount of the loan is intended to be used for the purpose indicated in the mechanic’s lien contract of even date between [me/us] and Contractor.

3. [I/We] have not executed any contract for work or materials with the Contractor before the fifth day after the above-mentioned application for an extension of credit or before today’s closing.

The closing must occur at the office of the lender, an attorney at law, or a title company.

4. This transaction is being closed at the following office: [name and address].

5. At closing, [I/we] received two copies of the notice of right to cancel. [I/We] understand that [I/we] can cancel or rescind this contract and any other contract for the contemplated construction at any time within three days after the signing of the contract by all parties, without penalty or charge of any kind whatever.
6. [I/We] received the residential construction contract disclosure statement at least one business day before the Closing Date.

7. [I/We] have received all of the documents related to the closing of the loan for the construction of improvements by Contractor on the Property at least one business day before the Closing Date.

8. As of this date, none of the improvements to be constructed are now located on the Property and no construction has commenced, nor have any materials or supplies been delivered to the Property to be used in the construction of the improvements to the Property.

9. [I am/We are] signing this certificate at the same time as [I am/we are] signing the mechanic’s lien contract and mechanic’s lien note and documents related to construction of the improvements by Contractor on the Property.

Owner

Repeat signature line as needed.
Election Regarding Right of Rescission

Basic Information

Date:

Borrower:

[Borrower’s Spouse:]  

Borrower’s Mailing Address:

[Borrower’s Spouse’s Mailing Address:]  

Contractor:

Contractor’s Mailing Address:

Mechanic’s Lien Contract

Date:

Amount:

Property: [address]

In accordance with section 50(a)(5)(C), article XVI, of the Texas Constitution, Borrower [and Borrower’s Spouse] provide[s] Contractor with the following notice regarding the Mechanic’s Lien Contract and any other related contract between Borrower and Contractor for improvements to the Property:
☐ I have elected not to rescind the Mechanic’s Lien Contract (or any other related contract with the Contractor for improvements to the Property). I acknowledge that more than three days have expired from the date that the Mechanic’s Lien Contract (and any other related contract with the Contractor for improvements to the Property) was signed by all the parties.

☐ I have elected to rescind the Mechanic’s Lien Contract (and all related contracts with the Contractor for improvements to the Property). This notice is given within three days from the date that the Mechanic’s Lien Contract (and related contracts with the Contractor for improvements to the Property) was made.

________________________________________
[Name of borrower]

Include the following if applicable.

________________________________________
[Name of borrower’s spouse]
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Chapter 21

Involuntary Mechanic’s Lien Documents

§ 21.1 Texas Constitutional Lien

§ 21.1:1 Generally

This chapter discusses primarily statutory mechanic’s liens and provides related forms based on Tex. Prop. Code ch. 53. The Texas Constitution provides a separate constitutional lien in addition to the statutory mechanic’s lien provided in the Texas Property Code. Tex. Const. art. XVI, § 37.

The constitutional lien requires no special notice to owners. It is considered self-enacting and arises solely from the claimant’s performance of the work. Two important features of constitutional liens should be noted: first, they arise only in favor of “original contractors” (persons with contracts directly with the owner of the property interest improved), and second, bona fide purchasers or lienholders without notice of the constitutional lien claim do not take subject to it.

Even though the constitutional lien is considered self-enacting, as a practical matter the claimant must take some action to put the world on notice of the lien claim before an intervening sale or other encumbrance of the property. Such notice might be given either by filing an affidavit claiming the lien in the real property records in the county in which the property is located or by filing suit and lis pendens notice. See Tex. Prop. Code § 12.007.

The forms presented in this chapter are for documenting statutory rather than constitutional lien claims. Form 21-4, however, could be adapted for use in filing notice of a constitutional claim. For the constitutional lien affidavit, a phrase may be included in paragraph 8. of the form specifically referring to the constitutional lien, Tex. Const. art. XVI, § 37. Paragraph 6. can also be changed to reflect the fact that the claimant is the original contractor (for example, “Claimant is also the original contractor on the above-referenced project”). No special form of notice is required; the claimant is merely placing constructive notice of the constitutional lien claim in the real property records by filing the affidavit. Of course, as a practical matter, the claimant should send a copy of the filed affidavit or lis pendens to the owner.

§ 21.1:2 Homestead Considerations

Necessity for Written Contract to Improve Homestead: No involuntary mechanic’s lien may attach to homestead property unless the homestead owner and the contractor sign a qualifying written contract for the improvements. This requirement applies to both constitutional and statutory mechanic’s liens. The qualifying written contract for the improvements must satisfy certain constitutional and statutory requirements. Tex. Const. art. XVI, § 50(a)(5); Tex. Prop. Code §§ 41.001, 53.254; Cavazos v. Munoz, 305 B.R. 661 (S.D. Tex. 2004). The required elements of a qualifying contract to improve the homestead are discussed in section 20.1:2 in this manual.

While the underlying written contract for the improvements is a prerequisite to the existence of an involuntary mechanic’s lien against the homestead, it is not the source of the lien. Rather, the lien arises from the performance of work by the claimant and (in the case of a statutory lien) the satisfaction of certain requirements necessary to perfect the lien.
Subcontractors do not have to sign the written contract to improve the homestead. Its lien qualifying effects vicariously inure to the benefit of all subcontractors and materialmen who furnish labor or materials through the original contractor. Tex. Prop. Code § 53.254(d).

**Required Admonitions for Statutory Mechanic's Liens against Homestead:** As a general rule, a statutory mechanic’s lien against the homestead may be perfected in the same manner prescribed for all such liens. However, in addition to the general requirements of chapter 53 of the Property Code, there are special admonitions required to be given by the lien claimant to the homestead owner that are unique to involuntary mechanic’s liens against the homestead. For a discussion of these special admonitions refer to section 21.5:1 below.

### § 21.2 General Considerations for Statutory Liens

Texas courts consistently have followed two interpretive principles in evaluating the validity of involuntary mechanic’s lien claims. First, the mechanic’s lien statutes are to be liberally interpreted for the purposes intended, to provide lien claimants security for their labor and materials furnished on construction of improvements on real property. *First National Bank v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974). Second, however, the time deadlines for sending required notices and filing the mechanic’s lien affidavit are critical. Missing the notice deadline or mechanic’s lien filing deadline is fatal to the mechanic’s lien in almost every instance. See *First National Bank v. Sledge*, 653 S.W.2d 283 (Tex. 1983).

**Residential Construction:** If a construction project is on residential property, the claimant must comply with the provisions of Tex. Prop. Code ch. 53, subch. K, in addition to the other statutory requirements. The portions of subchapter K that relate to involuntary liens are discussed or cited in the following sections of these practice notes. Residential projects are defined for purposes of the mechanic’s lien statute as construction or repair of a single-family house, duplex, triplex, quadruplex, or unit in a multi-unit structure used for residential purposes that is owned by one or more adult persons and is used or intended to be used as a dwelling by one or more of its owners. Tex. Prop. Code § 53.001(8), (9), (10).

### § 21.3 Construction Project Participants

To understand the rights and time deadlines for notice according to the statute, the attorney must first understand how the claimant fits into the chain of parties on the project: owner, original contractor, subcontractor, and supplier. Notice requirements fall into three basic categories based on the definitions of participants on a construction project.

#### § 21.3:1 Original Contractor

An original contractor is a person or entity contracting with the owner of the interest in the real estate being improved—either directly or through an agent for the owner. An original contractor creates a statutory lien against the property by filing a lien affidavit with the county clerk of the county in which the property is located and sending a copy of the affidavit to the owner of the property. Original contractors have no notice requirements other than sending a copy of the affidavit claiming the mechanic’s lien to the owner. See Tex. Prop. Code § 53.052. As discussed in section 21.1 above, original contractors also have a constitutional lien.
§ 21.3:2  First-Tier Subcontractors and Suppliers

First-tier subcontractors or suppliers have a subcontract, purchase order, or other agreement directly with the original contractor. In addition to filing a lien affidavit, they must provide notice of unpaid claims to the owner to create mechanic's lien rights. This notice authorizes the owner to withhold payment from the contractor to pay the claims. A copy of the notice of unpaid claims must be sent by certified mail to the original contractor. Tex. Prop. Code §§ 53.056, 53.081, 53.252. This statutory procedure is referred to as the trapping of funds.

§ 21.3:3  Second-Tier and Lower-Tier Subcontractors and Suppliers

Second-tier and lower-tier subcontractors or suppliers have subcontracts or agreements with a first-tier, second-tier, or lower-tier subcontractor. In other words, they have no contract with the original contractor. Therefore, they are required to give notice to the original contractor in addition to sending the same notice described in section 21.3:2 above to the owner as a prerequisite to perfecting a valid mechanic’s lien. Tex. Prop. Code §§ 53.056(b), 53.252(b).

Although the notice requirements differ, the mechanic’s lien rights to trapped funds and retainage are the same for second-tier and lower-tier subcontractors as for first-tier subcontractors and suppliers. In this chapter all second- and lower-tier subcontractor and supplier claimants will be referred to as “second-tier” claimants.

§ 21.4  Owner Liability for Mechanic’s Lien Claims

§ 21.4:1  Original Contractors

Owners are liable for the amount of the mechanic’s lien perfected by original contractors. Disputes may exist about the underlying merits of claims for the amount of indebtedness owed to the original contractor. However, owners are liable to pay the face amount of original contractor perfected mechanic’s lien claims, if the amount is owed.

§ 21.4:2  Derivative Claimants: First- and Second-Tier Claims, Statutory Retainage, and Fund Trapping

The owner’s liability to both first- and second-tier subcontractor or supplier lien claimants is the sum of two amounts described in Tex. Prop. Code § 53.084. First, an owner is liable for the mandatory 10 percent statutory retainage that owners are required to withhold from the original contractor on every nonbonded construction job. Tex. Prop. Code §§ 53.101–.103; Page v. Structural Wood Components, 102 S.W.3d 720, 722 (Tex. 2003). In addition, an owner is liable for “fund trapping,” which means “trapping” or withholding remaining contract funds otherwise owed to the original contractor once the owner receives a mechanic’s lien notice letter (Tex. Prop. Code § 53.056(b), (d)) containing language telling the owner to withhold payment from the contractor for the claim amount. If an owner receives a lien notice letter containing the required fund-trap warning but fails to withhold payment from the contractor, the owner is personally liable and his property subject to a lien for such amounts paid out in spite of receipt of such notice. This fund trapping liability is in addition to the owner’s liability for the 10 percent statutory retainage.

Aiken v. State, 36 S.W.3d 131 (Tex. App.—Austin 2000, no pet.), provides a good example of owner liability for fund trapping and retainage. Aiken involved criminal prosecution of a contractor on a residential construction project. The contractor was accused of taking a bank loan advance for the construction and misapplying the funds by not using them to pay project bills due on the job. This is ordinarily a violation of chapter 162 of the Texas Property Code (the Texas Construction Trust Funds...
Act). However, in this case, the prosecution chose to pursue a conviction under Texas Penal Code section 32.45, misapplication of fiduciary property. One of the elements of this offense is to prove that the defendant dealt with property of the victim in a manner that involves substantial risk of loss to the owners. In this case, because the owners had withheld 10 percent retainage, the court determined that the owners suffered no substantial risk of loss. Their liability was limited to the 10 percent retainage since no funds had been trapped by lien claimants, as described above. The case provides a good example of how owner liability is calculated.

To summarize, owners have to withhold or “trap” funds they otherwise owe the contractor on receipt of a proper lien notice letter. In addition, owners must withhold 10 percent retainage from the original contractor throughout the duration of the project. If owners fail to trap funds or retain the 10 percent retainage throughout the course of the job, they are nevertheless liable for such amounts they should have withheld.

§ 21.5 Instructions for Completing Forms

§ 21.5:1 Affidavit Claiming Lien

Original contractors and first- and second-tier subcontractors and suppliers create a statutory mechanic’s lien against property by filing a lien affidavit with the county clerk of the county in which the property is located and sending a copy of the affidavit to the owner of the property.

It is best to have the affidavit claiming mechanic’s and materialman’s lien, form 21-4 in this chapter, executed by a claimant with knowledge of the amount due on the account, the work performed, and the particular project involved. The mechanic’s lien affidavit is invalid unless it contains a jurat. Sugarland Business Center, Ltd. v. Norman, 624 S.W.2d 639, 641 (Tex. App.—Houston [14th Dist.] 1981, no writ).

Paragraph 4. of form 21-4 must state the type of labor performed and materials furnished.

The legal description of the property, sufficient to distinguish it from other tracts in the area, is required in paragraph 7. of form 21-4. The lien applies to the original tract at the time construction commenced. Subsequent conveyances of parts of the property, even if conveyed before the filing of the lien affidavit, are still subject to the lien. See Valdez v. Diamond Shamrock Refining & Marketing Co., 842 S.W.2d 273 (Tex. 1992).

The notice at the top of form 21-4 states “NOTICE: THIS IS NOT A LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING A LIEN.” This notice is required to assert a mechanic’s lien against homestead property and must appear at the top of the page in a minimum of ten-point bold-faced type or equivalent. Tex. Prop. Code § 53.254(f).

Also, for first- and second-tier claimants (other than original contractors), the lien affidavit must contain a statement as to each month in which material was delivered or work performed (paragraph 4.) and a description of the date and method of giving required notice to the owner (paragraph 10.). Tex. Prop. Code § 53.054(a)(3), (8).

A copy of the lien affidavit must be sent to the original contractor and the owner within five days of filing the affidavit. Tex. Prop. Code § 53.055. Form 21-5 is a cover letter for this purpose. Failure to send the lien affidavit within the time prescribed has been held fatal to the validity of the lien. Cabintree, Inc. v. Schneider, 728 S.W.2d 395 (Tex. App.—Houston [1st Dist.] 1986, writ ref’d); but see Arias v. Brookstone, L.P., 265 S.W.3d 459 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (declining to follow dicta from Cabintree that notice must be given after the lien affidavit has been filed).
§ 21.5:2 Notice to Original Contractor by Second-Tier Claimant

Form 21-1 in this chapter must be sent by certified mail to the original contractor and is self-explanatory. Copies of statements or billings should be attached.

§ 21.5:3 Notice of Unpaid Claim to Owner and Original Contractor

All derivative claimants, first-tier and second-tier, must send a written notice of unpaid claim to the owner and original contractor. Form 21-2 in this chapter is meant to satisfy this notice requirement. It contains language prescribed by Tex. Prop. Code §§ 53.056(d), 53.252(c), advising the owner that a failure to withhold payment from the contractor may result in the owner becoming personally liable and the property subjected to a lien. This language is required to trap funds on the project pursuant to Tex. Prop. Code § 53.081(b).

Form 21-2 includes a reference to the Texas Construction Trust Fund Act, Tex. Prop. Code §§ 162.001–.033. This statute states that all recipients of payment under a construction contract in Texas (including an owner who receives construction loan funds secured by a deed of trust on real property and the contractor who receives a construction draw) become trustees of the funds and must see to it that the funds received are used to pay actual expenses directly related to the job. Tex. Prop. Code §§ 162.002, 162.031(b). Diversion of funds to other jobs or expenses not directly related to the project on which the funds were received is a violation of the statute and, in some circumstances, is a crime. Tex. Prop. Code §§ 162.031(a), 162.032.

§ 21.5:4 Notice of Unpaid Claim—Homestead Property

Form 21-3 in this chapter is a statutory disclosure and warning that must be included verbatim in any notice of unpaid claim given on homestead property against which a contractor, subcontractor, supplier, or other claimant wishes to assert a mechanic’s lien. Tex. Prop. Code § 53.254(g).

§ 21.5:5 Special Notices

Specially Fabricated Materials: The notice regarding specially fabricated materials, form 21-6 in this chapter, is to be sent by the fifteenth day of the second month after the claimant receives and accepts an order for a specially fabricated material. Tex. Prop. Code §§ 53.058, 53.253.

This notice must be sent by certified mail, return receipt requested, to the owner or reputed owner and also to the original contractor, unless the claimant’s subcontract is with the original contractor. Tex. Prop. Code §§ 53.058(b), (d), 53.253(c), (e).

Sending this notice allows the claimant to later perfect a mechanic’s lien by filing an affidavit at the applicable time, even if the claimant has not yet delivered the specially fabricated materials. Tex. Prop. Code §§ 53.058, 53.253. Taking advantage of this procedure has the potential of allowing the lien claimant to retain specially fabricated materials while still asserting a mechanic’s lien claim.

Different or additional notices may be required if the specially fabricated materials have (or should have) already been delivered. See Tex. Prop. Code §§ 53.058(e), 53.253(b).

Contractual Retainage: Contractual retainage is the right expressed in a subcontract or other agreement to withhold, from progress payments otherwise due, a percentage of money due a first- or second-tier claimant pending completion of the work,
final payment released on the project, or other later date. Retainage provisions in Texas Property Code chapter 53 were amended by the 2011 legislature. For projects on which the original contract was executed before September 1, 2011, form 21-7, notice of agreement providing for retainage, must be sent by the claimant by registered or certified mail to the last known business or residence address of the owner, reputed owner, or original contractor to later perfect a lien claim for retainage on the project, if the claimant has entered into an agreement that provides for retainage. Tex. Prop. Code § 53.057. Form 21-8 is the notice of retainage agreement applicable to projects for which the original contract was executed on or after September 1, 2011. Tex. Prop. Code § 53.057(c). Form 21-8 need not be sent by registered or certified mail.

§ 21.5:6 Requests for Information

Tex. Prop. Code § 53.159 provides that the various participants in the construction project (owner, contractor, subcontractor, and supplier) may request information of each other. Forms 21-9 through 21-12 in this chapter are letters that indicate the information that may be requested. Failure to provide information requested in accordance with the statute triggers liability for the reasonable and necessary costs of obtaining the information elsewhere. Tex. Prop. Code § 53.159(f). Also, a subcontractor who does not timely receive the notice of the date of execution of the original contract for the project is not required to file a mechanic’s lien by the early retainage deadlines, but instead may file by the later dates specified by Tex. Prop. Code § 53.052. See the discussion in section 21.8:2 below.

§ 21.5:7 Release Required of Claimant

Once a claim is paid or otherwise satisfied, a mechanic’s lien claimant must furnish a release in recordable form to the person paying the claim. The release of mechanic’s and materialman’s lien, form 21-13 in this chapter, must be furnished by the claimant within ten days of receipt of a written request. See Tex. Prop. Code § 53.152.

If the claim is only partially paid, a partial release of lien, form 21-14, may be used to preserve the lien securing the balance owed.

§ 21.6 Time Limits for Contractual Retainage Claims

A first- or second-tier claimant has two alternative methods for sending lien notices covering the claimant’s contractual retainage claim. The claimant may send the notices, which are due each month, by the deadlines provided by Texas Property Code sections 53.056 or 53.252. (See section 21.7 below.) Alternatively, the claimant may send a simplified, one-time notice for contractual retainage agreement, given according to Tex. Prop. Code § 53.057. See forms 21-7 and 21-8 in this chapter. The claimant who gives the retainage notice by the Tex. Prop. Code § 53.057 deadline does not have to give other retainage notices, except notice of the filing of the mechanic’s lien affidavit. Tex. Prop. Code § 53.057(e). Note, however, that a claim consisting in part of retainage and in part of other billings on a job must comply not only with the retainage notice deadlines but also with the other applicable notice time limits as set out in section 21.7 below. Tex. Prop. Code §§ 53.056, 53.257.

The following deadlines are for contractual retainage notices. These apply to both residential and nonresidential projects. Because the retainage provisions in Texas Property Code chapter 53 were amended by the 2011 Texas legislature, two sets of deadlines are provided, the application of which depends on the date of execution of the original contract between the original contractor and owner.
Original Contract Executed before September 1, 2011: Notice to the original contractor and to the owner by second-tier and lower-tier claimants (subcontractors or suppliers with no contract with the original contractor) must be given not later than the fifteenth day of the second month following the first month of delivery or work. Tex. Prop. Code § 53.057(b).

Notice to the owner by first-tier claimants (subcontractors or suppliers with contracts directly with the original contractor) must also be given not later than the fifteenth day of the second month following the first month of delivery or work. Tex. Prop. Code § 53.057(b).

Original Contract Executed on or after September 1, 2011: Notice to the original contractor and to the owner by second-tier and lower-tier claimants (subcontractors or suppliers with no contract with the original contractor) must be given by the earlier of—

1. the thirtieth day after the claimant’s agreement (i.e., the subcontract work or delivery of material) is completed, terminated, or abandoned; or
2. the thirtieth day after the date the owner’s or original contractor’s agreement is terminated or abandoned.


Notice to the owner by first-tier claimants (subcontractors or suppliers with subcontracts or other agreements directly with the original contractor) must also be given by the earlier of the deadlines stated above for second-tier claimants. Tex. Prop. Code § 53.057(b–d).

§ 21.7 Time Limits for Notices of Claims Other than for Contractual Retainage

§ 21.7:1 Nonresidential Projects

Second-Tier Claimants—Original Contractor Notice: Notice to the original contractor by second-tier and lower-tier claimants must be given not later than the fifteenth day of the second month following each month of delivery or work. Tex. Prop. Code § 53.056(b). See the chart at section 21.9:1 below.

First- and Second-Tier Claimants—Owner Notice: Notice to the owner and to the original contractor of all derivative claims must also be given not later than the fifteenth day of the third month following each month of delivery or work. Tex. Prop. Code § 53.056(b). See the chart at section 21.9:1 below.

§ 21.7:2 Residential Projects

First- and Second-Tier Claimants—Owner and Original Contractor Notice: Notice to the owner and to the original contractor of all derivative claims must be given not later than the fifteenth day of the second month following each month of delivery or work. Tex. Prop. Code § 53.252. See the chart at section 21.9:2 below.

§ 21.8 Deadlines for Filing Lien Affidavit

In addition to sending the notices by the times described above, the claimant must file a lien affidavit in the real property records of the county in which the property is located.
§ 21.8:1 Accrual of Indebtedness

The deadline for filing the lien affidavit depends on several factors, including the date the claimant’s “indebtedness accrues.”

A claimant’s “indebtedness accrues” by the earliest of the following:

1. For original contractors, the earlier of (a) the last day of the month of receipt by the owner or contractor of a written declaration by the other party that the original contract has been terminated or (b) the last day of the month in which the project was completed or abandoned. Tex. Prop. Code § 53.053(b).
2. For a first- or second-tier claimant, the last day of the last month in which that claimant’s labor was performed or material furnished. Tex. Prop. Code § 53.053(c).
3. For a claimant furnishing specially fabricated material, the last day of the last month in which (a) the material was furnished; (b) the material would have been furnished; or (c) the owner, contractor, or subcontractor breached or terminated the contract or subcontract with the claimant. Tex. Prop. Code § 53.053(d).
4. For claims for unpaid contractual retainage, the earliest of the last day of the month in which the whole project is completed, finally settled, terminated, or abandoned. Tex. Prop. Code § 53.053(e).

§ 21.8:2 Original Contractor Lien Affidavit Filing Deadlines

The original contractor lien affidavit filing deadline for residential projects is the fifteenth day of the third calendar month after the “indebtedness accrues.” Tex. Prop. Code § 53.052.

For nonresidential projects, the deadline is the fifteenth day of the fourth calendar month after the “indebtedness accrues.” Tex. Prop. Code § 53.052.

§ 21.8:3 First- and Second-Tier Claimant Lien Affidavit Filing Deadlines

To obtain an enforceable lien claim and also claim a share of the owner’s required 10 percent statutory retainage, first- and second-tier subcontractor and supplier lien claimants must file their lien affidavits by the earlier of the deadlines indicated in sections 21.8:4 and 21.8:5 below. Because the retainage provisions affecting first- and second-tier claimants were amended by the 2011 Texas legislature, two sets of deadlines are provided, application of which depends on the date of execution of the original contract between the original contractor and owner.

§ 21.8:4 Original Contract Executed before September 1, 2011

First- and second-tier subcontractor and supplier lien claimants’ lien affidavit filing deadlines are determined as follows:

1. For residential projects, by the fifteenth day of the third calendar month after the “indebtedness accrues.” Tex. Prop. Code § 53.052. See the chart at section 21.9:2 below.
2. For nonresidential projects, by the fifteenth day of the fourth calendar month after the “indebtedness accrues.” Tex. Prop. Code § 53.052. See the chart at section 21.9:1 below.
However, if the deadline provided for in Tex. Prop. Code § 53.103 occurs earlier than the deadlines above, the claimant must file by the earlier date to share in the owner’s 10 percent statutory retainage. See Tex. Prop. Code § 53.103. This thirty-day deadline applies to both residential and nonresidential projects.

Note that for determining “final completion,” warranty work does not count to extend time limits.

§ 21.8:5 Original Contract Executed on or after September 1, 2011

A claimant may rely on the deadlines described in section 21.8:4 above, based on the pre-2011 version of the statute. Alternatively, a claimant may choose instead to file by the earliest of the following four deadlines for projects in which the original contract was executed on or after September 1, 2011:

1. The normal lien-filing date provided by Tex. Prop. Code § 53.052, which is (a) the fifteenth day of the fourth month following the last month of work or delivery by the claimant for nonresidential projects or (b) the fifteenth day of the third month following the last month of work or delivery by the claimant for residential projects. (See the charts at sections 21.9:1 and 21.9:2 below.)

2. The fortieth day after the date stated in the affidavit of completion for the original contract, if the owner sent the claimant notice of the affidavit. This affidavit of completion is provided for in Tex. Prop. Code § 53.106, which allows, but does not require, the owner to file such an affidavit stating the date of final completion for the project. See form 18-7 in this manual. Notice of filing and a copy of the affidavit must be sent to claimants making a written request for them or to claimants who have sent out owner lien notices. However, regardless of whether a claimant makes a request for such an affidavit or sends a lien notice, if the affidavit is not sent to a claimant, then the forty-day deadline provided in this section does not apply to that claimant. The affidavit is prima facie evidence of the actual final completion date for the project if it is sent to claimants as required.

3. For nonresidential projects only, the fortieth day after the date of termination or abandonment of the original contract if notice of termination or abandonment was sent by the owner to the claimant as required by Tex. Prop. Code § 53.107. The notice of termination or abandonment is required to be sent to each claimant who requests notice in writing or who sends the owner a lien notice. However, regardless of whether a claimant makes a request for a notice of termination or abandonment or sends a lien notice, if that notice is not sent to a claimant, then the forty-day deadline provided in this section does not apply. See form 21-15. This deadline option is not applicable to residential projects. Tex. Prop. Code § 53.107(e).

4. The thirtieth day after the day the owner sends written notice to the claimant demanding that the claimant file its mechanic’s lien affidavit. The notice must contain a legal description of the project property, the owner’s name and address, and it must specify that the lien affidavit must be filed within thirty days of when the notice was sent. Tex. Prop. Code § 53.057(g).

Interestingly, this fourth alternative provides that the notice is effective only for the amount of contractual retainage earned by the claimant as of the day this owner notice was sent. Therefore, Tex. Prop. Code § 53.057(g) indicates that claimants who fail to file within thirty days of the owner demand may have only their contractual retainage impacted.
§ 21.8:6 Owner Notice of Termination or Abandonment by Contractor—Nonresidential Projects

For nonresidential projects only, a notice of termination or abandonment is required of the owners. The notice must be sent not later than the tenth day after the date the original contract is terminated or the original contractor abandons the project. Tex. Prop. Code § 53.107.

The owner must send this notice to every claimant who has either provided the owner with notice of a lien claim or sent a request to the owner for notice of termination or abandonment. Tex. Prop. Code §§ 53.103, 53.107. A notice of termination or abandonment by owner is included as form 21-15 in this chapter.

If the owner fails to give the notice of termination or abandonment, the claimant will not be subject to the early retainage filing deadlines described in sections 21.8:4 or 21.8:5 (3) above. Tex. Prop. Code §§ 53.103, 53.107.

§ 21.8:7 Owner Failure to Withhold 10 Percent Retainage

If the owner fails to withhold statutory retainage, then the claimants are entitled to perfect their claims by notice and affidavit either by the longer deadlines described in sections 21.8:4 and 21.8:5 (1) above (the fifteenth day of the third month (residential) or the fifteenth day of the fourth month (nonresidential) following the last month of work/delivery). No thirty-day or forty-day deadlines under Tex. Prop. Code § 53.057(f) are applicable if the owner fails to withhold the statutory retainage.

§ 21.9 Timetables Outlining Deadlines

Caution: The following tables outline only the timetables for various deadlines; the attorney must have a clear understanding of the statutes to properly apply the tables.

If the retainage deadline, provided for in Tex. Prop. Code § 53.103, is earlier than the lien affidavit deadlines provided for by Texas Property Code sections 53.056 and 53.252, the affidavit must be filed by that earlier deadline.

§ 21.9:1 Nonresidential Projects (Tex. Prop. Code § 53.056)¹

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<th>Month of activity</th>
<th>Deadline for notice to original contractor by 2nd-tier &amp; lower claimants</th>
<th>Deadline for notice to owner/original contractor by 1st-tier, 2nd-tier &amp; lower claimants</th>
<th>Deadline for filing lien affidavit by all claimants¹</th>
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¹ These deadlines are based on the last calendar month in which the claimant delivered labor or material. Determine the affidavit filing date by finding the last month in which the claimant furnished labor or delivered material in the “Month of activity” column. The affidavit must be filed by the thirtieth day after completion of the entire project, if earlier than the date specified by this column.

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<tr>
<th>Month of activity</th>
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§ 21.10 Texas Prompt Payment Statute

Chapter 28 of the Texas Property Code provides that for private work, as contrasted with public works projects, the owner has thirty-five days from the date of receipt from a contractor of a written request for payment to pay the invoiced amount—less retainage required by law—for work properly performed or materials specially fabricated or suitably stored. Tex. Prop. Code § 28.002(a). Once the contractor receives payment, he must pay his subcontractors or suppliers their proportionate share of the draw not more than seven days later. Tex. Prop. Code § 28.002(b). A subcontractor who receives payment must in turn pay his subcontractors or suppliers their proportionate share not later than seven days thereafter. Tex. Prop. Code § 28.002(c). Unpaid bills earn interest at the rate of 1.5 percent per month. Interest stops accruing on the date of receipt of payment, the date payment is mailed, or the date a judgment is rendered in a suit filed under this statute, whichever occurs first. Tex. Prop. Code
§ 28.004. Recovery of attorney’s fees in a suit to collect the interest is also allowed. Any attempt to waive this section is void. Tex. Prop. Code §§ 28.005–.006.

If a good-faith dispute exists concerning the amount owed on a residential job (construction of a single-family residence, duplex, triplex, or quadruplex), the owner, contractor, or subcontractor disputing the payment may withhold no more than 110 percent of the difference between the amounts claimed due. Tex. Prop. Code § 28.003(a).

If a good-faith dispute exists on projects not involving construction of a single-family residence, duplex, triplex, or quadruplex, no more than 100 percent of the amount in dispute may be withheld. Tex. Prop. Code § 28.003(b).

If the construction lender’s late release of funds is the reason for the delay in payment, the owner is protected because the payment required of the owner pursuant to Tex. Prop. Code § 28.002(a) changes from the thirty-fifth day after the date the owner receives the payment request to the fifth day after the date the owner receives loan proceeds, if a construction loan exists and the owner has timely and properly requested disbursement but the lender failed to disburse in time to meet the thirty-five-day deadline. Tex. Prop. Code § 28.008.

**Right to Suspend Work:** Section 28.009 of the Texas Property Code provides a statutory right of the contractor or subcontractor to suspend work on private commercial projects if he has not been paid in accordance with this statute. Subpart (e) of section 28.009 provides that this part does not apply to a contract for the construction of improvements to a detached single-family residence, duplex, triplex, or quadruplex. Tex. Prop. Code § 28.009(e).

Work cannot be suspended until the tenth day after the claimant gives written notice to the owner or contractor, as applicable, stating that payment has not been received and stating the intent of the contractor or subcontractor to suspend performance. If a construction loan exists, the lender must also be given this notice of intent to suspend work. The claimant is not required to perform further work until the amount due is paid, plus costs of demobilization and remobilization. The claimant is not responsible for damages due to suspension of work if the claimant was not notified in writing before suspension either that payment has been made or that a good-faith dispute about payment exists. However, a notice of good-faith dispute must include a list of specific reasons for nonpayment. If one of the reasons for nonpayment is alleged defective or incomplete work, the claimant must be given a reasonable opportunity to cure the listed items or offer a deduction of a reasonable amount to compensate for the listed items that cannot be promptly cured. Tex. Prop. Code § 28.009.
Additional Resources


Notice to Original Contractor by Second-Tier Claimant

[Date]

[Name and address of original contractor]


[Salutation]

This is to provide you with the required notice, in accordance with section 53.056 of the Texas Property Code, that Claimant is owed the Claim Amount for its billings to [name of customer] for [labor/materials/labor and materials] furnished on the Project. Claimant’s [labor/materials/labor and materials] are generally described as [description of work and/or materials furnished].

Enclosed are copies of Claimant’s unpaid statements or billings. Please contact me regarding this notice. Thank you for your attention to this matter.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
Notice of Claim to Owner and Original Contractor

Date

[Name and address of owner]

[Name and address of original contractor]


Salutation

This is to provide you with notice that Claimant is owed the Claim Amount for its past-due and unpaid billings for [labor/materials/labor and materials] furnished on the Project. Claimant furnished [description of work and/or materials furnished] for the Project under Claimant’s agreement with [name of customer].

This notice is sent in compliance with the Texas Property Code’s mechanic’s lien provisions. Accordingly, we must notify you that if the Claim Amount remains unpaid, the owner of the premises may be personally liable, and the owner’s property may be subjected to a lien unless the owner withholds payment from the contractor for payment of the claim or the claim is otherwise paid or settled.

Also, further notice is given that all of the Claim Amount has accrued and is past due. Accordingly, demand for payment of the claim in the Claim Amount is hereby made.

Enclosed are copies of the statements or billings that constitute this claim.

This also constitutes notice pursuant to section 162.001 et seq. of the Texas Property Code (the Trust Fund Act) that Claimant has a priority interest in the construction funds for this project in your possession now or released to you in the future. The Trust Fund Act states
that project owners and contractors are trustees of the construction funds they receive. Such funds must be used to pay for the labor and materials on the Project and cannot be used for other purposes. The owner and contractor are deemed to be trustees of the Project funds for the benefit of unpaid subcontractors and suppliers, including Claimant, to see that payment is made. Consequently, you are directed to set aside such construction funds to cover the Claim Amount. Diversion of construction trust funds constitutes violation of the Trust Fund Act.

Please contact me immediately regarding this notice.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested

Certified Mail No. [number]
Return Receipt Requested

Attach the notice at form 21-3 in this chapter if the lien is against homestead property.
Notice to Owner Regarding Liens against Homestead Property

To fix a lien on homestead, the following statement must be included in or attached to form 21-2 in this chapter, the notice required to be given to the owner under Tex. Prop. Code § 53.252. Tex. Prop. Code § 53.254. The language is derived from the statute, and the practitioner must be careful not to alter the prescribed language.

Notice to Owner Regarding Liens against Homestead Property

If a subcontractor or supplier who furnishes materials or performs labor for construction of improvements on your property is not paid, your property may be subject to a lien for the unpaid amount if:

1. after receiving notice of the unpaid claim from the claimant, you fail to withhold payment to your contractor that is sufficient to cover the unpaid claim until the dispute is resolved; or

2. during construction and for 30 days after completion of construction, you fail to retain 10 percent of the contract price or 10 percent of the value of the work performed by your contractor.

If you have complied with the law regarding the 10 percent retainage and you have withheld payment to the contractor sufficient to cover any written notice of claim and have paid that amount, if any, to the claimant, any lien claim filed on your property by a subcontractor or supplier, other than a person who contracted directly with you, will not be a valid lien on your property. In addition, except for the required 10 percent retainage, you are not liable to a subcontractor or supplier for any amount paid to your contractor before you received written notice of the claim.
Affidavit Claiming Mechanic’s and Materialman’s Lien

Affiant, [name of affiant], on oath swears that the following statements are true and are within the personal knowledge of Affiant:

My name is [name of affiant]. I am the [claimant/[title] of [name of claimant]] (“Claimant”). This affidavit is made to perfect a mechanic’s and materialman’s lien against the real property described below:

1. Claimant has an unpaid claim in the amount of $[amount] (“Claim Amount”) for [labor/materials/labor and materials] furnished on the construction of improvements generally known as the [specify] construction project. The Claim Amount is, within my personal knowledge, just and true, the same is due and unpaid, and all just and lawful offsets, payments, and credits have been allowed. The Claim Amount is for [labor/materials/labor and materials] furnished and described below, on which a systematic record has been kept.

2. The name and last known address of the owner or reputed owner (“Owner”) of the real property and improvements on which this claim is made are [name and address].

3. The Claim Amount represents the unpaid contract price due Claimant, or, in the alternative, is the reasonable value of the unpaid portion of Claimant’s [labor/materials/labor and materials] furnished, which are described below.
4. Claimant’s [labor/materials/labor and materials] furnished for construction of improvements on the real property described below [is/are] generally described as [describe, e.g., specially fabricated and installed plumbing, heating, ventilating, and air-conditioning duct work, equipment, and allied systems]. Payment of the Claim Amount is requested for work performed or materials furnished during each of the following months: [specify months].

5. Claimant furnished the above-described [labor/materials/labor and materials] under a [subcontract/contract/purchase order] with [name of customer], whose last known address is [address].

6. The name and last known address of the original contractor on the above-referenced project are [name and address].

7. The legal description of the real property improved by Claimant’s above-described [labor/materials/labor and materials] is [legal description]. That real property and improvements on it are sought to be charged with Claimant’s lien.

8. Claimant claims a mechanic’s and materialman’s lien on the above-described real property and improvements thereon to secure payment of its Claim Amount in accordance with the Texas Property Code.

9. Claimant’s physical address is [address]. Claimant’s mailing address is [address].

10. Claimant’s notice[s] of mechanic’s lien [was/were] sent to Owner by United States certified mail, return receipt requested, on the following date[s]: [specify date[s]].

11. In compliance with the Texas Property Code, Claimant is sending one copy of this affidavit to Owner at its last known address and also one copy to the above-referenced original contractor at its last known address.
[Name of affiant]

SUBSCRIBED AND SWORN TO before me on __________________ by [name of affiant].

__________________________________________
Notary Public, State of Texas
Copies of the lien affidavit must be sent within five days of filing the lien affidavit. Tex. Prop. Code § 53.055(a).

Cover Letter Sending Copy of Lien Affidavit

[Date]

[Name and address of owner]
[Name and address of original contractor]

Re: Claim of [name of claimant] (“Claimant”); mechanic’s and materialman’s lien

[Salutation]

Enclosed is a copy of Claimant’s affidavit claiming a mechanic’s and materialman’s lien (“Affidavit”).

In accordance with the Texas Property Code, we notify you again that if the claim described in the Affidavit remains unpaid, the owner of the property described may be liable, unless the owner withholds payment from the contractor for the amount of the claim or it is otherwise settled or paid.

Claimant was forced to proceed with securing its lien rights because Claimant has not received payment from any source on the claim set forth in the Affidavit.

Previous written demand by Claimant for payment of this claim was made on [date]. No notice of dispute regarding this claim was submitted. Therefore demand for payment of the claim amount is hereby made in accordance with section 53.083 of the Texas Property Code.
Please contact me on receipt of this letter so that we may discuss a prompt resolution of this matter.

Sincerely yours,

[Name of attorney]

Enc.

Certified Mail No. [number]
Return Receipt Requested

Certified Mail No. [number]
Return Receipt Requested

Attach a copy of the lien affidavit (form 21-4 in this chapter). For residential construction on a homestead, also attach the notice at form 21-3.
Notice Regarding Specially Fabricated Material[s]

[Date]

[Name and address of owner]

[Name and address of original contractor]

Re: [specify] construction project (“Project”)

[Salutation]

[Name of claimant] (“Claimant”) has received and accepted an order from [name of customer] for specially fabricated [description] to be delivered to your Project after [they are/it is] made. The price of the specially fabricated order is $[amount]. This notice is sent to you in compliance with the mandatory provisions of Texas law regarding receipt of orders for specially fabricated materials. This is not intended as a comment in any way on Claimant’s customer, [name of customer], but is merely sent in compliance with the state law.

Claimant is pleased to be a participant in this Project and looks forward to working with [name of customer] toward the Project’s successful conclusion.

Sincerely yours,

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
Certified Mail No. [number]
Return Receipt Requested
Notice of Agreement Providing for Retainage

Date

[Name and address of owner]
[Name and address of original contractor]

Re: Notice for Contractual Retainage Claim—[describe in detail the name and location of the construction project] (“Project”)

[Salutation]

[Name of claimant] (“Claimant”) is pleased to have been selected as a subcontractor/supplier for the Project. Claimant’s contract with [name] provides that [10/[specify other percentage]] percent of the contract price may be withheld as retainage. Claimant therefore respectfully submits its notice of contractual retainage agreement. This notice is required by section 53.057 of the Texas Property Code.

The general nature of the agreement is as follows: [specify, e.g., 10 percent of contract price as adjusted by the change orders].

The date or dates when retainage is payable are as follows: [specify, e.g., thirty days after final completion of our portion of the work on the Project].

We believe the total amount to be retained under our contract will be $[amount]. Also [percent] percent of increases to Claimant’s contract by change order(s) will be subject to retainage.
This notice is not in any way to be considered a negative comment regarding Claimant’s customer, [name of customer], and Claimant looks forward to working toward a successful completion of your Project.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested

Certified Mail No. [number]
Return Receipt Requested
Notice of Retainage Agreement

Form 21-8

This notice is for use on projects in which the original contract was executed on or after September 1, 2011. This notice must be sent to the owner by the thirtieth day after the claimant’s agreement providing for retainage is completed, terminated, or abandoned. Certified mail is no longer required for this notice. See Tex. Prop. Code § 53.057(b).

Notice of Retainage Agreement

[Date]

[Name and address of owner]

Include the following if the claimant’s contract is not with the original contractor.

[Name and address of original contractor]

Continue with the following.

Re: Notice of Contractual Retainage; [name] construction project located at [address] (“Project”)

[Salutation]

This letter is to give you notice that [name of claimant] is a [subcontractor/supplier] on the Project and that a requirement for retainage exists in its agreement with [other party to claimant’s agreement] for the Project.

The complete name and address of [name of claimant] is [name and address of claimant].

[Name of claimant]’s agreement for the Project is with [name and address of other party to claimant's agreement].
Sincerely yours,

[Name of attorney]
Form 21-9

Request for Information to Owner

[Date]

[Name and address of owner]

Re: Request for information on [specify] construction project (“Project”)

[Salutation]

[Name of claimant] is furnishing [labor/materials/labor and materials] for the Project.

This is to respectfully request that you, as owner of the Project, furnish to us the following information within ten days of your receipt of this request. This information is required by sections 53.106, 53.107, and 53.159 of the Texas Property Code:

1. a sufficient legal description of the real property being improved;

2. whether there is a surety bond and, if so, the name and last known address of the surety and a copy of the bond;

3. whether there are any prior recorded liens or security interests on the Project property being improved and, if so, the name and address of the person or entity having the lien or security interest;

4. the date on which the original contract for the project was executed;

5. whether there is an affidavit of commencement or affidavit of completion filed, and, if so, a copy of each affidavit; and

6. notice of original contractor termination or abandonment.

Thank you for your cooperation and prompt attention.
Sincerely yours,

______________________________
[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
Request for Information to Original Contractor

[Date]

[Name and address of original contractor]

Re: Request for information on [specify] construction project ("Project")

[Salutation]

[Name of claimant] is furnishing [labor/materials/labor and materials] for the Project. This is to respectfully request that you, as original contractor for the Project, furnish to us the following information not later than the tenth day after you receive this request, as required by section 53.159 of the Texas Property Code:

1. the name and last known address of the person to whom you furnished labor and materials for the Project;

2. whether you have furnished or have been furnished any payment bonds for any work on the Project and, if so, the name and last known address of the surety or sureties and a copy of each bond; and

3. the date on which the original contract for the project was executed.

Thank you for your cooperation and prompt attention.

Sincerely yours,

__________________________________________________________________________________________________________________________ ...

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
Form 21-11

Request for Information to Subcontractor

[Date]

[Name and address of subcontractor]

Re: Request for information on [specify] construction project (“Project”)

[Salutation]

[Name of claimant] has furnished [labor/materials/labor and materials] for the Project under your subcontract on the Project. This is to respectfully request that you, as a subcontractor for the Project, furnish to us the following information not later than the tenth day after you receive this request, as required by section 53.159 of the Texas Property Code:

1. the name and last known address of each person from whom you purchased labor or materials for the Project, other than the materials that were furnished from your inventory;

2. the name and last known address of each person to whom you furnished labor and materials for the Project; and

3. whether you have furnished or have been furnished any payment bonds for any work on the Project and, if so, the name and last known address of the surety or sureties and a copy of each bond.

Thank you for your cooperation and prompt attention.

Sincerely yours,

__________________________________________________________________________________________________________________________

[Name of attorney]
Certified Mail No. [number]
Return Receipt Requested
Form 21-12

Request for Copy of Affidavit of Completion

[Date]

[Name and address of owner]

Re: Request for copy of affidavit of completion on [specify] construction project (“Project”)

[Salutation]

This is to respectfully request, on behalf of [name of claimant], a copy of the affidavit of completion, if any, on the Project. This request is made in accordance with the provisions of section 53.106 of the Texas Property Code. The claimant has furnished labor or material or both for the Project.

Sincerely yours,

__________________________________________________________________________________________________________________________ ...

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
Release of Mechanic’s and Materialman’s Lien

Basic Information

Date:

Claimant:

Property:

Claimant has on or about [date] attempted to assert a mechanic’s and materialman’s lien on the Property [include if applicable: by affidavit filed in [recording data] of the real property records of [county] County, Texas].

The owner of the Property, [name of owner], has reached an agreement with Claimant for the release of the lien against the Property.

Claimant hereby releases the Property from the mechanic’s and materialman’s lien in consideration of good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged.

__________________________________________________________
[Name of claimant]

Include acknowledgment.
Partial Release of Mechanic’s and Materialman’s Lien

Basic Information

Date:

Claimant:

Property:

Project: [describe project]

Claimant filed its affidavit claiming a mechanic’s and materialman’s lien on the Property on [date].

The lien was asserted by Claimant for its [labor/materials/labor and materials] generally described as [describe, e.g., specially fabricated and installed plumbing, heating, ventilating, and air-conditioning duct work, equipment, and allied systems] furnished for the Project located on the Property.

The described [labor/materials/labor and materials] were furnished by Claimant for construction of the Project under [a contract/an agreement] with [name of original contractor], as original contractor for the Project.

An agreement has been reached for a partial release of the lien claim against the Property.

Claimant hereby releases $[amount] of its mechanic’s and materialman’s lien against the Property but specifically preserves the balance of its lien in the amount of $[amount].
Partial Release of Mechanic’s and Materialman’s Lien

[Name of claimant]

Include acknowledgment.
Form 21-15

Notice of Termination of Work or Abandonment of Performance
by Original Contractor or Owner

Basic Information

Date of Notice: [date]

Project: [describe improvements]

Owner: [name and address]

Original Contractor: [name and address]

Legal Description of Project: [sufficient for identification of the project real property]

Date of Termination or Abandonment: [date]

This constitutes formal notice that the original contract on the project has been terminated or performance under the contract has been abandoned.

A MECHANIC’S LIEN CLAIMANT MAY NOT HAVE A LIEN ON RETAINED FUNDS FOR THE PROJECT UNLESS THE CLAIMANT FILES AN AFFIDAVIT CLAIMING A LIEN NOT LATER THAN THE FORTIETH DAY AFTER THE DATE OF THE TERMINATION OR ABANDONMENT.

[Name of owner]

By ________________________________
Form 21-15 Notice of Termination of Work or Abandonment of Performance

Printed Name

__________________________________________________________________________________________________________________________

Title

__________________________________________________________________________________________________________________________
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Restrictive Covenants and Property Owners Associations

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Chapter 23

Restrictive Covenants and Property Owners Associations

§ 23.1 General Considerations

§ 23.1:1 Restrictive Covenants

“Restrictive covenant” means “any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative.” Tex. Prop. Code § 202.001(4). A restrictive covenant is a private way to regulate or control the use of real property by contract. This type of regulation and control is based on the fundamental “right of parties to contract with relation to property as they see fit, provided they do not contravene public policy and their contracts are not otherwise illegal.” Curlee v. Walker, 244 S.W. 497, 498 (1922). Restrictive covenants are subject to general common-law rules of contracts. Pilarcik v. Emmons, 966 S.W.2d 474, 478 (Tex. 1998).

Under common law, restrictive covenants can be adopted as part of a general plan for the development of a tract of land to make it more attractive for residential or commercial purposes by reason of the covenants imposed on each of the separate lots sold. The development plan that includes restrictive covenants forms an inducement to each purchaser to buy a lot in the development, and it may be assumed that the purchaser pays an enhanced price for the property purchased. The development plan, including restrictive covenants, enters into and becomes a part of the consideration for the purchase of a lot. The purchaser of a lot submits to a burden on his own land because a like burden imposed on his neighbor’s lot will be beneficial to both lots. The covenant or agreement between the original owner and each purchaser is therefore mutual. Curlee, 244 S.W. at 498.

The most common reason for imposing restrictive covenants on property is to enhance the value of the property as part of a development scheme. For example, by subdividing property on the edge of a town that is zoned for agriculture into separate smaller lots, and by imposing restrictive covenants so the purchasers of the lots know how the use of nearby lots will be restricted, the value of the property as a whole will be substantially enhanced. A development project subject to restrictive covenants can be for residential use only, commercial use only, or a combination of the two. The forms in this chapter are for residential projects only.

Based on the common-law rules and the statutory definitions, restrictive covenants can be imposed or applied to property in a variety of ways. One of the most common ways to impose restrictive covenants on property is for the owner of the land to file with the county clerk a document known as a declaration, which describes the restrictive covenants to which the property is subject. A declaration regarding property is similar to the declaration of a living trust. Both documents declare that certain described property will be owned by the owner subject to the described covenants.

The filing of the declaration on real property with the county clerk is constructive notice to the public that the property described in the declaration is subject to the restrictive covenants stated. Once a declaration of restrictive covenants is filed regarding the described property, the covenants are continuing obligations for the use of the property from that time forward, through each sale of the property, until canceled or modified by the owner. These ongoing restrictions on the use of land are called “covenants running with the land.” Purchasers are charged with notice of the terms of deeds that form an essential link
in their chain of ownership and with knowledge of the provisions and contents of other recorded instruments. *Cooksey v. Sinder*, 682 S.W.2d 252, 253 (Tex. 1984).

A restrictive covenant is a contract subject to the same rules of construction and interpretation as any other contract. *Davis v. Canyon Creek Estates Homeowners Ass’n*, 350 S.W.3d 301, 313 (Tex. App.—San Antonio 2011, pet. denied). Once restrictive covenants are imposed on a property, they are contractual obligations among all future owners of subdivided parts of the property. An owner’s noncompliance with a restrictive covenant is a breach of contract as to all the other owners of lots subdivided from the same property to which the declaration applies. Therefore, each owner has a right to enforce the restrictive covenants in a development or sub-division by filing suit against an owner who violates a restrictive covenant. *Anderson v. New Property Owners’ Ass’n of Newport*, 122 S.W.3d 378, 384 (Tex. App.—Texarkana 2003, pet. denied). However, placing the burden on individual owners for the enforcement of restrictive covenants, while generally allowed by common law and by the terms of declarations, is not usually practical.

### § 23.1:2 Declarations and Other Dedicatory Instruments

“Dedicatory instrument” means—

Each document governing the establishment, maintenance, or operation of a residential subdivision, planned unit development, condominium or townhouse regime, or any similar planned development. The term includes a declaration or similar instrument subjecting real property to:

(A) restrictive covenants, bylaws, or similar instruments governing the administration or operation of a property owners’ association;

(B) properly adopted rules and regulations of the property owners’ association; or

(C) all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.


To be effective, a dedicatory instrument—whether from a property owners association or an original declarant—must be filed in the real property records of each county in which the property to which the dedicatory instruments relate is located. Tex. Prop. Code § 202.006. This requirement covers bylaws or similar instruments governing the administration or operation of a property owners association, properly adopted rules and regulations of the property owners association, and all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

A provision for amendment of a declaration cannot require a vote of more than 67 percent of the total votes of members of the property owners association entitled to vote on the proposed amendment. Tex. Prop. Code § 209.0041. If the declaration contains a lower percentage, the percentage in the declaration controls. Tex. Prop. Code § 209.0041. If the declaration is silent as to voting rights for an amendment, the declaration may be amended by a vote of owners owning 67 percent of the lots subject to the declaration. Tex. Prop. Code § 209.0041. Section 209.0041 prevails over any conflicting provisions in title 11 of the Texas Property Code. See, however, Property Code section 201.006 concerning the requirements for a petition to amend restrictions, with significantly different requirements. Tex. Prop. Code § 201.006.
§ 23.1:3 Limitations of Covenants and Restrictions

The Telecommunications Act of 1996 protects the rights of property owners to use satellite dishes. See 47 U.S.C. §§ 151–341. With a few exceptions, any homeowner may install a satellite dish of a size of one meter or smaller in diameter. While property owners associations may encourage that dishes be placed as inconspicuously as possible, the dish must be allowed to be placed where it may receive a usable signal. Additionally, many property owners associations have restrictive covenants prohibiting a homeowner from installing an OTA (Over-the-Air) rooftop antenna. These restrictions are not enforceable, except in some instances. For example, the antenna may be installed at any location unless it imposes on common property. Also, the antenna must be of a design to receive local, not long-distance, signals and must not extend any higher than twelve feet above the top roofline of the home, unless an exception is granted by the property owners association due to extenuating terrestrial interference. See the Federal Communications Commission Rule, available at https://www.fcc.gov/media/over-air-reception-devices-rule.

Federal and state fair housing acts will limit certain types of residential restrictions concerning age and occupancy limitations. See the section titled “Fair Housing” in chapter 2 of this manual.

With some exceptions noted in the statute, a provision in a dedicatory instrument is void and unenforceable if it prohibits or restricts a property owner from (1) implementing measures promoting solid-waste composting of vegetation, including grass clippings, leaves, or brush, or leaving grass clippings uncollected on grass; (2) installing rain barrels or a rainwater harvesting system; (3) implementing efficient irrigation systems, including underground drip or other drip systems; or (4) using drought-resistant landscaping or water-conserving natural turf. Tex. Prop. Code § 202.007.

A property owners association is limited on how it can enforce restrictions of political signs in a subdivision. Tex. Prop. Code § 202.009.

With certain exceptions listed in the statute, a provision in a dedicatory instrument that prohibits or restricts a property owner from installing a solar energy device is void. Tex. Prop. Code § 202.010.


Restrictions requiring wood shingle roofs are void. Tex. Prop. Code § 5.025. A property owners association may not include or enforce a provision in a dedicatory instrument that prohibits or restricts a property owner who is otherwise authorized to install shingles on the roof of the owner’s property from installing shingles that meet the specifications listed in the statute. Tex. Prop. Code § 202.011.

With specified exceptions, a property owners association may not enforce or adopt a restrictive covenant that prohibits a property owner or resident from displaying or affixing on the entry to the owner’s or resident’s dwelling one or more religious items, the display of which is motivated by the owner’s or resident’s sincere religious belief. Tex. Prop. Code § 202.018.

A property owners association is limited on the extent to which it can adopt and enforce restrictions on standby electric generators. Tex. Prop. Code § 202.019.
§ 23.2 Property Owners Association

A property owners association, which is composed of all owners of lots in a subdivision or development, enforces restrictive covenants on behalf of the association and all the owners who are in compliance. A property owners association means—

an incorporated or unincorporated association owned by or whose members consist primarily of the owners of the property covered by the dedicatory instrument and through which the owners, or the board of directors or similar governing body, manage or regulate the residential subdivision, planned unit development, condominium or townhouse regime, or similar planned development.


The practitioner should consider using a nonprofit association, which is an unincorporated organization. The members and management of a nonprofit association are shielded from personal liability under Tex. Bus. Orgs. Code § 252.006. A nonprofit association requires no certificate of formation or periodic reports. Failure of a corporation to file periodic reports (every four years in the case of a non-profit; annually in the case of a for-profit) with the secretary of state may result in the forfeiture of the corporation’s existence.

Property owners associations are regulated by federal, state, and local law, and they are subject to federal income taxation. They do not qualify as charitable organizations under Internal Revenue Code section 501(c)(3). Associations may qualify for special tax treatment under 26 U.S.C. § 528. All entities organized in Texas must comply with the Texas Business Organizations Code. See Tex. Bus. Orgs. Code ch. 402. Texas Property Code chapter 202 applies to all restrictive covenants and property owners associations. Chapter 209 of the Property Code applies to all residential property owners associations subject to a declaration that authorizes the property owners association to collect regular or special assessments on all or a majority of the property in the subdivision. Certain provisions of these chapters do not apply to a property owners association that is subject to Texas Government Code chapter 552. See Tex. Gov't Code § 552.0036. Property Code chapter 209 does not apply to condominiums governed by chapter 82 of the Property Code. See Tex. Prop. Code § 209.003(d).

Certain chapters of the Property Code have specific requirements not applicable generally to property owners associations in counties having defined characteristics. To determine if these specific requirements apply, see chapters 201, 203, 204, 205, 206, 208, 210, 211, 212 and 215 of the Property Code.

The Texas Residential Property Owners Protection Act is chapter 209 of the Property Code. It applies to residential subdivisions (other than condominiums governed by Tex. Prop. Code ch. 82) that are subject to restrictive covenants authorizing a property owners association to collect regular or special assessments and requiring mandatory membership in the association. Tex. Prop. Code § 209.003. In addition, the Property Code affords certain rights to property owners associations in cities or counties that meet various specified minimum population requirements to amend, extend, or supplement deed restrictions and to establish assessment lien mechanisms. Tex. Prop. Code chs. 201, 204–206.

A property owners association must record a management certificate in each county in which any portion of the residential subdivision is located and must record an amended management certificate within thirty days of the amendment. Tex. Prop. Code § 209.004. See form 23-7 in this chapter. All property owners associations must record a current management certificate on or before January 1, 2014, or rerecord the current management certificate if the previous recording was done before September 1, 2013. This requirement is to facilitate the county clerks’ indexing of management certificates, which, before September 1, 2013, did not have a clear, statutorily mandated system. Tex. Prop. Code § 209.004(a–1). Thus, a property owners
association should record or rerecord its current management certificates even if it missed the January 1, 2014, deadline. If either the property owners association has, or its management company maintains on behalf of the association, a publicly accessible website, then the dedicatory instruments related to the subdivision and the association must be posted on that website. Tex. Prop. Code § 207.006.

Despite any contrary provision in a dedicatory instrument or in other laws not specifically applicable to a property owners association, a property owners association must make the books and records of the association, including financial records, open to and reasonably available for examination and copying by an owner or a person designated in a writing signed by the owner as the owner’s agent, attorney, or certified public accountant. Tex. Prop. Code § 209.005(a), (c).

The procedure for an owner to examine and copy an association’s records is set out inTex. Prop. Code § 209.005. In addition, the property owners association must adopt a records production and copying policy that prescribes the costs the association will charge for the compilation, production, and reproduction of requested records. That policy must be recorded in the real property records. The association cannot assess any charges if they are not recorded. Tex. Prop. Code § 209.005(i). See form 23-12 for an example of a records production and copying policy.

A property owners association composed of more than fourteen lots must also adopt and comply with a document retention policy meeting certain defined requirements. Tex. Prop. Code § 209.005(m). The documentation retention policy must be recorded as a dedicatory instrument. Tex. Prop. Code § 209.005(i).

§ 23.2:1 Governance of Property Owners Associations

The governance of property owners associations, including meetings and voting procedures for members, is subject to common-law rules, the terms of the dedicatory instruments, the Texas Business Organizations Code, and the Texas Property Code.


The board of directors of a property owners association must call an annual meeting of the members. If a board does not call an annual meeting of the association members, any owner may demand that a meeting of the association members be called not later than the thirtieth day after the date of the owner’s demand. See Tex. Prop. Code § 209.014.

Mandatory, statutory provisions for board of director qualifications and meetings apply to property owners associations and supersede contrary provisions in a dedicatory instrument. See Tex. Prop. Code §§ 209.0051, 209.00591. Regular and special board meetings must be open to owners, subject to the right of the board to adjourn a board meeting and reconvene in closed executive session to consider certain specified matters. Written minutes of the meetings must be kept and made available to owners. Members must be given notice of the date, hour, place, and general subject of a regular or special board meeting, including a general description of any matter to be brought up for deliberation in executive session. See Tex. Prop. Code § 209.0051.

There are mandatory and permissive statutory provisions for how a property owners association gives notice to owners and the content of the notice. These provisions vary depending on factors such as type and location of meetings, action taken or to be taken with or without a meeting, voting methods, use of electronic communication, and size of the association. See, e.g., Tex. Prop. Code §§ 209.0042, 209.0051, 209.0056, 209.00593, 209.006.
§ 23.2:2 Enforcement of Covenants and Rules and Collection of Assessments

Before a property owners association may suspend an owner’s right to use a common area, file a suit against an owner other than a suit to collect a regular or special assessment or foreclose under an association’s lien, charge an owner for property damage, or levy a fine for a violation of the restrictions or bylaws or rules of the association, the association or its agent must give written notice to the owner by certified mail with certain required information. Tex. Prop. Code § 209.006. A reasonable time for the owner to cure a violation must be given if the violation is curable and does not materially affect the health or safety of an ordinary resident. Tex. Prop. Code § 209.006. The statute contains examples of curable and uncurable violations.

A property owners association may not hold an owner liable for fees of a collection agent retained by the property owners association unless the association first provides written notice with required information to the owner by certified mail. Tex. Prop. Code § 209.0064. A property owners association may collect from an owner reimbursement of reasonable attorney’s fees and other reasonable costs incurred relating to collecting amounts due to the association for enforcing restrictions or the bylaws or rules of the association only if the owner is provided a written notice that attorney’s fees and costs will be charged to the owner if the delinquency or violation continues after a date certain. Tex. Prop. Code § 209.008.

A property owners association composed of more than fourteen lots must adopt reasonable guidelines to establish an alternative payment schedule by which an owner may make partial payments to the property owners association for delinquent regular or special assessments or any other amount owed to the association without accruing additional monetary penalties. The guidelines must allow at least three months to pay the assessment. The guidelines are not considered a dedicatory instrument but must be recorded in the real property records. Tex. Prop. Code § 209.0062.


A property owners association may not conduct a nonjudicial foreclosure or commence a judicial foreclosure action related to the association’s assessment lien on an owner’s lot unless the association provides written notice to any holder of an inferior or subordinate deed-of-trust lien of record on the lot of (1) the total amount of the delinquency giving rise to the foreclosure and (2) the lienholder’s opportunity to cure the delinquency before the sixty-first day after the receipt of the notice. The notice must be sent by certified mail to the address for the inferior or subordinate lienholder shown in the deed records relating to the lot. Tex. Prop. Code § 209.0091.

Not later than the thirtieth day after a judicial or nonjudicial foreclosure sale of an owner’s lot, a property owners association must send to the lot owner, each lienholder of record according to the most recently filed deed of trust, and any transferee or assignee of that deed of trust, a written notice stating the date and time the sale occurred and informing them of the right of the lot owner and lienholder to redeem the lot under section 209.011 of the Texas Property Code. Tex. Prop. Code § 209.010–.011. See form 23-19 in this chapter for an example of a notice.

Not later than the thirtieth day after the property owners association sends notice under Tex. Prop. Code § 209.010, the association must record an affidavit under Tex. Prop. Code § 209.010(c) in the real property records where the property is located,
stating the date on which notice was sent and containing a legal description of the lot foreclosed. See form 23-18 for an example of an affidavit. If the lot owner or lienholder sends a written request to redeem the property before the expiration of the redemption period, the redemption period is extended until the tenth day after the date the association and any third-party purchaser at the foreclosure provides written notice to the redeeming party of the amounts that must be paid to redeem the property. Tex. Prop. Code § 209.011(m).

If the redemption period (including any extensions) expires without redemption of the property, the association or third-party foreclosure purchaser must record an affidavit in the real property records in which the property is located, stating that the lot owner or lienholder did not redeem the property. Tex. Prop. Code § 209.011(n). See form 23-20 for an example of an affidavit.

§ 23.2:3 Resale Certificates

Texas Property Code chapter 207 applies to residential subdivisions with a property owners association that is entitled to levy regular or special assessments. Tex. Prop. Code §§ 207.001(6), 207.002. Within ten business days after a written request, a residential property owners association is required to deliver a resale certificate to the requesting owner, title company, purchaser, or their respective agents. The resale certificate must be prepared no earlier than the sixtieth day before it is delivered and must include specific information about the property and the subdivision as a whole. Tex. Prop. Code § 207.003. See form 23-10 in this chapter for an example of a resale certificate. The property owners association may require evidence of the requester’s authority to order a resale certificate and payment of a fee for having provided the resale certificate. Tex. Prop. Code § 207.003.

§ 23.3 Instructions for Completing Declaration of Restrictive Covenants and Other Dedicatory Instruments

§ 23.3:1 General Information

See chapter 3 in this manual for general information about designations of parties, addresses, property descriptions, and execution and acknowledgment of documents.

§ 23.3:2 Scope of Declaration of Restrictive Covenants

Form 23-1 in this chapter is drafted for use with a single-family residential subdivision whose owners are members of a property owners association, and form 23-2 is drafted for use with a residential subdivision that does not include a property owners association.

§ 23.3:3 Prohibited Activities

The prohibitions listed in paragraph C.2. of forms 23-1 (the declaration of restrictive covenants for a subdivision with a property owners association) and 23-2 (the declaration for a subdivision without a property owners association) in this chapter should include only those activities that a declarant does not want to allow on the property subject to the declarations.
§ 23.3:4  Construction and Maintenance Standards

The construction and maintenance standards in section D. of forms 23-1 and 23-2 in this chapter should be tailored to address a declarant’s desired construction and maintenance standards for the property. In addition, several construction options need to be selected by a declarant in section D. of both declarations, such as maximum height restrictions, minimum floor area, time to complete repairs or for rebuilding of improvements, and time to complete installation of landscaping.

§ 23.3:5  Association

Section E. of form 23-1 in this chapter includes a property owners association that has two classes of membership. Class A members are all property owners except the declarant, and each Class A member has one vote. The declarant is designated a Class B member with special voting rights as specified in the bylaws of the association. Paragraph E.3.b. of form 23-1 allows a declarant to select the date on which Class B member rights are to be converted to Class A member rights.

§ 23.3:6  Architectural Control Committee

Section F. of form 23-1 in this chapter includes an architectural control committee (ACC) established to assist the association in ensuring that permitted improvements and landscaping conform to the dedicatory instruments. A declarant must select the number of members comprising the ACC and the number of days that a property owner or the ACC has to act on various matters brought before the ACC.

§ 23.3:7  Assessments

Section G. of form 23-1 in this chapter authorizes the association to impose and collect regular and special assessments, and a lien is created on each owner’s property to secure an owner’s payment of the assessments. The amount of the initial regular assessment, the timing for payment of regular assessments, and the manner in which the owners approve special assessments all need to be completed in this section.

§ 23.3:8  Remedial Rights

If a declarant desires to impose a late charge or interest on delinquent assessments, the amount and interest rate should be completed in section H. of form 23-1 in this chapter.

§ 23.3:9  Dedication or Conveyance of Common Areas

Paragraph I.1.d. of form 23-1 in this chapter requires a declarant to select the number of votes necessary to dedicate or convey common areas owned by the association.

§ 23.3:10  Term of Declaration

Paragraph J.1. of form 23-1 in this chapter and paragraph E.1. of form 23-2 both allow a developer to select the period of time the restrictive covenants will remain in effect and, if the restrictive covenants terminate on a specific date, how the property owners may continue the restrictive covenants.
§ 23.3:11  Annexation of Additional Property

Paragraph J.8. of form 23-1 in this chapter and paragraph E.7. of form 23-2 both allow for annexation of additional property into the declaration. A declarant needs to determine the percentage of owners needed to annex additional property into the declaration.

§ 23.3:12  Bylaws

Form 23-4 in this chapter is a set of bylaws for the property owners association. The bylaws can be adapted to either an unincorporated association or a corporation. If the property owners association is an unincorporated nonprofit association, consult chapter 252 of the Texas Business Organizations Code. For a nonprofit corporation, consult chapter 22 of the Business Organizations Code.

§ 23.3:13  Rules

Form 23-5 in this chapter is a form that can be used in promulgating rules for the property owners association and the use of any common areas. The rules and penalties for violation (to be inserted in sections A. and B. of the form), promulgated by the association, will be unique to each subdivision. The enforcement provisions (contained in section C. of the form) are based on the requirements in section 209.006 of the Texas Property Code.
Additional Resources


Form 23-1

This form is provided as an example only. The attorney should tailor the provisions of the form to address the specific standards of the association.

Declaration of Restrictive Covenants of the [name of subdivision] Subdivision
[with Property Owners Association]

Basic Information

Date:

Declarant:

Declarant’s Address:

Property Owners Association: [name], a Texas nonprofit [corporation/association]

Property Owners Association’s Address:

Property:

Definitions

“ACC” means the Architectural Control Committee established in this Declaration.

“Assessment” means any amount due to the Property Owners Association by an Owner or levied against an Owner by the Property Owners Association under this Declaration.

“Board” means the Board of Directors of the Property Owners Association.

“Bylaws” means the Bylaws of the Property Owners Association adopted by the Board.
“Common Area” means all property within the Subdivision not designated as a Lot on the Plat and that has not been accepted for maintenance by the applicable governmental body. Declarant will convey the Common Area to the Property Owners Association.

“Covenants” means the covenants, conditions, and restrictions contained in this Declaration.

“Declarant” means [name], [a/an] [individual/[Texas/[state of formation]] limited partnership/corporation/limited liability company] and any successor that acquires all unimproved Lots owned by Declarant for the purpose of development and is named as successor in a recorded document.

“Dedicatory Instruments” means this Declaration and the [certificate of formation.] Bylaws, rules of the Property Owners Association, and standards of the ACC, as amended.

“Easements” means Easements within the Property for utilities, drainage, and other purposes as shown on the Plat or of record.

“Lot” means each tract of land designated as a lot on the Plat, excluding lots that are part of the Common Area.

“Member” means Owner.

“Owner” means every record Owner of a fee interest in a Lot.

“Plat” means the Plat of the Property recorded in [recording data] of the real property records of [county] County, Texas, and any replat of or amendment to the Plat made in accordance with this Declaration.

“Residence” means a detached building designed for and used as a dwelling by a Single Family and constructed on one or more Lots.
“Single Family” means a group of individuals related by blood, adoption, or marriage or a number of unrelated roommates not exceeding the number of bedrooms in a Residence.

“Structure” means any improvement on a Lot (other than a Residence), including a sidewalk, driveway, fence, wall, tennis court, swimming pool, outbuilding, or recreational equipment.

“Subdivision” means the Property covered by the Plat and any additional property made subject to this Declaration.

“Vehicle” means any automobile, truck, motorcycle, boat, trailer, or other wheeled conveyance, whether self-propelled or towed.

Clauses and Covenants

A. Imposition of Covenants

1. Declarant imposes the Covenants on the Subdivision. All Owners and other occupants of the Lots by their acceptance of their deeds, leases, or occupancy of any Lot agree that the Subdivision is subject to the Covenants.

2. The Covenants are necessary and desirable to establish a uniform plan for the development and use of the Subdivision for the benefit of all Owners. The Covenants run with the land and bind all Owners, occupants, and any other person holding an interest in a Lot.

3. Each Owner and occupant of a Lot agrees to comply with the Dedicatory Instruments and agrees that failure to comply may subject him to a fine, an action for amounts due to the Property Owners Association, damages, or injunctive relief.
B. Plat and Easements

1. The Plat, Easements, and all matters shown of record affecting the Property are part of this Declaration and are incorporated by reference.

2. An Owner may use that portion of a Lot lying in an Easement for any purpose that does not interfere with the purpose of the Easement or damage any facilities. Owners do not own any utility facilities located in an Easement.

3. Neither Declarant nor any Easement holder is liable for damage to landscaping or a Structure in an Easement.

4. Declarant and each Easement holder may install, maintain, and connect facilities in the Easements.

C. Use and Activities

1. Permitted Use. A Lot may be used only for an approved Residence and approved Structures for use by a Single Family.

2. Prohibited Activities. Prohibited activities are—

   a. any activity that is otherwise prohibited by the Dedicatory Instruments;
   
   b. any illegal activity;
   
   c. any nuisance, noxious, or offensive activity;
   
   d. any dumping of rubbish;
   
   e. any storage of—

      i. building materials except during the construction or renovation of a Residence or a Structure;
ii. vehicles, except vehicles in a garage or Structure or operable automobiles on a driveway; or

iii. unsightly objects unless completely shielded by a Structure;

f. any exploration for or extraction of minerals;

g. any keeping or raising of animals, livestock, or poultry, except for common domesticated household pets, such as dogs and cats, not to exceed [number] confined to a fenced yard or within the Residence;

h. any commercial or professional activity except reasonable home office use;

i. the renting of a portion of a Residence or Structure;

j. the drying of clothes in a manner that is visible from any street;

k. the display of any sign except—

i. one not more than five square feet, advertising the Lot for sale or rent or advertising a garage or yard sale; and

ii. political signage not prohibited by law or the Dedicatory Instruments;

l. installing a mobile home, manufactured home, manufactured housing, motor home, or house trailer on a Lot;

m. moving a previously constructed house onto a Lot;

n. interfering with a drainage pattern without ACC approval;

o. hunting and shooting; and
p. occupying a Structure that does not comply with the construction standards of a Residence.

D. Construction and Maintenance Standards

1. Lots

   a. Consolidation of Lots. An Owner of adjoining Lots, with ACC approval, may consolidate those Lots into one site for the construction of a Residence.

   b. Subdivision Prohibited. No Lot may be further subdivided.

   c. Easements. No easement in a Lot may be granted without ACC approval.

   d. Maintenance. Each Owner must keep the Lot, all landscaping, the Residence, and all Structures in a neat, well-maintained, and attractive condition.

2. Residences and Structures

   a. Aesthetic Compatibility. All Residences and Structures must be aesthetically compatible with the Subdivision, as determined by the ACC.

   b. Maximum Height. The maximum height of a Residence is [number] [feet above grade/stories].

   c. Required Area. The total area of a Residence, exclusive of porches, garages, or carports, must be at least [number] square feet.

   d. Location on Lot. No Residence or Structure may be located in violation of the setback lines shown on the Plat. Each Residence must face the front Lot line. All Structures must be located behind the front wall of the Residence. All outbuildings, except garages, must not be visible from any street.
e. **Garages.** Each Residence must have at least a two-car garage accessed by a driveway. The garage may be a separate structure.

f. **Damaged or Destroyed Residences and Structures.** Any Residence or Structure that is damaged must be repaired within [number] days (or within a period approved by the ACC) and the Lot restored to a clean, orderly, and attractive condition. Any Residence or Structure that is damaged to the extent that repairs are not practicable must be demolished and removed within [number] days and the Lot restored to a clean and attractive condition.

g. **Fences, Walls, and Hedges.** No fence, wall, or hedge may be located forward of the front wall line of the Residence, except for trellises and decorative fences that are approved by the ACC.

h. **Traffic Sight Lines.** No landscaping that obstructs traffic sight lines may be placed on any Lot.

i. **Sidewalks.** When the Residence is constructed, the Lot must be improved with sidewalks connecting with the sidewalks on adjacent Lots.

j. **Landscaping.** Landscaping must be installed within [number] days after occupancy. The minimum landscaping is specified in the standards of the ACC.

3. **Building Materials for Residences and Structures**

   a. **Roofs.** Only [composition/tile/metal] roofs may be used on Residences and Structures, unless otherwise approved by the ACC. All roof stacks must be painted to match the roof color.
b. **Air Conditioning.** Window- or wall-type air conditioners may not be used in a Residence.

c. **Exterior Walls.** All Residences must have at least [percent] percent of their exterior walls, including exposed foundation, of stone or brick, minus windows and doors, unless otherwise approved by the ACC.

d. **Color Changes.** No change to the color of the exterior walls, trim, or roof of a Residence will be permitted, unless otherwise approved by the ACC.

e. **Driveways and Sidewalks.** All driveways and sidewalks must be surfaced with concrete, unless otherwise approved by the ACC. Driveways and sidewalks may not be surfaced with dirt, gravel, shell, or crushed rock.

f. **Lot Identification.** Lot address numbers and name identification must be aesthetically compatible with the Subdivision.

E. **Property Owners Association**

   Select one of the following.

1. **Establishment and Governance.** The Property Owners Association is established by filing its certificate of formation and is governed by the certificate, the Declaration, and the Bylaws. The Property Owners Association has the powers of a nonprofit corporation and a property owners association under the Texas Business Organizations Code, the Texas Property Code, and the Dedicatory Instruments.

   Or

1. **Establishment and Governance.** The filing of this Declaration establishes the Property Owners Association as an unincorporated nonprofit association that is governed by this Declaration and the Bylaws. The Property Owners Association has the powers of an unin-
corporated nonprofit association and a property owners association for the Subdivision under the Texas Business Organizations Code, the Texas Property Code, and the Dedicatory Instruments.

2. **Rules.** The Board may adopt rules that do not conflict with law or the other Dedicatory Instruments. On request, Owners will be provided a copy of any rules.

3. **Membership and Voting Rights.** Every Owner is a Member of the Property Owners Association. Membership is appurtenant to and may not be separated from ownership of a Lot. The Property Owners Association has two classes of voting Members:

   a. **Class A.** Class A Members are all Owners, other than Declarant. Class A Members have one vote per Lot. When more than one person is an Owner, each is a Class A Member, but only one vote may be cast for a Lot.

   b. **Class B.** The Class B Member is Declarant and has the number of votes for each Lot owned specified in the Bylaws. The Class B Membership ceases and converts to Class A Membership on the earlier of—

      i. when the Class A Members’ votes exceed the total of Class B Member’s votes or

      ii. [date].

F. **ACC**

1. **Establishment**

   a. **Purpose.** The ACC is established as a committee of the Property Owners Association to assist the Property Owners Association in ensuring that all
Residences, Structures, and landscaping within the Subdivision are aesthetically compatible and conform to the Dedicatory Instruments.

b. **Members.** The ACC consists of at least [number] persons appointed by the Board. The Board may remove or replace an ACC member at any time.

c. **Term.** ACC members serve until replaced by the Board or they resign.

d. **Standards.** Subject to Board approval, the ACC may adopt standards that do not conflict with the other Dedicatory Instruments to carry out its purpose. These standards are not effective unless recorded with the county clerk. On request, Owners will be provided a copy of any standards.

2. **Plan Review**

   a. **Required Review by ACC.** No Residence or Structure may be erected on any Lot, or the exterior altered, unless plans, specifications, and any other documents requested by the ACC have been submitted to and approved by the ACC. The plans and specifications must show exterior design, height, building materials, color scheme, location of the Residence and Structures depicted horizontally and vertically, and the general plan of landscaping, all in the form and detail the ACC may require.

   b. **Procedures**

      i. **Complete Submission.** Within [number] days after the submission of plans and specifications by an Owner, the ACC must notify the submitting Owner of any other documents or information required by the ACC. In the absence of timely notice from the ACC requesting additional documents or other information, the submission is deemed complete.
ii. *Deemed Approval.* If the ACC fails to give notice of disapproval of the plans and specifications to the submitting Owner within [number] days after complete submission, the submitted plans and specifications are deemed approved.

c. *Appeal.* An Owner may appeal any action of the ACC to the Board. The appealing Owner must give written notice of the appeal to the Board, and if the appeal is by an Owner who is not the submitting Owner, the appealing Owner must also give written notice to the submitting Owner within [number] days after the ACC’s action. The Board shall determine the appeal within [number] days after timely notice of appeal is given. The determination by the Board is final.

d. *Records.* The ACC will maintain written records of all requests submitted to it and of all actions taken. The Board will maintain written records of all appeals of ACC actions and all determinations made. Any Owner may inspect the records of the ACC and Board, but no Owner may inspect or copy the interior floor plan or security system design of any other Owner.

e. *No Liability.* The Property Owners Association, the Board, the ACC, and their members will not be liable to any person submitting requests for approval or to any Owner by reason of any action, failure to act, approval, disapproval, or failure to approve or disapprove any request.

G. **Assessments**

1. *Authority.* The Property Owners Association may levy Assessments to promote the recreation, health, safety, and welfare of the residents in the Subdivision, to fund operating expenses of the Property Owners Association, and to improve and maintain the Common Areas.
2. **Personal Obligation.** An Assessment is a personal obligation of each Owner when the Assessment accrues.

3. **Creation of Lien.** Assessments are secured by a continuing vendor’s lien on each Lot, which lien is reserved by Declarant and hereby assigned to the Property Owners Association. By acceptance of a deed to a Lot, each Owner grants the lien, together with the power of sale, to the Property Owners Association to secure Assessments.

4. **Commencement.** A Lot becomes subject to Assessments on conveyance of the Lot by Declarant.

5. **Regular Assessments**

   a. **Rate.** Regular Assessments are levied by the Board, annually, to fund the anticipated operating and maintenance expenses of the Property Owners Association. Until changed by the Board, the Regular Assessment is $[amount] per [Lot/acre].

   b. **Changes to Regular Assessments.** Regular Assessments may be changed annually by the Board. Written notice of the Regular Assessment will be sent to every Owner at least thirty days before its effective date.

   c. **Collections.** Regular Assessments will be collected [annually/semiannually/monthly] in advance, payable on the [first/tenth/[other]] day of the [month/year] and on [the same day of each succeeding [month/year]/the [first/tenth/[other]] day of [month] of each year].

6. **Special Assessments.** In addition to the Regular Assessments, the Board may levy Special Assessments for the purpose of funding the cost of any construction, reconstruction, repair, or replacement of any capital improvement on the Common Area or for any other purpose benefiting the Subdivision but requiring funds exceeding those available from the
Regular Assessments. Special Assessments must be approved by the Members. Written notice of the terms of the Special Assessment will be sent to every Owner.

7. **Approval of Special Assessments.** Any Special Assessment must be approved by a [majority/two-thirds] vote at a meeting of the Members in accordance with the Bylaws.

8. **Fines.** The Board may levy a fine against an Owner for a violation of the Dedicatory Instruments as permitted by law.

9. **Subordination of Lien to Mortgages.** The lien granted and reserved to the Property Owners Association is subordinate to any lien granted by an Owner against a Lot not prohibited by the Texas Constitution. The foreclosure of a superior lien extinguishes the Property Owners Association’s lien as to Assessments due before the foreclosure.

10. **Delinquent Assessments.** Any Assessment not paid within [number] days after it is due is delinquent.

H. **Remedial Rights**

1. **Late Charges and Interest.** A late charge of [$[amount]/[percent] percent of the delinquent amount] is assessed for delinquent payments. Delinquent Assessments accrue interest at the rate of [percent] percent per year. The Board may change the late charge and the interest rate.

2. **Costs, Attorney’s Fees, and Expenses.** If the Property Owners Association complies with all applicable notice requirements, an Owner is liable to the Property Owners Association for all costs and reasonable attorney’s fees incurred by the Property Owners Association in collecting delinquent Assessments, foreclosing the Property Owners Association’s lien, and enforcing the Dedicatory Instruments.
3. **Judicial Enforcement.** The Property Owners Association may bring an action against an Owner to collect delinquent Assessments, foreclose the Property Owners Association’s lien, or enforce or enjoin a violation of the Dedicatory Instruments. An Owner may bring an action against another Owner to enforce or enjoin a violation of the Dedicatory Instruments.

4. **Remedy of Violations.** The Property Owners Association may levy a fine against an Owner for a violation of the Dedicatory Instruments.

5. **Suspension of Rights.** If an Owner violates the Dedicatory Instruments, the Property Owners Association may suspend the Owner’s rights under the Dedicatory Instruments in accordance with law.

6. **Damage to Property.** An Owner is liable to the Property Owners Association for damage to Common Areas caused by the Owner or the Owner’s family, guests, agents, independent contractors, and invitees in accordance with law.

I. **Common Area**

1. **Common Area Easements.** Each Owner has an easement in and to the Common Area, subject to the right of the Property Owners Association to—

   a. charge reasonable admission and other fees for the use of recreational facilities situated on the Common Area, and if an Owner does not pay these fees, the Owner may not use the recreational facilities;

   b. suspend an Owner’s rights to use a Common Area under the Dedicatory Instruments;

   c. grant an easement approved by the Board over the Common Area for utility, drainage, or other purposes; and
d. dedicate or convey any of the Common Area for public purposes, on approval by a vote of [a majority/two-thirds] of the Members at a meeting in accordance with the Bylaws.

2. **Permitted Users.** An Owner’s right to use and enjoy the Common Area extends to the Owner’s family, guests, agents, and invitees, subject to the Dedicatory Instruments.

3. **Unauthorized Improvements in Common Area.** An Owner may not erect or alter any Structure on, or clear, landscape, or disturb, any Common Area except as approved by the Board.

**J. General Provisions**

1. **Term.** This Declaration runs with the land and is binding in perpetuity.

    1. **Term.** This Declaration runs with the land and is binding for a term of [number] years. The term may be extended for [successive terms of [number] years each by [percent] percent of the Members at a meeting in accordance with the Bylaws within [number] months before the end of a term/an initial term of [number] years. [Include if applicable: Thereafter this Declaration automatically continues for successive terms of [number] years each, unless within [number] months before the end of a term [percent] percent of the Members at a meeting in accordance with the Bylaws elect not to extend the term.] An instrument reflecting the extension will be signed by the Property Owners Association and recorded.

2. **No Waiver.** Failure by the Property Owners Association or an Owner to enforce the Dedicatory Instruments is not a waiver.
3. **Corrections.** The Board may correct typographical or grammatical errors, ambiguities, or inconsistencies contained in this Declaration, provided that any correction must not impair or affect a vested property right of any Owner.

4. **Amendment.** This Declaration may be amended at any time by vote of [percent (cannot exceed sixty-seven)] percent of Owners entitled to vote on the amendment. An instrument containing the approved amendment will be signed by the Property Owners Association and recorded.

5. **Conflict.** This Declaration controls over the other Dedicatory Instruments.

6. **Severability.** If a provision of this Declaration is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this Declaration, and this Declaration is to be construed as if the unenforceable provision is not a part of the Declaration.

7. **Notices.** All notices must be in writing and must be given as required or permitted by the Dedicatory Instruments or by law. Notice by mail is deemed delivered (whether actually received or not) when properly deposited with the United States Postal Service, addressed (a) to a Member, at the Member’s last known address according to the Property Owners Association’s records, and (b) to the Property Owners Association, the Board, the ACC, or a managing agent at the Property Owners Association’s principal office or another address designated in a notice to the Members. Unless otherwise required by law or the Dedicatory Instruments, actual notice, however delivered, is sufficient.

8. **Annexation of Additional Property.** On written approval of the Board and not less than [percent] percent of the Members at a meeting in accordance with the Bylaws, the owner of any property who desires to subject the property to this Declaration may record an annexation agreement that will impose this Declaration and the Covenants on that property.
Declaration of Restrictive Covenants [with Property Owners Association] Form 23-1

________________________________________________________________________________________________________________________
________________________________________________________________________________________________________________________

[Name of declarant]

By ____________________________________________________________

[Name and title]

Include acknowledgment.

After recording, please return to:
[Name and address of declarant or attorney]
Declaration of Restrictive Covenants of the [name of subdivision] Subdivision
[without Property Owners Association]

Basic Information

Date:

Declarant:

Declarant’s Address:

Property:

Definitions

“Covenants” means the covenants, conditions, and restrictions contained in this Declaration.

“Declarant” means [name], [a/an] [individual/[Texas/[state of formation]]] limited partnership/corporation/limited liability company] and any successor that acquires all unimproved Lots owned by Declarant for the purpose of development and is named as successor in a recorded document.

“Easements” means Easements within the Property for utilities, drainage, and other purposes as shown on the Plat or of record.

“Lot” means each tract of land designated as a lot on the Plat.

“Owner” means every record Owner of a fee interest in a Lot.
“Plat” means the Plat of the Property recorded in [recording data] of the real property records of [county] County, Texas, and any replat of or amendment to the Plat made in accordance with this Declaration.

“Residence” means a detached building designed for and used as a dwelling by a Single Family and constructed on one or more Lots.

“Single Family” means a group of individuals related by blood, adoption, or marriage or a number of unrelated roommates not exceeding the number of bedrooms in a Residence.

“Structure” means any improvement on a Lot (other than a Residence), including a fence, wall, tennis court, swimming pool, outbuilding, or recreational equipment.

“Subdivision” means the Property covered by the Plat and any additional property made subject to this Declaration.

“Vehicle” means any automobile, truck, motorcycle, boat, trailer, or other wheeled conveyance, whether self-propelled or towed.

**Clauses and Covenants**

**A. Imposition of Covenants**

1. Declarant imposes the Covenants on the Subdivision. All Owners and other occupants of the Lots by their acceptance of their deeds, leases, or occupancy of any Lot agree that the Subdivision is subject to the Covenants.

2. The Covenants are necessary and desirable to establish a uniform plan for the development and use of the Subdivision for the benefit of all Owners. The Covenants run with the land and bind all Owners, occupants, and any other person holding an interest in a Lot.
3. Each Owner and occupant of a Lot agrees to comply with this Declaration and agrees that failure to comply may subject him to a fine, damages, or injunctive relief.

B. Plat and Easements

1. The Plat, Easements, and all matters shown of record affecting the Property are part of this Declaration and are incorporated by reference.

2. An Owner may use that portion of a Lot lying in an Easement for any purpose that does not interfere with the purpose of the Easement or damage any facilities. Owners do not own any utility facilities located in an Easement.

3. Neither Declarant nor any Easement holder is liable for damage to landscaping or a Structure in an Easement.

4. Declarant and each Easement holder may install, maintain, and connect facilities in the Easements.

C. Use and Activities

1. Permitted Use. A Lot may be used only for an approved Residence and approved Structures for use by a Single Family.

2. Prohibited Activities. Prohibited activities are—

   a. any activity that is otherwise prohibited by this Declaration;

   b. any illegal activity;

   c. any nuisance or noxious or offensive activity;

   d. any dumping of rubbish;

   e. any storage of—
i. building materials except during the construction or renovation of a Residence or a Structure;

ii. vehicles, except vehicles in a garage or Structure or operable automobiles on a driveway; or

iii. unsightly objects unless completely shielded by a Structure;

f. any exploration for or extraction of minerals;

g. any keeping or raising of animals, livestock, or poultry, except for common domesticated household pets, such as dogs and cats, not to exceed [number] confined to a fenced yard or within the Residence;

h. any commercial or professional activity except reasonable home office use;

i. the renting of a portion of a Residence or Structure;

j. the drying of clothes in a manner that is visible from any street;

k. the display of any sign except—

i. one not more than five square feet, advertising the Lot for sale or rent or advertising a garage or yard sale; and

ii. political signage not prohibited by law;

l. installing a mobile home, manufactured home, manufactured housing, motor home, or house trailer on a Lot;

m. moving a previously constructed house onto a Lot;

n. interfering with a drainage pattern or the natural flow of surface water;
o. hunting and shooting; and

p. occupying a Structure that does not comply with the construction standards of a Residence.

D. Construction and Maintenance Standards

1. Lots

   a. Consolidation of Lots. An Owner of adjoining Lots may consolidate those Lots into one site for the construction of a Residence.

   b. Subdivision Prohibited. No Lot may be further subdivided.

   c. Easements. No easement in a Lot may be granted.

   d. Maintenance. Each Owner must keep the Lot, all landscaping, the Residence, and all Structures in a neat, well-maintained, and attractive condition.

2. Residences and Structures

   a. Aesthetic Compatibility. All Residences, Structures, and Landscaping must be aesthetically compatible with the Subdivision.

   b. Maximum Height. The maximum height of a Residence is [number] [feet above grade/stories].

   c. Required Area. The total area of a Residence, exclusive of porches, garages, or carports, must be at least [number] square feet.

   d. Location on Lot. No Residence or Structure may be located in violation of the setback lines shown on the Plat. Each Residence must face the front Lot
line. All Structures must be located behind the front wall of the Residence. All outbuildings, except garages, must not be visible from any street.

e. **Garages.** Each Residence must have at least a two-car garage accessed by a driveway. The garage may be a separate structure.

f. **Damaged or Destroyed Residences and Structures.** Any Residence or Structure that is damaged must be repaired within [number] days and the Lot restored to a clean, orderly, and attractive condition. Any Residence or Structure that is damaged to the extent that repairs are not practicable must be demolished and removed within [number] days and the Lot restored to a clean and attractive condition.

g. **Fences, Walls, and Hedges.** No fence, wall, or hedge may be located forward of the front wall line of the Residence, except for trellises and decorative fences.

h. **Antennae.** No antenna, satellite dish, or associated wires may be visible from the street or be located behind the back setback line of any Lot.

i. **Traffic Sight Lines.** No landscaping that obstructs traffic sight lines may be placed on any Lot.

j. **Sidewalks.** When the Residence is constructed, the Lot must be improved with sidewalks connecting with the sidewalks on adjacent Lots.

k. **Landscaping.** Landscaping must be installed within [number] days after occupancy.
3. **Building Materials for Residences and Structures**

   a. **Roofs.** Only [composition/tile/metal] may be used on Residences and Structures. All roof stacks must be painted to match the roof color.

   b. **Air Conditioning.** Window- or wall-type air conditioners may not be used in a Residence.

   c. **Exterior Walls.** All Residences must have at least [percent] percent of their exterior walls, including exposed foundation, of stone or brick, minus windows and doors.

   d. **Driveways and Sidewalks.** All driveways and sidewalks must be surfaced with concrete or asphalt.

   e. **Lot Identification.** Lot address numbers and name identification must be aesthetically compatible with the Subdivision.

E. **General Provisions**

   | Select one of the following. |

   1. **Term.** This Declaration runs with the land and is binding in perpetuity.

   Or

   1. **Term.** This Declaration runs with the land and is binding for a term of [number] years. The term may be extended for [successive terms of [number] years each by the affirmative vote of [percent] percent of the Owners within [number] months before the end of a term/ an initial term of [number] years. [Include if applicable: Thereafter this Declaration automatically continues for successive terms of [number] years each, unless within [number] months before the end of a term [percent] percent of the Owners vote not to extend the term.]
2. **No Waiver.** Failure by an Owner to enforce this Declaration is not a waiver.

3. **Corrections.** Declarant may correct typographical or grammatical errors, ambiguities, or inconsistencies contained in this Declaration, provided that any correction must not impair or affect a vested property right of any Owner.

4. **Amendment.** This Declaration may be amended at any time by the affirmative vote of [percent] percent of the Owners.

5. **Severability.** If a provision of this Declaration is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this Declaration, and this Declaration is to be construed as if the unenforceable provision is not a part of the Declaration.

6. **Notices.** Any notice required or permitted by this Declaration must be given in writing by certified mail, return receipt requested. Unless otherwise required by law or this Declaration, actual notice, however delivered, is sufficient.

7. **Annexation of Additional Property.** On written approval of Declarant and not less than [percent] percent of the Owners, the owner of any property who desires to subject the property to this Declaration may record an annexation agreement that will impose this Declaration and the Covenants on that property.

8. **Presuit Mediation.** As a condition precedent to the commencement of a legal proceeding to enforce this Declaration, the Owners will mediate the dispute in good faith.

9. **Association.** The Owners of [percent] of Lots in the Subdivision may authorize the formation of an association of Owners (“Association”) by signing and acknowledging a
Declaration of Restrictive Covenants [without Property Owners Association]  Form 23-2

statement containing (a) the proposed Association’s name and type of entity and (b) the names and addresses of the initial directors. The Association will be governed by this Declaration, its Certificate of Formation, if any, and its bylaws and rules adopted by its board of directors (collectively, “Dedicatory Instruments”).

If an Association is formed, every Owner will be a member and agrees to comply with the Dedicatory Instruments with the same consequences for failure to comply as are contained in this Declaration for failure to comply with it. Membership in the Association is appurtenant to and may not be separated from ownership of a Lot. If more than one person is an Owner of a Lot, only one vote may be cast for the Lot. The Association will have the powers of a Texas nonprofit corporation/unincorporated nonprofit association and a property owners association for the Subdivision under the Texas Business Organizations Code, the Texas Property Code, and the Dedicatory Instruments. The Association may levy assessments to pay the expenses of its formation; to promote the recreation, health, safety, and welfare of Owners in the Subdivision; to fund its operating expenses; and to improve and maintain any common areas. An assessment is a personal obligation of each Owner when the assessment accrues. Assessments are secured by a continuing vendor’s lien on each Lot, and the lien is reserved by the Declarant and assigned to the Association. By acceptance of a deed to a Lot, each Owner grants a lien, together with the power of sale, to the Association to secure assessments. The lien granted and reserved to the Association is subordinate to any lien granted by an Owner against a Lot not prohibited by the Texas Constitution. The foreclosure of a superior lien extinguishes the Association’s lien as to assessments due before the foreclosure. The bylaws or the rules of the Association establish when assessments are due, how assessment amounts may be changed, and the Association’s rights to collect assessments. Regular assessments [will be equal for all Lots/will be based on the size of each Lot, rounded to the nearest one-tenth of an acre]. The bylaws and rules may also specify the Association’s remedial rights to charge late fees for late payment of assessments; enforce compliance with the Dedicatory Instruments; and assess an Owner for attorney’s fees and costs arising out of enforcement
actions, foreclosure of the Association’s lien, or suspension of an Owner’s rights, including voting rights, for a delinquency in paying an assessment or other violations of the Dedicatory Instruments.

[Name of declarant]

Include acknowledgment.

After recording, please return to:
[name and address of declarant or attorney]
Certificate of Formation of [name of corporation], a Texas Nonprofit Corporation

1. **Name.** The name of the corporation is [name].

2. **Type of Filing Entity.** The type of filing entity being formed is a nonprofit corporation.

3. **Purpose.** The purpose for which the filing entity is formed is to be the property owners association under the Declaration of Restrictive Covenants of the [name] subdivision.

4. **Period of Duration.** The period of duration of the filing entity is perpetual.

5. **Initial Registered Office.** The street address of the initial registered office of the filing entity and the name of its initial registered agent at that address are:

   Name: [name of registered agent]
   Address: [address, city, state]

6. **Organizer.** The name and address of the organizer for the filing entity are:

   Name: [name of organizer]
   Address: [address, city, state]

7. **Members.** The filing entity will be composed of Members.

8. **Initial Board of Directors.** The number of directors constituting the initial board of directors is [number], and their names and addresses are:

   Name: [name]
   Address: [address, city, state]
9. **Meetings.** Any action that may be taken at a Members or board of directors meeting may be taken without a meeting by written consent setting forth the action taken signed by a sufficient number of Members or of the board of directors as would be necessary to take that action at a meeting.

Signed on [date].

[Name of organizer]
Bylaws of [name of property owners association] [Inc.]

Basic Information

Property Owners Association: [name], [established by the certificate of formation filed with the secretary of state of Texas on [date] under file number [number]/a Texas nonprofit association, which is an unincorporated organization].

Principal Office: [address, city], Texas. The Property Owners Association may have other offices.

Declaration: The Declaration of Restrictive Covenants of the [name of subdivision] Subdivision, recorded in the real property records of [county] County, Texas.

Definitions: Capitalized terms used but not defined herein have the meaning set forth in the Declaration.

Voting Members: Members entitled to vote or their proxies. Any Member delinquent in payment of any Assessment is not a Voting Member.

A. Members

A.1. Membership. Every Owner is a Member of the Property Owners Association. Membership is appurtenant to and may not be separated from ownership of a Lot. The Property Owners Association has two classes of voting Members:

A.1.a. Class A. Class A Members are all Owners, other than Declarant. Class A Members have one vote per Lot. When more than one person is an Owner, each is a Class A Member, but only one vote may be cast for a Lot.
A.1.b. Class B. The Class B Member is Declarant and has [number] votes for each Lot owned. The Class B membership ceases and converts to Class A membership on the earlier of—

   i. when the Class A Members’ votes exceed the total of Class B Member’s votes; or

   ii. the date specified in the Declaration.

A.2. Place of Meeting. Members meetings will be held at the Property Owners Association’s Principal Office or at another place designated by the Board.

A.3. Annual Meetings. The first Members meeting will be held within [number] months after the formation of the Property Owners Association. Subsequent regular annual Members meetings will be held on [describe meeting date taking into consideration when dues are payable, e.g., the first Sunday in June].

A.4. Special Meetings. The president may call special meetings. The president must call a special meeting if directed by the Board or by a petition signed by [percent] percent of the Class A Voting Members.

A.5. Notice of Meetings, Election, and Vote. Written notice stating the place, day, and hour of each Members meeting, other than a reconvened meeting, must be given to each Member not less than ten nor more than sixty days before the meeting. For voting not at a meeting, notice must be given not later than the twentieth day before the latest day on which a ballot may be submitted to be counted. The special Members meeting notices must also state the meeting’s purpose, and no business may be conducted except as stated in the notice. Notice to a Member must state the purpose of an association-wide election or vote and is deemed given when hand delivered or mailed. If mailed, notice is deemed given (whether
actually received or not) when deposited with the United States Postal Service, postage pre-

paid.

A.6. Waiver of Notice. A Member may, in writing, waive notice of a meeting. Attendance at a meeting is a waiver of notice of the meeting, unless the Member objects to lack of notice when the meeting is called to order.

A.7. Quorum. A majority of the Voting Members is a quorum. If a Members meeting cannot be held because a quorum is not present, a majority of the Voting Members who are present may adjourn the meeting. At the reconvened meeting, [percent] percent of the Voting Members is a quorum. If a quorum is not present, a majority of the Voting Members who are present may adjourn the meeting. At the second reconvened meeting, a majority of the Board is a quorum. Written notice of the place, date, and hour of each reconvened meeting must be given to each Member not more than [number] nor less than [number] days before the reconvened meeting.

A.8. Majority Vote. Voting by Members may be at a meeting or outside of a meeting. Voting must be as required by law. Votes representing more than 50 percent of the Voting Members present at a meeting at which a quorum is present are a majority vote.


A.10. Conduct of Meetings. The president will preside over Members meetings. The secretary will keep minutes of the meetings and will record in a minutes book the votes of the members.

B. Board

B.1. Governing Body; Composition. The affairs of the Property Owners Association are governed by the Board. Each director has one vote. The initial Board is composed of
the directors appointed in the certificate of formation. Each director must be a Member or, in the case of an entity Member, a person designated in writing to the secretary.

B.2. **Number of Directors.** The Board consists of not less than three nor more than [number] directors. Within those limits, the Board may change the number of directors. No decrease may shorten the term of a director.

B.3. **Term of Office.** The initial directors serve until the first annual meeting of Members.

The terms of directors will be staggered. At least one-third of the Board will be elected each year. The initial Board will determine the initial term, not to exceed three years, of each director. At the expiration of the initial term of a director, each successor will have a term of [number] years.

Successor directors will have a term of one year.

Directors may serve consecutive terms.

B.4. **Election.** At the first annual meeting of Members, the Voting Members will elect directors to succeed the initial directors. At subsequent annual Members meetings, successors for each director whose term is expiring will be elected. Cumulative voting is prohibited. The candidate or candidates receiving the most votes will be elected. The directors elected by the Voting Members will hold office until their respective successors have been elected.
B.5. **Removal of Directors and Vacancies**

B.5.a. **Removal by Members.** Any director may be removed, with or without cause, by a majority of the Voting Members. Any director whose removal is sought will be given notice of the proposed removal.

B.5.b. **Removal by Board.** Any director may be removed at a Board meeting if the director—

i. failed to attend [number] consecutive Board meetings;

ii. failed to attend [percent] percent of Board meetings within one year;

iii. is delinquent in the payment of any Assessment for more than [number] days; or

iv. is the subject of an enforcement action by the Property Owners Association for violation of the Dedicatory Instruments.

B.5.c. **Vacancies.** A director’s position becomes vacant if the director dies, becomes incapacitated, resigns, or is no longer a Member.

B.5.d. **Successors.** If a director is removed or a vacancy exists, a successor will be elected by the remaining directors for the remainder of the term.

B.6. **Compensation.** Directors will not receive compensation. A director may be reimbursed for expenses approved by the Board.

B.7. **Powers.** The Board has all powers necessary to administer the Property Owners Association’s affairs.

B.8. **Management.** The Board may employ a managing agent. Declarant, or an affiliate of Declarant, may be the managing agent.
B.9. **Accounts and Reports.** Accounting and controls must conform to good accounting practices. Accounts will not be commingled with accounts of other persons. The following financial reports will be prepared at least annually:

B.9.a. An income statement reflecting all income and expense activity for the preceding period.

B.9.b. A statement reflecting all cash receipts and disbursements for the preceding period.

B.9.c. A variance report reflecting the status of all accounts in an “actual” versus “approved” budget format.

B.9.d. A balance sheet as of the last day of the preceding period.

B.9.e. A delinquency report listing all Owners who are delinquent by more than [number] days in paying any Assessment and describing the status of any action to collect those delinquent Assessments.

B.10. **Borrowing.** The Board may borrow money to maintain, repair, or restore the Common Area without the approval of the Members. If approved in advance by the Members in the same manner as approving a Special Assessment, the Board may borrow money for any other purpose.

B.11. **Rights of Association.** With respect to the Common Area, and in accordance with the Declaration, the Property Owners Association will have the right to contract with any person for the performance of various duties and functions. Such agreements require the approval of the Board.
B.12. Enforcement Procedures

B.12.a. Notice. Before the Board may (i) suspend an Owner’s right to use a Common Area, (ii) file a suit against an Owner other than a suit to collect any Assessment, (iii) foreclose the Property Owners Association’s lien, (iv) charge an Owner for property damage, or (v) levy a fine for a violation of the Dedicatory Instruments, the Property Owners Association or its agent must give written notice to the Owner as required or permitted by law. The notice must describe the violation or property damage that is the basis for the suspension action, charge, or fine and state any amount due the Property Owners Association from the Owner. The notice must also (i) inform the Owner that if the violation is curable and does not pose a threat to public health or safety, which means it could not materially affect the health or safety of an ordinary resident, the Owner is entitled to a reasonable period to cure the violation and avoid the fine or suspension unless the Owner was given notice and a reasonable opportunity to cure a similar violation within the preceding six months; (ii) indicate that the Owner may request a hearing in accordance with Texas Property Code section 209.007 on or before the thirtieth day after the date the notice was mailed to the Owner; (iii) state that the Owner may have special rights if the Owner is serving on active military duty, and (iv) state the date by which the Owner must cure a curable violation that does not pose a threat to public health and safety.

B.12.b. Hearing. If the Owner is entitled to an opportunity to cure the violation, the Owner has the right to submit a written request for a hearing to discuss and verify facts and resolve the matter in issue before a committee appointed by the Board or before the Board if the Board does not appoint a committee. If a hearing is to be held before a committee, the notice must state that the Owner has the right to appeal the committee’s decision to the Board by written notice to the Board.

The Property Owners Association must hold a hearing under this section not later than the thirtieth day after the date the Board receives the Owner’s request for a hearing and must
notify the Owner of the date, time, and place of the hearing not later than the tenth day before the date of the hearing. The Board or the Owner may request a postponement, and, if requested, a postponement will be granted for a period of not more than ten days. Additional postponements may be granted by agreement of the parties. The Owner or the Property Owners Association may make an audio recording of the meeting.

The hearing will be held in executive session affording the alleged violator a reasonable opportunity to be heard. Before any sanction hereunder becomes effective, proof of proper notice will be placed in the minutes of the meeting. Such proof will be deemed adequate if a copy of the notice, together with a statement of the date and manner of delivery, is entered by the officer, director, or agent who delivered the notice. The notice requirement will be satisfied if the alleged violator appears at the meeting. The minutes of the meeting will contain a written statement of the results of the hearing and the sanction, if any, imposed. The Board may, but will not be obligated to, suspend any proposed sanction if the violation is cured within a [number]-day period. Such suspension will not constitute a waiver of the right to sanction violations of the same or other provisions and rules by any person.

B.12.c. Appeal. Following hearing before a committee, if any, the violator will have the right to appeal the decision to the Board. To perfect this right, a written notice of appeal must be received by the managing agent, if any, president, or secretary within [number] days after the hearing date.

B.12.d. Changes in Law. The Board may change the enforcement procedures set out in this section to comply with changes in law.

C. Board Meetings

C.1. Meetings. Except as permitted by law, all regular and special meetings of the Board must be open to the Owners. Except for a meeting held by electronic or telephonic means, a Board meeting must be held in a county in which all or part of the property in the
subdivision is located or in a county adjacent to that county. A Board meeting may be held by electronic or telephonic means, provided all Owners and Board Members have access to the communication at the meeting as required by law.

C.2. Notice. Owners and Board Members must be given notice of the date, hour, place, and general subject of a regular or special Board meeting, including a general description of any matter to be brought up for deliberation in executive session. Notice must be given as required by law.

C.3. Waiver of Notice. The actions of the Board at any meeting are valid if (a) a quorum is present and (b) either proper notice of the meeting was given to each director or a written waiver of notice is given by any director who did not receive proper notice of the meeting. Proper notice of a meeting will be deemed given to any director who attends the meeting without protesting before or at its commencement about the lack of proper notice.

C.4. Quorum of Board. At all meetings, a majority of the Board will constitute a quorum, and the votes of a majority of the directors present at a meeting at which a quorum is present constitutes the decision of the Board. If the Board cannot act because a quorum is not present, a majority of the directors who are present may adjourn the meeting to a date not less than [number] nor more than [number] days from the date the original meeting was called. At the reconvened meeting, if a quorum is present, any business that may have been transacted at the meeting originally called may be transacted without further notice.

C.5. Conduct of Meetings. The president will preside at Board meetings. The secretary will keep minutes of the meetings and will record in a minute book the votes of the directors. The Board meeting will be conducted as required by law.

C.6. Proxies. Directors may vote by written proxy.
D. Officers

D.1. Officers. The officers of the Property Owners Association are a president, vice president, secretary, and treasurer, to be elected from the Members. The Board may appoint other officers having the authority and duties prescribed by the Board. Any two or more offices may be held by the same person, except the offices of president and secretary.

D.2. Election, Term of Office, and Vacancies. Officers will be elected annually by the Board at the first meeting of the Board following each annual meeting of the Voting Members. A vacancy in any office may be filled by the Board for the unexpired portion of the term.

D.3. Removal. The Board may remove any officer whenever, in the Board’s judgment, the interests of the Property Owners Association will be served thereby.

D.4. Powers and Duties. Officers have such powers and duties as are generally associated with their respective offices and as may be specifically conferred by the Board. The president is the chief executive officer of the Property Owners Association. The treasurer has primary responsibility for the preparation of the budget and financial reports and may delegate all or part of the preparation and notification duties to a finance committee, management agent, or both.

D.5. Resignation. Any officer may resign at any time by giving written notice to the Board, the president, or the secretary. Resignation takes effect on the date of the receipt of the notice or at any later time specified in the notice.

E. Committees

The Board may establish committees by resolution and authorize the committees to perform the duties described in the resolution.
F. Miscellaneous

F.1. Fiscal Year. The Board may establish the Property Owners Association’s fiscal year by resolution. In the absence of a Board resolution determining otherwise, the Property Owners Association’s fiscal year is a calendar year.

F.2. Rules for Meeting. The Board may adopt rules for the conduct of meetings of Members, Board, and committees.

F.3. Conflict. The Declaration controls over these Bylaws.

F.4. Inspection of Books and Records

F.4.a. Inspection by Member. After a written request to the Property Owners Association, a Member may examine and copy, in person or by agent, any Property Owners Association books and records relevant to that purpose. The Board may establish rules concerning the (i) written request; (ii) hours, days of the week, and place; and (iii) payment of costs related to a Member’s inspection and copying of books and records.

F.4.b. Inspection by Director. A director has the right, at any reasonable time, and at the Property Owners Association’s expense, to (i) examine and copy the Property Owners Association’s books and records at the Property Owners Association’s Principal Office and (ii) inspect the Property Owners Association’s properties.

F.5. Notices. Any notice required or permitted by the Dedicatory Instruments must be in writing. Notices regarding enforcement actions must be given as required or as permitted by law. All other notices may be given by regular mail. Notice by mail is deemed delivered (whether actually received or not) when properly deposited with the United States Postal Service, addressed to (a) a Member at the Member’s last known address according to the Property Owners Association’s records and (b) the Property Owners Association, the Board, or a managing agent at the Property Owners Association’s Principal Office or another address desig-
nated in a notice to the Members. Unless otherwise required by law or the Dedicatory Instruments, actual notice, however delivered, is sufficient.

F.6. Amendment. These Bylaws may be amended at any time by the vote of [percent] percent of the Voting Members in the Property Owners Association. This provision will not be construed as limiting the Board’s power to amend the enforcement procedures to comply with changes in law.

[Name of association]

By __________________________

[Name and title]

Include acknowledgments.
Form 23-5

Rules of [name of property owners association] [, Inc.]

Basic Information

Date:

Property Owners Association: [name], [established by the certificate of formation filed with the secretary of state of Texas on [date] under file number [number]/a Texas nonprofit association, which is an unincorporated organization].

Property Owners Association’s Address:

Declaration: The Declaration of Restrictive Covenants of the [name of subdivision] Subdivision, [include recording information].

Definitions: Capitalized terms used but not defined in the Rules have the meaning set forth in the Declaration or Bylaws.

The Property Owners Association adopts these Rules, which will be enforceable on the recording of this document in the real property records of the [county/counties] in which the property described by the Declaration is located. On violation of these Rules, owners may be subject to Penalties for Violation.
A. Rules

Insert the rules that the property owners association wants to adopt. Consider the following subject areas: use of common areas (including swimming pools and recreation facilities), architectural and building rules, parking of vehicles, pet control, nuisances, trash collection, etc.

B. Penalties for Violation

Insert penalties for violation by type of violation.

C. Enforcement Procedures

C.1. Notice. Before the Property Owners Association may (a) suspend an Owner’s right to use a common area, (b) file a suit against an Owner other than a suit to collect a Regular Assessment or Special Assessment or foreclose under the Property Owners Association’s lien, (c) charge an Owner for property damage, or (d) levy a fine for a violation of the restrictions or Bylaws or Rules of the Property Owners Association, the Property Owners Association or its agent must give written notice to the Owner by certified mail, return receipt requested. The notice must describe the violation or property damage that is the basis for the suspension action, charge, or fine and must state any amount due the Property Owners Association from the Owner. The notice also must inform the Owner that the Owner (a) is entitled to a reasonable period to cure the violation and avoid the fine or suspension, unless the Owner was given notice and a reasonable opportunity to cure a similar violation within the preceding six months; (b) may request a hearing in accordance with Texas Property Code section 209.007 on or before the thirtieth day after the date the Owner receives the notice; and (c) may have special rights or relief related to the enforcement action under federal law, including the Servicemembers Civil Relief Act (50 U.S.C. §§ 3901–4043) if the Owner is serving on active military duty. If a hearing is to be held before a committee, the notice must state that the Owner has the right to appeal the committee’s decision to the Board by written notice to the Board.
C.2. Hearing. If the Owner is entitled to an opportunity to cure the violation, the Owner has the right to submit a written request for a hearing to discuss and verify facts and resolve the matter at issue before a committee appointed by the Board or before the Board if the Board does not appoint a committee. The Property Owners Association must hold a hearing under this provision not later than the thirtieth day after the date the Board receives the Owner’s request for a hearing and must notify the Owner of the date, time, and place of the hearing not later than the tenth day before the date of the hearing. The Board or the Owner may request a postponement, and, if requested, a postponement will be granted for a period of not more than ten days. Additional postponements may be granted by agreement of the parties. The Owner or the Property Owners Association may make an audio recording of the meeting. The hearing will be held in executive session, affording the alleged violator a reasonable opportunity to be heard. Before any sanction under these Rules becomes effective, proof of proper notice will be placed in the minutes of the meeting. Such proof will be deemed adequate if a copy of the notice, together with a statement of the date and manner of delivery, is entered by the officer, director, or agent who delivered the notice. The notice requirement will be satisfied if the alleged violator appears at the meeting. The minutes of the meeting will contain a written statement of the results of the hearing and the sanction imposed, if any. The Board may, but will not be obligated to, suspend any proposed sanction if the violation is cured within a [number]-day period. Such suspension will not constitute a waiver of the right to sanction violations of the same or other provisions and rules by any person.

C.3. Appeal. Following hearing before a committee, if any, the violator will have the right to appeal the decision to the Board. To perfect this right, a written notice of appeal must be received by the managing agent, president, or secretary within [number] days after the hearing date.
Form 23-5

Rules of [name of property owners association] [, Inc.]

By __________________________________________
[Name and title]

Include acknowledgment.
Deed without Warranty

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date: [date]

Grantor: [name of developer]

Grantor’s Mailing Address:

Grantee: [name of association], a [Texas nonprofit corporation/nonprofit association]

Grantee’s Mailing Address:

Subdivision: [name of subdivision], a subdivision, according to the Plat recorded in [recording data] of the real property records of [county] County, Texas.

Declaration: The Declaration recorded in [recording data] of the real property records of [county] County, Texas.

Property (including any improvements): The Common Area defined in the Declaration.

Reservations from Conveyance:

State “None” or, to create reservations of title, include the appropriate clauses from form 5-7 in this manual.

Exceptions to Conveyance:

State “None” or, to create exceptions to conveyance, include the appropriate clauses from form 5-8.
Grantor, subject to the Plat, the Declaration, the Reservations from Conveyance, and the Exceptions to Conveyance, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee’s heirs, successors, and assigns forever, without express or implied warranty. All warranties that might arise by common law as well as the warranties in section 5.023 of the Texas Property Code (or its successor) are excluded.

This conveyance is made in connection with Grantor’s development of the Subdivision pursuant to the Plat and Declaration as a ministerial task that fulfills a duty of Grantor under the Declaration.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

If the deed imposes contractual obligations on the grantees, include the following signature line.

[Name of grantees]

Include acknowledgments.
Management Certificate
(Texas Property Code Section 209.004)

Name of Subdivision: [name of subdivision]

Subdivision Recording Data: The plat of the Subdivision recorded in [recording data] of the real property records of [county] County, Texas

Declaration Recording Data: The Declaration recorded in [recording data] of the real property records of [county] County, Texas

Name of Association: [name of association]

Mailing Address of Association: [address, city, state]

Name of Person Managing Association or Association’s Designated Representative: [name of person managing association or association’s designated representative]

Mailing Address of Person Managing Association or Association’s Designated Representative: [address, city, state]

[Include other information the association considers appropriate.]
The undersigned hereby certifies that [he/she] is the duly elected and qualified president of [name of association]; that [name] is the duly elected and qualified [secretary/[other officer]] of [name of association]; that the signature above is [name]’s genuine signature; and that the foregoing certificate is true and correct.

[Name of president]
Notice to Purchaser[s]

STATE OF TEXAS )
COUNTY OF )

The real property described below, which you are purchasing, is subject to deed restrictions recorded at [recording data] of the County [title of records in which restrictions are recorded] records. [If restrictions have been amended or extended or if the property is subject to restrictions recorded at various places, identify each filing and be certain to include reference to subdivision and other map filings to the extent they include setback lines or other restrictions.] The restrictions limit your use of the property. The city of Houston is authorized by statute to enforce compliance with certain deed restrictions. You are advised that, in the absence of a declaratory judgment that the referenced restrictions are no longer enforceable, the City of Houston may sue to enjoin a violation of such restrictions. ANY PROVISIONS THAT RESTRICT THE SALE, RENTAL, OR USE OF THE REAL PROPERTY ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN ARE UNENFORCEABLE; however, the inclusion of such provisions does not render the remainder of the deed restrictions invalid.

The legal description and street address of the property you are acquiring are as follows: [insert legal description or attach and refer to by designated exhibit; state property street address].

[Name of seller]
Date:

Include acknowledgment.

The undersigned admit[s] receipt of the foregoing notice at or prior to closing the purchase of property above described.
Notice to Purchaser[s]

[Name of purchaser]
Date:

Include acknowledgment.
Notice of Membership in Property Owners Association

Concerning the Property at
[street address and name of residential community]

Property:

Property Owners Association:

As a purchaser of property in the residential community in which this Property is located, you are obligated to be a member of a Property Owners Association. Restrictive covenants governing the use and occupancy of the Property and all dedicatory instruments governing the establishment, maintenance, or operation of this residential community have been or will be recorded in the real property records of the county in which the Property is located. Copies of the restrictive covenants and dedicatory instruments may be obtained from the county clerk.

You are obligated to pay assessments to the Property Owners Association. The amount of the assessments is subject to change. Your failure to pay the assessments could result in a lien on and the foreclosure of your Property.

Section 207.003 of the Texas Property Code entitles an owner to receive copies of any document that governs the establishment, maintenance, or operation of a subdivision, including but not limited to restrictions, bylaws, rules and regulations, and a resale certificate from the Property Owners Association. A resale certificate contains information including but not limited to statements specifying the amount and frequency of regular assessments of the Property Owners Association and the style and cause number of lawsuits to which the Property
Owners Association is a party, other than lawsuits relating to unpaid ad valorem taxes of an individual member of the Property Owners Association. These documents must be made available to you by the Property Owners Association or the Property Owners Association’s agent on your request.

Date: ________________________________

[Name of purchaser]
Form 23-10

Note: If a written request for an update to the resale certificate is received within 180 days after the date a resale certificate is issued, the property owners association shall deliver the updated information within seven days to the party requesting the original resale certificate. Tex. Prop. Code § 207.003(f), (g).

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**Required Information [Issued on [date]] Applicable to the Property Including Resale Certificate**  
*(Texas Property Code Section 207.003)*

<table>
<thead>
<tr>
<th>Date:</th>
<th>[date]</th>
</tr>
</thead>
<tbody>
<tr>
<td>Property (including any common areas assigned to the Property):</td>
<td>[address, city], [county] County, Texas</td>
</tr>
<tr>
<td>Subdivision:</td>
<td>[name and legal description]</td>
</tr>
<tr>
<td>Property Owners Association:</td>
<td>[name of association]</td>
</tr>
</tbody>
</table>
| Property Owners Association’s address: | [address, city, state]  
[telephone]  
[fax] |
| Managing agent of Subdivision: | [name of managing agent] |
| Managing agent’s address: | [address, city, state]  
[telephone]  
[fax] |
| Current regular assessment: | $[amount] per [time period, e.g., month] |
Special assessment(s) due after the date of [this updated] resale certificate: $[amount] payable as follows: [specify time-frame for paying and purpose of special assessment[s]]

Total amounts due and unpaid to Property Owners Association: $[amount]

Capital expenditures approved by Property Owners Association for current fiscal year: $[amount]

Reserves for capital expenditures: $[amount]

Unsatisfied judgments against Property Owners Association: $[amount]

Administrative transfer fee: $[amount] payable to: [specify]

Other fees for change of ownership: $[amount] to [name] for [specify]

There [are/are not any] suits pending against the Property Owners Association. [Include if applicable: The style and cause number of each pending suit are: [describe any pending suits].]

The Property Owners Association’s board has [no] actual knowledge of conditions on the Property in violation of the restrictions applying to the Subdivision or the bylaws or rules of the Property Owners Association. [Include if applicable: Known violations are: [list any known violations].]
The Property [is/is not] subject to a right of first refusal or other restraint contained in the restrictions or restrictive covenants that restricts the owner’s right to transfer the owner’s property.

The Property Owners Association [has/has not] received notice from any governmental authority regarding health or building code violations with respect to the Property or any common areas or common facilities owned or leased by the Property Owners Association.

[Include if applicable: A summary or copy of each notice is attached.]

The restrictions on the Lot [do/do not] allow foreclosure of the Property Owners Association’s lien on the Property for failure to pay assessments.

Required Attachments:

1. Restrictions
2. Rules
3. Bylaws
4. Current Balance Sheet
5. Current Operating Budget
6. Certificate of Insurance Concerning Property and Liability Insurance for Common Areas and Facilities
7. Any Governmental Notices of Health or Housing Code Violations

Notice: This Subdivision information may change at any time.
[Name of property owners association]

By

[Name and title]
[Mailing address]
[E-mail]
 Restrictive Covenant Agreement

Basic Information

Date:

Seller:

Seller’s Mailing Address:

Buyer:

Buyer’s Mailing Address:

Conveyed Property: [Describe by metes and bounds or plat reference the property being conveyed by the seller to the buyer that will be subject to the restrictive covenants.]

Retained Property: [Describe by metes and bounds or plat reference the property being retained by the seller that will be subject to the restrictive covenants.]

Development: [Describe by metes and bounds or plat reference the subdivision of which the conveyed property and the retained property are a part.]

Restricted Uses of the Conveyed Property: [specify]

Restricted Uses of the Retained Property: [specify]

Consideration: Good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Seller.
Agreements

1. *Restrictions on Use of Conveyed Property.* No portion of the Conveyed Property may be used for the Restricted Uses of the Conveyed Property for the period beginning on the date of this agreement and ending on the earlier of the expiration of [number] years after that date or the cessation of the use of the Retained Property for any of the Restricted Uses of the Conveyed Property for a continuous period of not less than [number] consecutive days.

2. *Restrictions on Use of Retained Property.* No portion of the Retained Property may be used for the Restricted Uses of the Retained Property for the period beginning on the date of this agreement and ending on the earlier of the expiration of [number] years after that date or the cessation of the use of the Conveyed Property for any of the Restricted Uses of the Retained Property for a continuous period of not less than [number] consecutive days.

3. *Prohibited Uses.* The Conveyed Property and the Retained Property will not be used for any of the following prohibited uses for a period beginning on the date of this agreement and ending [number] years after that date: [list prohibited uses].

4. *Amendment and Termination.* This agreement may be amended or terminated in whole or in part from time to time, and at any time, by written instrument signed by the then owners of all of the Conveyed Property and the Retained Property and by the owners of 75 percent or more in surface area of the remaining portion of the Development and recorded in the real property records of [county] County, Texas; provided, however, that as long as Seller owns any portion of the Development any such instrument must be signed by Seller to be effective.

5. *Covenants Running with the Land.* Without limiting the provisions of paragraph 4. above, the parties agree that the provisions of this agreement will be deemed to be covenants running with the land that are for the benefit of, and create burdens on, the respective portions of the Development described above.
6. **Binding Effect.** This agreement binds, benefits, and may be enforced by the successors in interest to the parties.

7. **Choice of Law.** This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules in any jurisdiction. Venue is in the county or counties in which the Development is located.

8. **Attorney’s Fees.** If [either/any] party retains an attorney to enforce this agreement, the party prevailing in litigation will be entitled to recover reasonable attorney’s fees and court and other costs.

9. **Severability.** If a provision in this agreement is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this agreement, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement.

10. **Remedies Cumulative.** Except as otherwise provided herein, all rights, privileges, and remedies afforded the parties by this agreement will be deemed cumulative and not exclusive and the exercise of any remedy will not be deemed to be a waiver of any other right, remedy, or privilege provided for herein or available at law or in equity. It is expressly understood that a recovery in damages may not be an adequate remedy for a violation of the provisions of this agreement and that the granting of equitable remedies may, and probably will, be necessary.

11. **Number and Gender.** The use of the singular will be deemed to mean the plural, the masculine to mean the feminine or neuter, and the neuter to mean the masculine or feminine when context requires.

12. **Captions.** Captions used in this agreement are for convenience only and will not be considered as a limitation on or an expansion of the terms of the agreement.
13. **Construction of Agreement.** The terms and provisions of this agreement are the result of negotiation between the parties, each of which has been represented by counsel of its selection, and neither of which has acted under duress or compulsion, legal, economic, or otherwise. Consequently, the terms and provisions of this agreement will be interpreted and construed in accordance with their usual and customary meanings, and the parties expressly waive and disclaim any rule of law or procedure interpreting or construing this agreement otherwise, including, without limitation, any rule of law to the effect that ambiguous or conflicting terms or provisions in this agreement must be interpreted or construed against the party whose attorney prepared this agreement or any draft hereof.

14. **Other Instruments.** The parties to this agreement covenant and agree that they will execute any further instruments and agreements necessary or convenient to carry out the purposes of this agreement, including, without limitation, amendments of this agreement reasonably requested by Seller in connection with the sale of any of the Retained Property to other parties, as long as such amendments do not materially and adversely affect the rights and obligations of Buyer and Buyer’s heirs, successors, and assigns under this agreement.

15. **Entire Agreement.** This agreement and any exhibits are the entire agreement of the parties concerning the Conveyed Property, the Retained Property, the Development, the Restricted Uses of the Conveyed Property, and the Restricted Uses of the Retained Property. There are no representations, agreements, warranties, or promises, and neither party is relying on any statements or representations of any agent of the other party, that are not in this agreement and any exhibits.

16. **Notices.** Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular
mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

17. **No Third-Party Beneficiaries.** Nothing in this agreement, expressed or implied, is intended or may be construed to confer on any person or entity, other than the parties and their respective heirs, successors, and assigns, any right, remedy, or claim by reason of this agreement. This agreement is intended for the sole and exclusive benefit of the parties and their respective heirs, successors, and assigns as the owners of the Development or portions thereof.

18. **Time.** Time is of the essence with respect to each covenant, agreement, and obligation of the parties set forth in this agreement.

19. **Counterparts.** If this agreement is executed in multiple counterparts, all counterparts taken together will constitute this agreement.

[Name of seller]

[Name of buyer]

Include acknowledgments.
Form 23-12

This form may be used to comply with the requirements of Tex. Prop. Code § 209.005.

Records Production and Copying Policy

Date:

Subdivision: [insert legal description]

Property Owners Association:

Charges: Charges for examining and copying Property Owners Association information are set out in Exhibit A.

Except for information deemed confidential by law or court order, the Property Owners Association will make its books and records open to and reasonably available for examination by an owner of property in the Subdivision or a person designated in a writing signed by the owner as the owner’s agent, attorney, or certified public accountant, in accordance with Texas Property Code section 209.005. Owners are also entitled to obtain copies of information in the Property Owners Association’s books and records on payment of the Charges for the copies. To the extent the Charges in this policy exceed the charges in section 70.3 of title 1 of the Texas Administrative Code, the amounts in section 70.3 of title 1 of the Texas Administrative Code govern.

Information not subject to inspection by owners includes but is not limited to—

1. any document that constitutes the work product of the Property Owners Association’s attorney or that is privileged as an attorney-client communication;
2. files and records of the Property Owners Association’s attorney relating to the Property Owners Association, excluding invoices requested by an owner under Texas Property Code section 209.008(d); and

3. except to the extent the information is provided in the meeting minutes or as authorized by Texas Property Code section 209.005(l), (a) information that identifies the dedicatory instrument violation history of an individual owner; (b) an owner’s personal financial information, including records of payment or nonpayment of amounts due the Property Owners Association; (c) an owner’s contact information, other than the owner’s address; and (d) information related to an employee of the Property Owners Association, including personnel files.

If a document in the Property Owners Association’s attorney’s files and records relating to the Property Owners Association would be subject to a request by an owner to inspect or copy Property Owners Association documents, the document will be produced by using the copy from the attorney’s files and records if the Property Owners Association has not maintained a separate copy of the document.

Procedures for Inspecting Information or Obtaining Copies

1. An owner or the owner’s agent must submit a written request for access or information by certified mail, with sufficient detail describing the Property Owners Association’s books and records requested, to the mailing address of the Property Owners Association or authorized representative as reflected on the most current management certificate filed with the county clerk of [county] County, Texas.

2. The request must include enough description and detail about the information requested to enable the Property Owners Association to accurately identify and locate the information requested. Owners must cooperate with the Property Owners Association’s reasonable efforts to clarify the type or amount of information requested.
3. The request must contain an election either to inspect the books and records before obtaining copies or to have the Property Owners Association forward copies of the requested books and records and—

   a. if an inspection is requested, the Property Owners Association, on or before the tenth business day after the date the Property Owners Association receives the request, will send written notice of dates during normal business hours that the owner may inspect the requested books and records to the extent those books and records are in the possession, custody, or control of the Property Owners Association; or

   b. if copies of identified books and records are requested, the Property Owners Association will, to the extent those books and records are in the possession, custody, or control of the Property Owners Association, produce the requested books and records for the requesting party on or before the tenth business day after the date the Property Owners Association receives the request.

4. If the Property Owners Association is unable to produce the books or records requested that are in its possession or custody on or before the tenth business day after the date the Property Owners Association receives the request, the Property Owners Association must provide to the requestor written notice that—

   a. informs the owner that the Property Owners Association is unable to produce the information on or before the tenth business day after the date the Property Owners Association received the request; and

   b. states a date by which the information will be sent or made available for inspection to the requesting party that is not later than the fifteenth business day after the date notice under this subsection is given.
5. If an inspection is requested or required, the inspection will take place at a mutually agreeable time during normal business hours, and the owner will identify the books and records for the Property Owners Association to copy and forward to the owner.

6. The Property Owners Association may produce copies of the requested information in paper copy, electronic, or other format reasonably available to the Property Owners Association.

7. Before starting work on an owner’s request, the Property Owners Association must provide the owner with a written, itemized statement of estimated Charges for examining and copying records related to the owner’s request, using amounts prescribed in this policy when the estimated Charges exceed $40. Owners may modify the request in response to the itemized statement.

8. Within ten business days of the date the Property Owners Association sent the estimate of Charges, the owner must respond in writing to the written estimate, or the request is considered automatically withdrawn. The response must state whether the owner (a) accepts the estimate per the request, (b) modifies the request, or (c) withdraws the request.

9. Owners are responsible for Charges related to the compilation, production, and reproduction of the requested information in the amounts stated in this policy. The Property Owners Association may require advance payment of the estimated Charges of compilation, production, and reproduction of the requested information.

10. If the estimated Charges are less or more than the actual Charges, the Property Owners Association must submit a final invoice to the owner on or before the thirtieth business day after the date the information is delivered. If the final invoice includes additional amounts due from the owner, the additional amounts, if not reimbursed to the Property Owners Association before the thirtieth business day after the date the invoice is sent to the owner, may be added to the owner’s account as an assessment. If the estimated Charges exceeded the
final invoice amount, the owner is entitled to a refund, and the refund will be issued to the owner not later than the thirtieth business day after the date the invoice is sent to the owner.

[Name of property owners association]

By __________________________________________

[Name and title]

Include acknowledgment.
Exhibit A
Charges for Examining and Copying Property Owners
Association Information

A. Labor Charge for Computer Programming

If a particular request requires the services of a computer programmer to execute an existing program or to create a new program so that requested information may be accessed and copied, the Property Owners Association will charge $28.50 an hour for the programmer’s time spent on the request.

B. Labor Charge for Locating, Compiling, Manipulating, and Reproducing Data and Information

1. The charge for labor costs incurred in processing an owner’s request for Property Owners Association information is $15.00 an hour. The labor charge will be calculated based on the actual time to locate, compile, manipulate, and reproduce the requested data and information.

2. A labor charge will not be billed in connection with complying with requests that are for fifty or fewer pages of paper records, unless the documents to be copied are located in (a) two or more separate buildings that are not physically connected with each other or (b) a remote storage facility.

3. A labor charge will not be billed for any time spent by an attorney, legal assistant, or any other person who reviews the requested information to determine whether it is confidential or privileged under Texas law.

4. When confidential or privileged information is mixed with public information in the same page, a labor charge may be recovered for time spent to redact, black out, or otherwise obscure the confidential or privileged information in order to comply with the owner’s
request. The Property Owners Association will not charge for redacting confidential or privileged information for requests of fifty or fewer pages unless the request also qualifies for a labor charge under section 552.261(a)(1) or 552.261(a)(2) of the Texas Government Code.

C. Overhead Charge

1. Whenever any labor charge is applicable to a request, the Property Owners Association may include in the Charges direct and indirect costs, in addition to the specific labor charge. This overhead charge would cover such costs as depreciation of capital assets, rent, maintenance and repair, utilities, and administrative overhead. If the Property Owners Association chooses to recover such costs, the overhead charge will be computed at 20 percent of the charge made to cover any labor costs associated with a particular request.

For example, if one hour of labor is used for a particular request, the formula would be as follows:

a. Labor charge for locating, compiling, and reproducing—$15.00 x .20 = $3.00.

b. Labor charge for computer programming—$28.50 x .20 = $5.70.

If a request requires a charge for one hour of labor for locating, compiling, and reproducing information ($15.00 per hour) and one hour of programming ($28.50 per hour), the combined overhead would be $15.00 + $28.50 = $43.50 x .20 = $8.70.

2. An overhead charge will not be made for requests for copies of fifty or fewer pages of standard paper records.

D. Microfiche and Microfilm Charge

If the Property Owners Association already has the requested information on microfiche or microfilm, the charge for a copy must not exceed the cost of reproducing the informa-
tion on microfiche or microfilm or ten cents per page for standard size paper copies of the information on microfiche or microfilm, plus any applicable labor and overhead charge for more than fifty copies.

E. Remote Document Retrieval Charge

To the extent that the retrieval of documents stored on the Property Owners Association’s property results in a charge to comply with a request, the Property Owners Association will charge the actual cost of the retrieval.

F. Copy Charges

1. The charge for standard paper copies reproduced by means of an office machine copier or a computer printer is ten cents per page or part of a page. Each side of a piece of paper on which information is recorded is counted as a single copy. A piece of paper that has information recorded on both sides is counted as two copies. Standard paper copy is a copy of Property Owners Association information that is a printed impression on one side of a piece of paper that measures up to eight and one-half by fourteen inches.

2. A “nonstandard” copy includes everything but a copy of a piece of paper measuring up to eight and one-half by fourteen inches. Microfiche, microfilm, diskettes, magnetic tapes, and CD-ROM are examples of nonstandard copies. The charges in this subsection are to cover the materials onto which information is copied and do not reflect any additional charges, including labor, that may be associated with a particular request. The charges for nonstandard copies are—

   a. diskette—$1.00;

   b. magnetic tape—actual cost;

   c. data cartridge—actual cost;
d. tape cartridge—actual cost;

e. rewritable CD (CD-RW)—$1.00;

f. nonrewritable CD (CD-R)—$1.00;

g. digital video disc (DVD)—$3.00;

h. JAZ drive—actual cost;

i. other electronic media—actual cost;

j. VHS video cassette—$2.50;

k. audio cassette—$1.00;

l. oversize paper copy (e.g., larger than eight and one-half by fourteen inches, greenbar, bluebar, not including maps and photographs using specialty paper)—$0.50; and

m. specialty paper (e.g., Mylar, blueprint, blueline, map, photographic)—actual cost.
Guidelines for Alternative Payment Plans

Form 23-13

This form may be used to comply with the requirements of Tex. Prop. Code § 209.0062. The minimum term for a payment plan is three months. The maximum term is eighteen months from the date of the owner’s request for a payment plan.

Guidelines for Alternative Payment Plans

Date:

Property Owners Association:

Property Owners Association’s Address:

Subdivision:

Payment Plan Guidelines: [describe terms that will govern all payment plans]

Administrative Fee: [state amount of fee and how often it accrues]

Annual Interest Rate:

The Property Owners Association establishes these guidelines to allow owners who are delinquent in payment of a debt to the Property Owners Association to pay the debt in partial payments to avoid monetary penalties. However, delinquency in payment of a debt [may/will] result in nonmonetary penalties, such as loss of privileges.

Payments under a payment plan will incur the Administrative Fee and interest at the Annual Interest Rate.

To be entitled to pay a debt under a payment plan, an owner who is delinquent on a debt must submit a written request to the Property Owners Association.
Owners can make no more than [number] requests for a payment plan within a twelve-month period. The Property Owners Association is not required to enter into a payment plan agreement with an owner who failed to honor the terms of a previous payment plan agreement during the two years following the owner’s default under the previous payment plan agreement.

[Name of property owners association]

By ________________________________

[Name and title]

Include acknowledgment.
Form 23-14

This form may be used to comply with the requirements of Tex. Prop. Code § 209.0062. The minimum term for a payment plan is three months. The maximum term is eighteen months from the date of the debtor’s request for a payment plan.

Alternative Payment Plan Agreement

Date: 

Debtor: 

Debtor’s Mailing Address: 

Debt

Principal Amount of Debt: [describe the delinquent regular assessments, special assessments, and/or other amount owed to the property owners association]

Annual Interest Rate:

Annual Interest Rate on Matured, Unpaid Amounts:

Administrative Fee: [state amount of fee and how often it accrues]

Property Owners Association:

Place for Payment: [mailing address of property owners association or other place for payment]
Debtor promises to pay to the Property Owners Association the Principal Amount of Debt plus interest at the Annual Interest Rate and the Administrative Fee. The Debt is payable at the Place for Payment and according to the Terms of Payment. All unpaid amounts are due by the Maturity Date. If any amount is not paid either when due under the Terms of Payment or on acceleration of maturity, Debtor promises to pay any unpaid amount plus interest from the date the payment was due to the date of payment at the Annual Interest Rate on Matured, Unpaid Amounts.

If Debtor defaults in the payment of this agreement, the Property Owners Association may declare the unpaid principal balance, earned interest, and any other amounts owed immediately due. Debtor and each surety, endorser, and guarantor waive all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

Debtor also promises to pay reasonable attorney’s fees and court and other costs if this agreement is given to an attorney to collect or enforce. These expenses will bear interest from the date of advance at the Annual Interest Rate on Matured, Unpaid Amounts. Debtor will pay the Property Owners Association these expenses and interest on demand at the Place for Payment. These expenses and interest will become part of the Debt evidenced by this agreement.

Interest on the Debt will not exceed the maximum rate or amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in
excess of that maximum amount will be credited on the Principal Amount of Debt or, if the Principal Amount of Debt has been paid, refunded. On any acceleration or required or permitted prepayment, any excess interest will be canceled automatically as of the acceleration or prepayment or, if the excess interest has already been paid, credited on the Principal Amount of Debt or, if the Principal Amount of Debt has been paid, refunded. This provision overrides any conflicting provisions in this agreement and all other instruments concerning the Debt.

Each Debtor is responsible for all obligations represented by this agreement.

When the context requires, singular nouns and pronouns include the plural.

[Name of debtor]
Notice of Collection Agent Fees

Basic Information

Date:

Property Owners Association:

Property Owners Association’s Address:

Property:

Owner: [name and address]

Delinquent Amounts: [specify each delinquent amount by category and amount]

Total Amount Required to Make Account Current:

You are delinquent in payment of the Delinquent Amounts.

To avoid having your account turned over to a collection agent you must, within thirty days of receipt of this notice, either (1) pay the Total Amount Required to Make Account Current or (2) sign and return to the Property Owners Association the enclosed alternative payment plan agreement.

If you fail to cure the delinquency, you will be charged for all fees that the Property Owners Association must pay its collection agent related to your account and for all reason-
able attorney’s fees and other reasonable costs incurred by the Property Owners Association relating to collecting amounts that you owe the Property Owners Association.

[Name of property owners association]

By ________________________________

[Name and title]

Certified Mail No. [number]
Return Receipt Requested

Attach the alternative payment plan agreement. See form 23-14 in this chapter.
Form 23-16

This form may be used to comply with the requirements of Tex. Prop. Code § 209.0091. This notice should be sent to all inferior or subordinate lienholders whose lien is evidenced by a deed of trust at the address for the lienholder shown in the deed records relating to the property. It should be sent to such lienholders by certified mail, return receipt requested.

Notice of Delinquency to Subordinate Lienholder

Basic Information

Date:

Property Owners Association:

Property Owners Association’s Address:

Property:

Owner:

Owner’s Address:

Delinquent Amount: [specify each delinquent amount by category and amount]

Total Amount Required to Cure Delinquency:

Subordinate Lienholder[s]: [name[s] and address[es]]

Notice

You are notified that the Owner is delinquent in payment of the Delinquent Amount.
To avoid the Property Owners Association foreclosing its lien against the Property, you may, within sixty-one days of your receipt of this notice, pay the Property Owners Association the Total Amount Required to Cure Delinquency.

If the delinquency is not cured within sixty-one days of your receipt of this notice, the Property Owners Association has the right to foreclose on the Property.

[Name of property owners association]

By ________________________________
[Name and title]

Certified Mail No. [number]
Return Receipt Requested
Form 23-17

This form may be used to comply with the requirements of Tex. Prop. Code §§ 209.006, 209.008. The notice should be sent to the owner by certified mail, return receipt requested.

Notice of Enforcement Action and Attorney’s Fees

Basic Information

Date:

Property Owners Association:

Property Owners Association’s Address:

Property:

Amount Due to Property Owners Association:

Date By Which Violation or Delinquency Must Be Cured:

Owner:

Owner’s Address:

“You” and “your” in this notice refers to Owner.

Notice

You are subject to enforcement action by the Property Owners Association for the following:

Select one or more of the following as applicable.

Violation of the declaration: [specify]
Violation of the bylaws of the Property Owners Association: [specify]

Violation of the rules of the Property Owners Association: [specify]

Damage to Property Owners Association property: [specify]

Failure to pay the Property Owners Association: [specify]

[Specify other reason for enforcement action.]

You are entitled to a reasonable period from your receipt of this notice to cure the violation or delinquency and avoid enforcement action and attorney’s fees.

On or before the thirtieth day after the date you receive this notice, you have the right to submit a written request to the Property Owners Association for a hearing to discuss and verify facts and resolve the matter in issue before a committee appointed by the Board of the Property Owners Association or before the Board if the Board does not appoint a committee. If a hearing is to be held before a committee, you have the right to appeal the committee’s decision to the Board by written notice to the Board.

You may have special rights or relief related to the enforcement action under federal law, including the Servicemembers Civil Relief Act (50 U.S.C. §§ 501–596), if you are serving on active military duty.

If you do not request a hearing, then you must either (1) pay the Amount Due to Property Owners Association, cure the violation, or both, as applicable, by the Date By Which Violation or Delinquency Must Be Cured or (2) sign and deliver an Alternative Payment Plan Agreement, if applicable, to pay the delinquent amount in accordance with the Property Owners Association’s Guidelines for Alternative Payment Plans, a copy of which is attached.
However, you are not eligible to use an alternative payment plan if you failed to honor the terms of a previous Alternative Payment Plan Agreement within the last two years.

If you do not request a hearing and you (1) fail to cure the violation or delinquency by the Date By Which Violation or Delinquency Must Be Cured or (2) sign an Alternative Payment Plan Agreement, if eligible, and fail to pay the Amount Due to Property Owners Association pursuant to that plan, the Property Owners Association may—

1. suspend your right to use a common area;

2. file a suit against you;

3. charge you for property damage;

4. levy a fine for a violation of the declaration, bylaws, or rules of the Property Owners Association;

5. collect reimbursement of reasonable attorney’s fees and other reasonable costs incurred by the Property Owners Association relating to collecting amounts, including damages, due the Property Owners Association or for enforcing restrictions in the declaration, bylaws, or rules of the Property Owners Association; and

6. take other enforcement action against you in accordance with the declaration, bylaws, and rules of the Property Owners Association and Texas law.

[Name of property owners association]

By ________________________________

[Name and title]

Certified Mail No. [number]
Return Receipt Requested
Attach the guidelines for alternative payment plans. See form 23-13 in this chapter.
Form 23-18

This form may be used to comply with the requirements of Tex. Prop. Code § 209.010(c). This affidavit must be recorded in the real property records of the county in which the property is located no later than the thirtieth day after the date the property owners association sent the notice required under Tex. Prop. Code § 209.010(a).

Affidavit of Mailing

Basic Information

Date:

Property Owners Association:

Property Owners Association’s Address:

Property:

Date Property Owners Association Mailed Notice:

Affiant:

Statement

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made concerning the foreclosure of the lien held by the Property Owners Association on the Property.

2. Attached to this affidavit is a copy of the letter sent to—

   a. each former property owner obligated to pay the debt secured by the lien on the Property, at the former property owner’s last known mailing address;
b. each holder of a lien on the Property evidenced by the most recently filed deed of trust on the Property; and

c. each transferee/assignee of a deed of trust on the Property who provided the Property Owners Association with notice under section 209.010 of the Texas Property Code.

3. Each letter was sent by certified mail, return receipt requested, to the person designated on the letter on the date designated in the letter.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _________________ by [name of affiant].

Notary Public, State of Texas

Attach copies of letters sent.
Form 23-19

This form may be used to comply with the requirements of Tex. Prop. Code § 209.010. This notice must be sent no later than the thirtieth day after the foreclosure sale. It should be sent to the former property owner and to each lienholder by certified mail, return receipt requested. If a recorded instrument does not include an address for a lienholder, the property owners association has no duty to notify that lienholder. The notice should also be sent to each transferee or assignee of a lien who has provided the property owners association with notice of the transfer or assignment in accordance with Tex. Prop. Code § 209.010(b)(3).

Notice of Foreclosure Sale

[Date]

To: [name and address of former property owner]
[name[s] and address[es] of lienholder[s]]

Re: Foreclosure Sale

Property: [include legal description]

Date and Time:

Property Owners Association:

[Third Party Purchaser: [name and address]]

NOTICE

The Property Owners Association foreclosed the Property Owners Association’s lien on the Property at the Date and Time indicated [insert if applicable: to the Third Party Purchaser]. You have the right to redeem the Property under section 209.011 of the Texas Property Code. You must redeem the Property within 180 days after the date of this notice. If you are a lienholder, you may not redeem the Property before ninety days after the date of this notice, and then only if the former property owner has not previously redeemed the Property.
You may obtain an extension of the redemption period only as provided in section 209.011(m) of the Texas Property Code.

[Name of property owners association]

By ________________________________

[Name and title]

Certified Mail No. [number]
Return Receipt Requested

Certified Mail No. [number]
Return Receipt Requested
Form 23-20

This form may be used to comply with the requirements of Tex. Prop. Code § 209.011(n). This affidavit must be recorded in the real property records of the county in which the property is located. Tex. Prop. Code § 209.011(n).

Affidavit of Nonredemption

Basic Information

Date:

Property:

Property Owners Association:

Property Owners Association’s Address:

Include if applicable.

Third Party Purchaser:

Third Party Purchaser’s Address:

Continue with the following.

Former Property Owner:

Former Property Owner’s Address:

Lienholder:

Lienholder’s Address:

If there is more than one lienholder, repeat above information for each additional lienholder.
Date of Foreclosure:

Affiant:

Statement

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the foreclosure of the lien held by the Property Owners Association on the Property on the Date of Foreclosure.

2. Neither the Former Property Owner nor any Lienholder redeemed the Property during the redemption period or any extended redemption period.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _________________ by [name of affiant].

________________________________________

Notary Public, State of Texas
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Condominium Documents

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Chapter 24

Condominium Documents

§ 24.1 General Considerations

§ 24.1:1 Definition and Creation of a Condominium and Its Owners Association

A condominium is a form of real property ownership in which portions of the real property are designated for separate ownership or occupancy (the “units”) and the remainder is designated for common ownership or occupancy solely by the owners of the units. Real property is a condominium only if one or more of the common elements (for use by all the unit owners) are directly owned in undivided interests by the unit owners. Real property is not a condominium if all of the common elements are owned by a legal entity separate from the unit owners, such as a corporation or property owners association, even if the separate legal entity is owned by the unit owners. Tex. Prop. Code § 82.003(a)(8).

Condominiums are established through filing, in the real property records of the county in which the property is located, a declaration imposing restrictive covenants on the property comprising the condominium regime. Tex. Prop. Code § 82.051. The declaration must contain statutorily prescribed information. Tex. Prop. Code § 82.055. The declaration defines the boundaries of the units and operates to subdivide the property into separate condominium units and common areas or elements. Tex. Prop. Code § 82.052. It is not uncommon for condominium developers to presell condominium units before construction of the condominium building and thus before the boundaries of the units are defined by an as-built survey. In 2013, the Texas legislature amended the definition in Tex. Prop. Code § 82.003(a)(11) to eliminate the word recorded with reference to the declaration but left section 82.051 (requiring recording to establish a condominium) unchanged.

The provisions of the declaration and bylaws are severable. See Tex. Prop. Code § 82.053. These bylaws are for a condominium owners association that will take over management of the condominium regime from the declarant. The declaration also typically includes rules affecting the property and owners in the condominium regime.

A condominium owners association for a condominium formed after January 1, 1994, must be a Texas corporation. Tex. Prop. Code § 82.101. These owners associations are typically nonprofit corporations, although section 82.101 allows them to be for-profit corporations. The Texas Business Organizations Code provides for the formation of both nonprofit and for-profit corporations. Form 24-3 in this chapter is a certificate of formation for a condominium owners association.

§ 24.1:2 Applicable Law

The Uniform Condominium Act, chapter 82 of the Texas Property Code, governs all condominiums with declarations recorded on or after January 1, 1994. The Act also applies to condominiums formed before that date if the owners vote to have chapter 82 apply or if a declaration or amendment of declaration recorded before January 1, 1994, states that chapter 82 will apply. See Tex. Prop. Code § 82.002(a). Portions of the Act apply to all condominiums; however, certain rights cannot be limited for owners of condominiums created before 1994. See Tex. Prop. Code § 82.002(b)–(d). Condominiums created before January 1, 1994, are otherwise governed by chapter 81 of the Property Code.
Property Code chapter 202, governing construction and enforcement of restrictive covenants, also applies to condominiums. Section 202.002(a) states that the chapter “applies to all restrictive covenants.” “Restrictive covenant” is defined to mean any covenant, condition, or restriction in a dedicatory instrument, and a “dedicatory instrument” means all governing instruments of planned developments, explicitly including condominiums. See Tex. Prop. Code § 202.001(1), (4). “Dedicatory instrument” as it relates to condominiums is defined in Tex. Prop. Code § 82.003(a)(11–a), which does not specifically require recording. Under chapter 202, however, a dedicatory instrument has no effect until it is recorded in the public records. Tex. Prop. Code § 202.006(b). In many instances, the provisions of the statutes applicable to condominiums differ substantially from those that apply to noncondominium residential subdivisions. See Tex. Prop. Code § 209.003(d).

In addition to provisions in chapter 82 of the Property Code, the Texas Business Organizations Code governs the formation and operation of the condominium owners association. See Tex. Bus. Orgs. Code ch. 21 (for-profit corporations), ch. 22 (non-profit corporations).

Condominium owners associations are subject to federal income taxation. They do not qualify as charitable organizations under Internal Revenue Code section 501(c)(3). Associations may qualify for special tax treatment under 26 U.S.C. § 528.

§ 24.1:3 Foreclosure of Assessment Lien

An assessment levied by a condominium owners association is a personal obligation of the unit owner and is also secured by a continuing lien on the unit, on rents, and on insurance proceeds relating to the unit. See Tex. Prop. Code § 82.113(a). For purposes of this section, “assessment” includes regular and special assessments, dues, fees, late fees, fines, collection costs, attorney’s fees, “and any other amount due to the association by the unit owner or levied against the unit by the association . . . .” Tex. Prop. Code § 82.113(a). The lien for assessments is created by the recording of the declaration, and no other recordation of a lien or notice of lien is required. Tex. Prop. Code § 82.113(c). The association’s lien for assessments has priority over other liens, except for liens for real property taxes or other governmental assessments, liens recorded before the declaration was recorded, first vendor’s liens or first deed-of-trust liens recorded before the assessment becomes delinquent, and under certain circumstances, liens on improvements. See Tex. Prop. Code § 82.113(b).

By acquiring a unit, an owner grants the association a power of sale. That power of sale is exercised pursuant to Texas Property Code section 51.002 unless the declaration provides otherwise. Tex. Prop. Code § 82.113(d). The association may not foreclose a lien for assessments consisting only of fines. Tex. Prop. Code § 82.113(e). The association may not foreclose during a person’s active military service or nine months thereafter without complying with Tex. Prop. Code § 51.015. A notice of foreclosure sale must include the military service language in Tex. Prop. Code § 51.002(i). A unit owner may not petition a court to set aside a sale solely because the price at foreclosure was insufficient to fully satisfy the owner’s debt. The association may purchase the unit at foreclosure.

The redemption rights of condominium owners are set out in Tex. Prop. Code § 82.113(g). The Texas Residential Property Owners Protection Act, chapter 209 of the Property Code, does not apply to condominiums. Tex. Prop. Code § 209.003(d). See Duarte v. Disanti, 292 S.W.3d 733, 736 (Tex. App.—Dallas 2009, no pet.) (it was “the legislature’s clear intent to have different redemption rights for residential subdivisions than for condominiums”).

At any time before a nonjudicial foreclosure sale, the unit owner may avoid foreclosure by paying “all amounts due the association.” Tex. Prop. Code § 82.113(j). The association is not prohibited from taking a deed in lieu of foreclosure or from filing suit to recover a money judgment. Tex. Prop. Code § 82.113(i).
If an owner defaults on obligations to the association, the association may notify other lienholders of its intent to foreclose and must notify any holder of a recorded lien or a duly perfected mechanic’s lien if the lienholder has given the association a written request of notification. Tex. Prop. Code § 82.113(h), (m). Foreclosure of a tax lien under chapter 32 of the Texas Tax Code does not discharge the association’s lien. Tex. Prop. Code § 82.113(l).

§ 24.2 General Instructions for Completing Forms

For general information about completing the forms in this chapter, see chapter 3 in this manual. In most forms, the information that the attorney must provide is listed at the beginning of the form. Of course, the attorney may add other specific provisions and references to exhibits and riders at the end of the form.

For general information about designation of parties, addresses, property descriptions, and execution and acknowledgment of documents, see chapter 3.

§ 24.3 General Considerations for Declaration

The required contents for a condominium declaration are set out in Tex. Prop. Code § 82.055.

§ 24.3:1 Definitions

The definition of “assessment” used in the declaration, form 24-1 in this chapter, is based on that used in Tex. Prop. Code § 82.113(a).

The definition of “residential purposes” is derived from Tex. Prop. Code § 82.003(a)(21).

The definition of “common elements” is based on Tex. Prop. Code § 82.003(a)(5). In each condominium, there will likely be portions that should be designated as “limited common elements.” The consequence of such a designation is important, not only to limit use of those elements but also to determine responsibility for their maintenance, repair, or replacement, and the costs thereof. The drafter should carefully review Texas Property Code sections 82.052, 82.058, 82.107, and 82.112(d) when determining which aspects of a condominium should be designated as limited common elements as opposed to common elements.

The declaration defines the plat as including the plans. Property Code section 82.003(a) makes a distinction between plan and plat as follows:

(18) “Plan” means a dimensional drawing that is recordable in the real property records or the condominium plat records and that horizontally and vertically identifies or describes units and common elements that are contained in buildings.

(19) “Plat” means a survey recordable in the real property records or the condominium plat records and containing the information required by Section 82.059. As used in this chapter, “plat” does not have the same meaning as “plat” in Chapter 212 or 232, Local Government Code, or other statutes dealing with municipal or county regulation of property development.

Tex. Prop. Code § 82.003(a)(18), (19).
§ 24.3:2 Restrictions on Use, Occupancy, or Alienation

Texas Property Code section 82.055(9) requires a declaration to set out any restrictions on use, occupancy, or alienation of the units. Examples are provided in paragraph D.8. of the declaration, form 24-1 in this chapter. The practitioner will need to consider what conditions or activities are to be prohibited. The nature and extent of the limitations will depend on the declarant’s purpose and expectations for the condominium. In addition, lenders may require that restrictions be incorporated to protect their interests and the security of mortgages.


§ 24.3:3 Units and Common Elements

Texas Property Code sections 82.052 and 82.055(4) allow the declaration to define the boundaries of a unit other than as set forth in paragraphs D.3. and D.4. of the declaration, form 24-1 in this chapter.

The declaration is required to contain a description of limited common elements other than those described in Texas Property Code section 82.052(2) and (4). Tex. Prop. Code § 82.055(6). Examples of limited common elements as set out in the statute include chutes, flues, ducts, wires, bearing walls, and other fixtures partially within and partially outside the designated boundaries of a unit and that serve only that unit. Tex. Prop. Code § 82.052(2). Items such as windows, exterior doors, shutters, awnings, window boxes, doorsteps, porches, balconies, and patios designed to serve a single unit but located outside the unit’s boundaries are also limited common elements. Tex. Prop. Code § 82.052(4). The declaration must also contain a description of property that may be allocated subsequently as limited common elements. Tex. Prop. Code § 82.055(7).

§ 24.3:4 Assignment of Association Income

Unless a dedicatory instrument requires a vote of the association members to borrow money or to assign the association’s right to future income or lien rights, Tex. Prop. Code § 82.102(f) gives the association’s board of directors the power to borrow money and assign as collateral for the loan the association’s right to future income and lien rights. If a vote of the members is required, (1) the board can provide for electronic voting, absentee ballot, proxy at a meeting, or written consent, and (2) at least 67 percent of all voting interests must vote in favor of the action, unless a dedicatory instrument provides for a lower threshold.

Form 24-12 in this chapter is a unanimous consent in lieu of a directors’ meeting to approve a loan under Tex. Prop. Code § 82.102(f) after any required members’ vote under section 82.102(g) has approved the loan. Chapter 6 in this manual contains forms and clauses for the promissory note. Form 24-13 is a security agreement and transfer of lien to secure the loan.
Texas Property Code section 82.112 provides that an expense for maintenance, repair, or replacement of a limited common element must be assessed as if it were a general common element expense except as otherwise provided by the declaration or Tex. Prop. Code § 82.107.

Late charges are governed by Tex. Prop. Code §§ 82.102(a)(12), 82.112(c), 82.117(1). The creation of liens and foreclosure for failure to pay assessments is addressed in Tex. Prop. Code § 82.113. Redemption rights for condominium owners after foreclosure of an association’s lien for assessments are governed by Tex. Prop. Code § 82.113(g).

Among the powers granted to the association by the Uniform Condominium Act is the power to impose charges for use of the common elements. See Tex. Prop. Code § 82.102(a)(11). Paragraph H.2. of the declaration, form 24-1 in this chapter, concerns fees for use of specified common elements and is optional. The purpose of this section is to expressly authorize such charges and to provide a procedure to the association.

The declaration may provide for different allocations of votes on particular specified matters or class voting on specified issues; however, units may not constitute a class merely because they are owned by a declarant. Tex. Prop. Code § 82.057(c), (d).

The formulas used to establish the allocations of interests must be stated in the declaration. See Tex. Prop. Code §§ 82.055(8), (16), 82.057(a), (c). Attention should be given to section 82.057(c), which permits special provisions relating to voting rights.

If any unit is restricted exclusively to residential purposes, the approval of at least 80 percent of the members is required to terminate the condominium under section 82.068(a) of the Texas Property Code.

Tex. Prop. Code § 82.055(11) requires the declaration to contain the method of its amendment. By statute an amendment to a declaration may be made—

1. by written ballot that states the exact wording or substance of the amendment and that specifies the date by which a ballot must be received to be counted;

2. at a meeting of the members of the association after written notice of the meeting has been delivered to an owner of each unit stating that a purpose of the meeting is to consider an amendment to the declaration; or

3. by any method permitted by the declaration.

Tex. Prop. Code § 82.067(a).

The drafter may merely reference the two specific methods described in Tex. Prop. Code § 82.067(a) or may include additional methods. Some thought should be given to taking advantage of technological advances in order to accommodate different sizes and types of anticipated membership populations. For example, written ballots might be submitted electronically, rather than only by mail.
§ 24.3:8 Development Rights

The right to create additional units is a development right. See Tex. Prop. Code § 82.003(a)(12)(B). The Uniform Condominium Act requires all condominium declarations to include a statement of the maximum number of units that the declarant reserves the right to create. See Tex. Prop. Code § 82.055(5). If any development right is to be reserved by the declarant, the declaration (form 24-1 in this chapter) will require substantial modification.

§ 24.3:9 Special Declarant Rights

Tex. Prop. Code § 82.055(14), (15) requires not only a description of development rights and other special declarant rights but also clear identification of the particular real property to which such rights apply and time limits within which such rights must be exercised. Unless special declarant rights are expressly reserved in the declaration, they do not arise under the Uniform Condominium Act. If development rights are reserved, the declaration (form 24-1 in this chapter) will require substantial modification. See Tex. Prop. Code §§ 82.003(a)(12), (22), 82.055(14). Examples of special declarant rights include:

1. The right to complete or make improvements indicated on the plats and plans. See Tex. Prop. Code §§ 82.003(a)(22)(A), 82.059.
2. The right to maintain sales and other offices and models and condominium advertising signs on the condominium. See Tex. Prop. Code §§ 82.003(a)(22)(D), 82.065.
4. The right to appoint or remove officers or directors. See Tex. Prop. Code §§ 82.003(a)(22)(F), 82.103(c).

§ 24.4 General Considerations for Bylaws

Form 24-4 in this chapter is a proposed set of bylaws for a condominium owners association. The form can be modified consistent with applicable law, found primarily in the Texas Business Organizations Code and the Texas Property Code.

The Business Organizations Code provides that bylaws may contain provisions for the “regulation and management” of corporate affairs that are consistent with law and the corporation’s certificate of formation. Tex. Bus. Orgs. Code § 21.057(b) (for-profit corporation), § 22.102(b) (nonprofit corporation).

Section 82.106 of the Property Code mandates that the bylaws contain specified provisions governing the “administration and operation of the condominium.” It also provides for “other matters the association considers desirable, necessary or appropriate” subject to the declaration. Section 81.202 of the Property Code (applying to condominiums formed before January 1, 1994) states that the “bylaws of a condominium regime govern the administration of the buildings that comprise the regime.” Thus, it is not unusual, particularly for associations formed before January 1, 1994, to see provisions in bylaws that go beyond corporate governance.

§ 24.5 General Considerations for Rules

Form 24-11 in this chapter can be used in promulgating rules for the condominium owners association and the use of any common areas. The rules and penalties for violation (to be inserted in sections A and B of the form) will be unique to each
condominium regime. The enforcement provisions (contained in section C of the form) are based on the requirements in section 82.102(d) of the Texas Property Code.

§ 24.6 Additional Forms

§ 24.6:1 Condominium Information Statement

Before offering to the public the sale of any interest in a condominium, a declarant (as well as certain other persons in the business of selling real property) must prepare and provide a condominium information statement to prospective purchasers. Tex. Prop. Code § 82.152. The requirements for the condominium information statement are found in Tex. Prop. Code § 82.153. These include—

1. the name and principal address of the declarant and of the condominium;
2. a general description of the condominium that includes the types and maximum number of units;
3. the minimum and maximum number of additional units that may be included in the condominium;
4. a brief description of any development rights reserved by a declarant and of any conditions relating to those rights;
5. copies of the declaration, articles of incorporation, bylaws, any rules of the association and their amendments, and copies of leases and contracts, other than loan documents, required by the declarant to be signed by purchasers at closing;
6. a projected or pro forma budget for the association for the first fiscal year of the association that conforms to Texas Property Code section 82.153(a)(6) and (b);
7. a general description of each lien, lease, or encumbrance affecting title to the condominium after conveyance by the declarant;
8. a copy of each written warranty provided by the declarant;
9. a description of any unsatisfied judgments against the association and any pending suits to which the association is a party or that are material to the land title and construction of the condominium of which a declarant has actual knowledge;
10. a general description of the insurance coverage provided for the benefit of unit owners; and
11. current or expected fees or charges to be paid by unit owners for the use of the common elements and other facilities related to the condominium.

Form 24-2 in this chapter is based on the above requirements. Special disclosures are required for condominiums located in whole or in part in a municipality with a population of more than 1.9 million. See Tex. Prop. Code § 82.153(a)(12).

§ 24.6:2 Management Certificate

Texas Property Code section 82.116 requires a management certificate to be recorded in each county in which the condominium is located. If any changes in information occur, the association is required to file a new management certificate not later than thirty days after the date the association has notice of the change. See Tex. Prop. Code § 82.116(b). In addition, all condominium owners associations must record a current management certificate on or before January 1, 2014, or rerecord the
current management certificate if the previous recording was done before September 1, 2013. This requirement is to facilitate the county clerks’ indexing of management certificates, which, before September 1, 2013, did not have a clear, statutorily mandated system. Tex. Prop. Code § 82.116(a–1). Thus, a condominium owners association should record or rerecord its current management certificates even if it missed the January 1, 2014, deadline. Form 24-5 in this chapter, the management certificate, may be used to comply with these requirements.

§ 24.6:3 Resale Certificate and Acknowledgment of Receipt

A unit owner, other than a declarant, who intends to sell a unit must provide a purchaser with a current copy of the declaration, bylaws, any association rules, and a resale certificate. The resale certificate, required under chapter 82 of the Texas Property Code, must be prepared not earlier than three months before the date of delivery. The resale certificate must be issued by the association and contain the disclosures specified in Tex. Prop. Code § 82.157. The resale certificate and other provisions in chapter 207 of the Property Code do not apply to condominiums. Tex. Prop. Code § 207.002(b).

Form 24-6 in this chapter, the resale certificate, may be used to comply with the requirements of Tex. Prop. Code § 82.157.

If the seller fails to deliver to the purchaser copies of the declaration, bylaws, and association rules as required by Tex. Prop. Code § 82.157 before the purchaser executes the contract, or if the contract does not contain an underlined or bold-faced provision acknowledging the purchaser’s receipt of those documents and recommending that the purchaser read the documents before executing the contract, the purchaser has the right to cancel the contract before the sixth day after the date the seller delivers those documents to the purchaser. See Tex. Prop. Code § 82.156. Form 24-8, the acknowledgment of receipt of condominium documents, may be used to document compliance with Tex. Prop. Code § 82.157 or may be modified to use as additional clauses in a sales contract.

§ 24.6:4 Record of Unit

An association is required to keep certain records, including information concerning each unit owner. The unit owner, within thirty days after acquiring an interest, must provide—

1. the unit owner’s mailing address, telephone number, and driver’s license number, if any;
2. the name and address of the holder of any lien against the unit and any loan number;
3. the name and telephone number of any person occupying the unit other than the unit owner; and
4. the name, address, and telephone number of any person managing the unit as agent of the unit owner.

Tex. Prop. Code § 82.114(e).

This information must be updated no later than thirty days after the date the owner has notice of any change in the required information. Tex. Prop. Code § 82.114(f). Form 24-10 in this chapter, the record of unit, may be used to comply with those requirements.
Additional Resources


Declaration of [name of condominium], a Condominium

Basic Information

Date:

Declarant:

Declarant’s Address:

Association: [name], a Texas [for-profit/nonprofit] corporation

Association’s Address:

Property: [include legal description] [include county], including the following easements and licenses appurtenant to, included in, or to which the condominium is or may become subject [include recording data for easements and licenses]

Plat/Plan: [attached hereto as Exhibit [exhibit number/letter]/recorded at [recording data]]

[Reservations from Declaration:]

[Property Subject to Development Right of Withdrawal: [include legal description]]

Definitions

“Act” means chapter 82 of the Texas Property Code, as amended, and any successor law, known as the Texas Uniform Condominium Act.

“Assessment” means regular and special assessments, dues, fees, charges, interest, late fees, fines, collection costs, attorney’s fees, and any other amount due to the association by the Owner or levied against the Unit by the Association.
“Board” means the Board of Directors of the Association.

“Bylaws” means the Bylaws of the Association adopted by the Board. The initial Bylaws are attached as Exhibit [exhibit number/letter].

“Certificate of Formation” means the Association’s certificate of formation.

“Common Elements” means all portions of the Condominium other than the Units and includes both General and Limited Common Elements. The Common Elements are directly owned by the Condominium Unit Owners in undivided interests.

“Common Expenses” means expenditures made by or financial liabilities of the Association, together with any allocations to reserves.

“Condominium” means the Property covered by the Plat and any additional property that is subject to this Declaration.

“Covenants” means the covenants, conditions, and restrictions contained in this Declaration.

“Declarant” means the person or persons identified as Declarant in the Basic Information or who reserves or succeeds to any special declarant right.

“Declarant Control Period” means the period of time during which Declarant can appoint a majority of the Board members and officers as provided in paragraph E.2.

“Dedicatory Instruments” means this Declaration and the Certificate of Formation, Bylaws, and Rules, as amended.

“Development Rights” means a right or combination of rights reserved by the Declarant set forth in paragraph L.3.
“General Common Elements” means common elements that are not Limited Common Elements.

“Limited Common Elements” means a portion of the Common Elements allocated by the Declaration or by the Act for the exclusive use of one or more but less than all of the Units, including [include as applicable and consider expressly excluding any of the following items that are not intended as limited common elements: shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and exterior doors and windows or other fixtures designed to serve one or more but less than all of the Units, but located outside the boundaries of the Unit(s)]. [Include any additional building features that are to be characterized or expressly excluded as limited common elements.]

“Member” means Owner.

“Owner” means every record Owner of a fee interest in a Unit.

“Plat” means the Plat and any plans for the Condominium [recorded in [recording data] of the real property records of [county] County, Texas/recorded with this Declaration as Exhibit [exhibit number/letter]] and any replat of or amendment to the Plat made in accordance with this Declaration.

“Residential Purposes” means recreational or dwelling purposes or both.

“Rules” means the Rules related to the Condominium adopted by the Board that do not conflict with law or the Dedicatory Instruments. On request, an Owner will be provided a copy of the Rules.

Include the following if applicable.

“Single Family” means a group of individuals related by blood, adoption, or marriage or a number of unrelated roommates not exceeding the number of bedrooms in a Unit.
“Special Declarant Rights” means a right or combination of rights reserved by the Declarant set forth in paragraph L.1.

“Unit” means a physical portion of the Condominium designated for separate ownership, the boundaries of which are described by the Declaration.

Each capitalized term not otherwise defined in this Declaration has the meaning specified in the Act.

**Clauses and Covenants**

A. **Imposition of and Agreement to the Covenants**

   A.1. Declarant imposes the Covenants on the Property and subjects the Property to a condominium form of ownership in accordance with the provisions of the Act [include if applicable: , subject to the Reservations from Declaration]. The Covenants run with the land and bind all Owners, occupants, and any other person holding an interest in a Unit.

   A.2. All Owners and other occupants of the Units by their acceptance of their deeds, leases, or by occupancy of any Unit agree that the Condominium is subject to the Covenants. Each Owner, each occupant of a Unit, and the Association agree to comply with the Dedicatory Instruments and to be subject to an action arising out of or related to the Dedicatory Instruments for declaratory judgment, damages, or for injunctive relief.

B. **Plat**

   B.1. The Plat is part of this Declaration and is incorporated by reference.

   B.2. To the extent that a Unit or Common Element encroaches on another Unit or Common Element, a valid easement for the encroachment exists. The easement does not
relieve an Owner of liability in case of willful misconduct or relieve Declarant or any other person of liability for failure to adhere to the Plat.

C. Use and Activities

C.1. Permitted Use. A Unit [shall/shall not] be used [only] for Residential Purposes [by a Single Family]. [Include if applicable: A Unit shall be used only for [office/warehouse/industrial/other nonresidential] purposes.]

C.2. Prohibited Use and Occupancy Restrictions. Subject to the Special Declarant Rights, the following use restrictions apply to all Units and to the Common Elements:

Select from the following as applicable.

a. any activity that is otherwise prohibited by the Dedicatory Instruments;

b. any illegal activity;

c. any nuisance, noxious, or offensive activity;

d. any dumping of trash or rubbish, except in approved locations and in an approved manner;

e. any storage of—

i. building materials except during the construction or renovation of a Unit or

ii. vehicles, except vehicles in a garage or operable automobiles on a driveway or in a parking space;
f. any keeping or raising of animals, except for common domesticated household pets, such as dogs and cats, not to exceed [number] confined to the Unit;

g. any commercial or professional activity except reasonable home office use;

h. the drying of clothes outside of a Unit;

i. the display of any sign except—
   i. one not more than five square feet, advertising the Unit for sale or rent and
   ii. political signage not prohibited by law or the Dedicatory Instruments;

[j. the renting of a portion of a Unit;]

[j./k.] [Insert any additional restrictions.]

D. Units

D.1. Number of Units. The number of Units in the Condominium is as shown on Exhibit [exhibit number/letter]. [Include as applicable: Declarant reserves no rights to create additional Units./Declarant reserves the right to create [number] additional Units as shown in section L./Declarant reserves the right to withdraw [number] Units as shown in section L.]

D.2. Identification of Units. The identification number of each Unit is shown on Exhibit [exhibit number/letter] and on the Plat.
D.3. **Unit Boundaries.** The boundaries of each Unit are the walls, floors, and ceilings of the Unit. The boundaries of each Unit are located as shown on the Plat and are more particularly described in paragraph D.4.

D.4. **Parts of Unit.** A Unit includes all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting part of the finished surfaces that are a part of a Unit, and the spaces, interior partitions, and other fixtures and improvements within the boundaries of a Unit are a part of the Unit. A Unit also includes [include any additional things that represent part of a unit]. A Unit does not include any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture that is partially within and partially outside the designated boundaries of a Unit, of which the portion serving only that Unit is a Limited Common Element allocated solely to that Unit and of which the portion serving more than one Unit or the Common Elements is a part of the General Common Elements.

D.5. **No Subdivision or Consolidation of Units.** No Unit will be subdivided or consolidated with another Unit (unless approved by the Board).

D.6. **No Structural Modification of Unit without Board Approval.** No structural modifications or alterations will be made in a Unit unless plans, specifications, and any other documents requested by the Board are submitted to and approved by the Board in accordance with the Rules. The Association, the Board, and their members will not be liable to any person submitting requests for approval or to any Owner by reason of any action, failure to act, approval, disapproval, or failure to approve or disapprove any request. Any structural modification made to a Unit (a) without Board approval, (b) not in conformity with the Board approval, or (c) without the required permit from the applicable entity are unauthorized modifications. The Board may require the Owner to restore the Unit, at the Owner’s expense, to the condition before the unauthorized modifications were made.
D.7. Maintenance. Each Unit will be maintained by its Owner.

D.8. Restrictions on Transfer

A Unit may not be conveyed pursuant to a time-sharing arrangement.

A Unit may not be leased or rented for a term of less than sixty days.

All leases and rental agreements shall be in writing and subject to the reasonable requirements of the Board.

If an Owner receives an acceptable purchase offer for a Unit, the Owner must first offer to sell the Unit to the Association for the same price and terms as the offer received. The Owner will give the Board written notice of the price and terms of the offer received and the name and address of the person making such offer. If, within ten days from the date the Board receives the Owner’s notice, the Board fails to give the Owner notice that the Association elects to purchase the Unit, the Owner may sell the Unit to the person(s) making the offer. In such case, the Board will certify in writing, duly acknowledged and in recordable form, that the Association has declined to purchase the Unit. The Board may waive the provisions of this paragraph for any Unit. Any mortgagee of any Unit that acquires title to a Unit is exempt from this “right of first refusal.”

Continue with the following.

E. Association

E.1. Establishment and Governance. The Association is established by filing its Certificate of Formation and is governed by the Dedicatory Instruments. The Association, acting through the Board, will administer and manage the Condominium in accordance with the Dedicatory Instruments. The Association has the powers (a) of a [for-profit/nonprofit] corpo-
ration under the Texas Business Organizations Code, (b) of a condominium association under the Act, and (c) stated in the Dedicatory Instruments, respectively as amended. All acts of the Association must be by and through the Board, except as otherwise provided by the Declaration or Bylaws or by law.

E.2. Declarant Control. Declarant has all the powers reserved in section 82.103(c) of the Act to appoint and remove officers and members of the Board until the 120th day after conveyance of 50 percent of the Units that may be created to Owners other than Declarant, at which time not less than one-third of the Board members must be elected by Owners other than Declarant. Not later than the 120th day after conveyance of 75 percent of the Units to Owners other than Declarant, the Declarant Control Period terminates, and all the Board and Association officers shall be elected by the Owners as provided in the Bylaws.

E.3. Membership and Voting Rights. Every Owner is a Member of the Association. Membership is appurtenant to and may not be separated from ownership of a Unit. On termination of the Declarant Control Period, the Members have the voting rights provided in the Bylaws.

E.4. Assignment of Future Income. The Association may assign its future income, including its rights to receive Common Expenses assessments, [in accordance with section 82.102 of the Act/only by the affirmative vote of Unit Owners of Units to which at least [specify number] of the votes in the Association are allocated].

F. Assessments

F.1. Authority. The Association will charge Assessments as provided in the Act.

F.2. Personal Obligation. An Assessment is a personal obligation of each Owner when the Assessment accrues.
F.3. **Creation of Lien.** Assessments are secured by a continuing lien on each Unit as provided in section 82.113 of the Act. By acceptance of a deed to a Unit, each Owner grants the lien, together with the power of sale, to the Association to secure Assessments.

F.4. **Commencement.** A Unit becomes subject to Assessments as provided in the Act.

F.5. **Regular Assessments**

F.5.a. **Rate.** Regular assessments will be charged by the Board to fund the budgeted Common Expenses.

F.5.b. **Changes to Regular Assessments.** Regular assessments may be changed by the Board. Written notice of the regular assessment will be sent to every Owner at least thirty days before its effective date.

F.5.c. **Collections.** Regular assessments will be collected [annually/semiannually/monthly] in advance, payable on the [first/tenth/other] day of the [month/year] and on [the same day of each succeeding month/year/ the first/tenth/other] day of [month] of each year.

Include the following if applicable.

F.5.d. **Expenses for Maintenance, Repair, or Replacement of Limited Common Elements.** Expenses for the maintenance, repair, or replacement of a Limited Common Element shall be assessed to the Owner(s) whose Unit(s) benefit from the Limited Common Element.

Continue with the following.

F.6. **Special Assessments.** In addition to the regular assessments, the Board may charge special assessments for the purpose of funding the cost of any construction, reconstruc-
tion, repair, or replacement of any capital improvement on the Common Elements or for any
other purpose benefiting the Condominium but requiring funds exceeding those available
from the regular assessments. Written notice of the terms of the special assessment will be
sent to every Owner. Any special assessment must be approved by a [majority/two-thirds]
vote at a meeting of the Members in accordance with the Bylaws.

F.7. Subordination of Lien to Mortgages. The lien granted and reserved to the
Association is subordinate to the liens described in section 82.113(b) of the Act.

F.8. Delinquent Assessments. Any Assessment not paid within [number] days after
it is due is delinquent.

G. Remedial Rights

G.1. Late Charges and Interest. Owners will pay the Association a late charge of
[$amount]/[percent] percent of the delinquent amount] for Delinquent Assessments. Owners
will pay the Association interest at the rate of [percent] percent per year on Delinquent
Assessments from the delinquent date until the date paid. The Board may change the late
charge and the interest rate; however, the interest rate may not exceed the maximum permitted
by law.

G.2. Costs, Attorney’s Fees, and Expenses. The prevailing party in any legal pro-
ceeding among the Association, an Owner, or an occupant of a Unit related to the Dedicatory
Instruments is entitled to recover reasonable attorney’s fees and all costs of such proceeding
incurred by the prevailing party. A prevailing party is the party who successfully prosecutes
the action or successfully defends against it, prevailing on the main issue, even though not to
the extent of its original contention.

G.3. Nonjudicial Foreclosure of Lien. The Association may foreclose the Associa-
tion’s lien against a Unit in accordance with section 82.113 of the Act.
G.4.  Judicial Action. The Association may sue an Owner and an occupant of a Unit to enforce the Dedicatory Instruments for damages for breach of the Dedicatory Instruments, for injunctive relief regarding the Dedicatory Instruments, and to foreclose the Association’s lien on a Unit. An Owner and an occupant of a Unit may sue the Association, any Owner, and any occupant of a Unit to enforce the Dedicatory Instruments, for injunctive relief regarding the Dedicatory Instruments, and for damages for breach of the Dedicatory Instruments.

G.5.  Remedy of Violations. The Association may access an Owner’s Unit to remedy a violation of the Dedicatory Instruments.


G.7.  Suspension of Other Rights. If an Owner violates the Dedicatory Instruments, the Association may suspend the Owner’s rights under the Dedicatory Instruments in accordance with law until the violation is cured.

G.8.  Damage to Property or Violation of Dedicatory Instruments. An Owner is liable to the Association (a) for damage to Common Areas caused by the Owner or the Owner’s family, guests, agents, independent contractors, and invitees (“Owner Affiliates”), and (b) for violations of the Dedicatory Instruments by the Owner or Owner Affiliates, in accordance with law.

H.  Limited Common Elements

H.1.  Allocation of Reserved Limited Common Elements

H.1.a. Limited Common Elements are marked on the Plat and include [include as applicable: vehicle parking areas, storage areas, and others].
Declaration of [name of condominium], a Condominium

H.1.b. To the extent the Limited Common Elements are not allocated to a Unit by the Declaration, Declarant reserves the right to allocate the Limited Common Elements for the exclusive use of one or more Units (i) by making the allocation in a recorded instrument, (ii) in the deed to the Unit(s) to which the Limited Common Element is ancillary, or (iii) by recording an appropriate amendment to this Declaration.

The following paragraph is optional. Unless the declaration contains a similar provision, a reallocation of limited common elements can be undertaken only by an amendment to the declaration.

H.2. Allocation of Specified Common Elements. The Board may designate parts of the Common Elements from time to time for use by less than all of the Owners or by nonowners for specified periods of time or by only those persons paying fees or satisfying other reasonable conditions for use as may be established by the Board. Any such designation by the Board shall not be a sale or disposition of such portions of the Common Elements.

I. Allocated Interests

I.1. Allocated Interests. The Owners’ respective undivided interest in the Common Elements, the Owners’ respective Common Expense liability, and the Owners’ respective votes in the Association allocated to each Unit are set forth in Exhibit [exhibit number/letter].

I.2. Determination of Allocated Interests. The interests allocated to each Unit have been calculated as follows:

a. the undivided interest in Common Elements, on the basis of [include the method of calculation used];

b. the percentage of liability for Common Expenses, on the basis of [include the method of calculation used]; and
c. the number of votes in the Association, on the basis of [include the method of calculation used].

J. Amendment of Declaration

The Declaration may be amended by consent of Owners to which at least [67 percent of the votes (or higher for residential condominiums)/[smaller percentage] percent of the votes (if all units are restricted to nonresidential use)] in the Association are allocated—

1. by written ballot that states the exact wording or substance of the amendment and that specifies the date by which a ballot must be received to be counted;

2. at a meeting of the Members of the Association after written notice of the meeting has been delivered to an Owner of each Unit stating that a purpose of the meeting is to consider an amendment to the Declaration;

3. by unanimous written consent of the Owners; or

4. [other method].

K. Reconstruction after Loss

On a casualty to any portion of the Condominium for which insurance is required, the Association must promptly repair or replace that portion unless (1) the Condominium is terminated, (2) repair or replacement would be illegal under any state or local health or safety statute or ordinance, or (3) at least 80 percent of the Owners, including each Owner of a Unit or assigned Limited Common Element that will not be rebuilt or repaired, vote to not rebuild. Each unit owner may vote (in person or by proxy at a meeting; electronically or by written ballot in the absence of a meeting) regardless of whether the owner’s unit or limited common element has been damaged or destroyed. Costs will be assessed and paid as provided in section 82.111 of the Act. [Specify alternative provisions if desired and if all units are restricted to
nonresidential use, as the provisions of section 82.111 of the Act may then be varied or waived.]

L. **Special Declarant Rights and Development Rights**

L.1. **Special Declarant Rights.** The Declarant reserves the following Special Declarant Rights:

a. The right to complete or make improvements indicated on the Plats and Plans.

b. The right to maintain sales offices, management offices, leasing offices, and models in Units or on the Common Elements, but only [include limits in number, size, location, and relocation].

c. The right to maintain signs on the Condominium to advertise the Condominium.

d. The right to use, and to permit others to use, easements through the Common Elements as may be reasonably necessary for the purpose of discharging the Declarant’s obligations under the Act and this Declaration.

e. The right to appoint or remove any officer of the Association or any director under paragraph E.2. or section 82.003(a)(22)(F) or 82.103(c) of the Act.

L.2. **Limitations on Special Declarant Rights.** Unless sooner terminated by a recorded instrument signed by the Declarant, any Special Declarant Right may be exercised by the Declarant [until [date]/for the period of time specified in the Act].

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If development rights are reserved, this form will require substantial modification. See Tex. Prop. Code §§ 82.003(a)(12), 82.003(a)(22)(B), 82.055(14).
L.3. Development Rights. The Declarant reserves the following development rights: [specify rights reserved].

M. General Provisions

M.1. Term. The Condominium may be terminated—

a. by a taking of all of the Units by condemnation; or

b. by the approval of 100 percent of the votes in the Association and each holder of a deed of trust or vendor’s lien on a Unit.

Select one of the following.

Or

Caution: The number may not be less than 80 percent if any unit in the condominium regime is residential.

b. by the approval of at least [percent] percent of the Members of the Association and each holder of a deed of trust or vendor’s lien on a Unit.

M.2. No Waiver. Failure by the Association or an Owner to enforce the Dedicatory Instruments is not a waiver.

M.3. Corrections. The Board may correct typographical or grammatical errors, ambiguities, or inconsistencies contained in this Declaration, provided that any correction must not impair or affect a vested property right of any Owner.

M.4. Conflict. This Declaration controls over the other Dedicatory Instruments.

M.5. Severability. If a provision of this Declaration is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this Declaration, and this Declaration is to be construed as if the unenforceable provision is not a part of the Declaration.
M.6. Notices. Any notice required or permitted by the Dedicatory Instruments must be in writing. To the extent required by law, notices regarding remedial rights must be given by certified mail, return receipt requested. All other notices may be given by regular mail. Notice is deemed delivered (whether actually received or not) when properly deposited with the United States Postal Service, addressed to a Member at the Member’s last known address according to the Association’s records and the Association, the Board, or a managing agent at the Association’s principal office or another address designated in a notice to the Members. Unless otherwise required by law or the Dedicatory Instruments, actual notice, however delivered, is sufficient.

[Name of declarant]

Include acknowledgment.

After recording, please return to:
[name and address of declarant or attorney]
Form 24-2

Condominium Information Statement
[name of condominium], a Condominium
[Tex. Prop. Code § 82.153]

Date:

Declarant:

Declarant’s Address:

Condominium’s Address:

Association:

Association’s Address:

A. Minimum and Maximum Number of Units

The Condominium contains [number] units. [No additional units may be added to the Condominium./A maximum of [number] additional units may be added to the Condominium.]

B. Development Rights

The Declarant [does not reserve any development rights/reserves the following development rights: [list rights]].

The development rights are [not subject to any conditions or limits/subject to the following conditions or limits: [list limits]].

C. Attachments

1. Attached are copies of the [insert if declaration has not yet been recorded: proposed] Condominium declaration and the Association’s certificate of formation, bylaws, and
rules and amendments to any of them. Also attached are copies of leases and contracts, other than loan documents, that are required by the Declarant to be signed by purchasers at closing.

2. Attached are copies of the Association’s projected or pro forma budget in compliance with Texas Property Code section 82.153(b) for the first fiscal year of the Association following the date of the first conveyance to a purchaser, identification of the person(s) who prepared the budget, and a statement of the budget’s assumptions concerning occupancy and inflation factors.

3. Attached is a general description of each lien, lease, or encumbrance on or affecting the title to the Condominium after conveyance by the Declarant.

4. Attached is a copy of each written warranty provided by the Declarant.

5. Attached is a description of any unsatisfied judgments against the Association and any pending suits to which the Association is a party or which are material to the land title and construction of the Condominium that are known by the Declarant.

6. Attached is a general description of the insurance coverage provided for the benefit of unit owners.

7. Attached are the current or expected fees or charges to be paid by unit owners for the use of the common elements and other facilities related to the Condominium.

D. Service

A unit owner—
1. as an alternative to personal service, may be served with process by the municipality or the municipality’s agent for a judicial or administrative proceeding initiated by the municipality and directly related to the unit owner’s property interest in the Condominium by serving the unit owner at the unit owner’s last known address, according to the records of the appraisal district in which the Condominium is located, by any means permitted by rule 21a of the Texas Rules of Civil Procedure;

2. shall promptly notify the appraisal district in writing of a change in the unit owner’s mailing address not later than the ninetieth day after the date the unit owner changes the address; and

3. may not offer proof in the judicial or administrative proceeding, or in a subsequent related proceeding, that otherwise proper service by mail of the notice was not received not later than three days after the date the notice was deposited in a post office or official depository under the care and custody of the United States Postal Service.

Continue with the following.

[Name of declarant]

By ____________________________

[Name and title]
Certificate of Formation of [name of corporation], a Texas [For-Profit/Nonprofit] Corporation

1. Name. The name of the corporation is [name].

2. Type of Filing Entity. The type of filing entity being formed is a [for-profit/nonprofit] corporation.

3. Purpose. The purpose for which the filing entity is formed is to be the property owners association under the Declaration of [name of condominium], a condominium.

4. Period of Duration. The period of duration of the filing entity is perpetual.

5. Initial Registered Office. The street address of the initial registered office of the filing entity and the name of its initial registered agent at that address are:

   Name: [name of registered agent]
   Address: [address, city, state]

6. Organizer. The name and address of the organizer for the filing entity are:

   Name: [name of organizer]
   Address: [address, city, state]

   [Include the following for nonprofit only.]

7. Members. The filing entity will be composed of Members.

   [Continue with the following.]

   [7./8.] Initial Board of Directors. The number of directors constituting the initial board of directors is [number], and their names and addresses are:
Name: [name]
Address: [address, city, state]

Highlighted: Repeat as necessary.

Signed on [date].

[Name of organizer]
Bylaws of [name of association] [, Inc.]

Basic Information

Association: [name], established by the certificate of formation filed with the secretary of state of Texas on [date] under file number [number], a Texas [for-profit/non-profit] corporation.

Principal Office:

Declaration: The Declaration of [name of condominium], a condominium, [include recording information].

Definitions: Capitalized terms used but not defined in the Bylaws have the meaning set forth in the Declaration.

Voting Members: Members entitled to vote or their proxies. Any Member delinquent in payment of any Assessment is not a Voting Member.

A. Members and Members Meetings

A.1. Membership. Every Owner is a Member of the Association. Membership is appurtenant to and may not be separated from ownership of a Unit.

A.2. Place of Members Meetings. Members meetings will be held at the Association’s principal office or at another place designated by the Board.

A.3. Annual Meetings. The first Members meeting will be held within [number] months after the formation of the Association. Subsequent regular annual Members meetings
will be held on [describe meeting date taking into consideration when dues are payable, e.g., the first Sunday in June].

A.4. Special Meetings. The president, a majority of the Board, or Owners having at least 20 percent of the votes of the Association may call special meetings.

A.5. Notice of Members Meetings.

A.5.a. Requirements. Except as provided in paragraph F.5., written notice stating the place, day, and hour of each Members meeting, other than a reconvened meeting, must be given to each Member not less than [number (if the association is a nonprofit corporation, must be ten)] nor more than [number (if the association is a nonprofit corporation, must be sixty)] days before the meeting. The special Members meeting notices must also state the meeting’s purpose, and no business may be conducted except as stated in the notice. Notice to a Member is deemed given when hand delivered or mailed. If mailed, notice is deemed given (whether actually received or not) when deposited with the United States Postal Service, properly addressed, postage prepaid. Upon written request of a Member, the Association shall inform the Member of the time and place of the next regular or special meeting of the Association Members.

A.5.b. Meetings at which Amendments Considered. The Members cannot meet to adopt an amendment or other change to the Declaration, articles of incorporation, bylaws, or rules of the Association (the “Governing Documents”) unless written notice is given to each Member, in a document showing the specific amendment or other change that would be made to the Governing Documents, after the twentieth day but before the tenth day preceding the meeting, by either (i) personal delivery as shown by a receipt signed by the Member, or (ii) deposit in the United States mail as shown on the postmark date.
A.6. **Waiver of Notice.** A Member may, in writing, waive notice of a meeting. Attendance at a meeting is a waiver of notice of the meeting, unless the Member objects to lack of notice when the meeting is called to order.

> Unless the bylaws provide otherwise, a quorum is determined by Tex. Prop. Code § 82.109.

A.7. **Quorum.** Members holding [percent (if the association is a nonprofit corporation, must be more than ten; if the association is a for-profit corporation, consult Tex. Bus. Orgs. Code § 21.358)] percent of the votes in the Association, in person or by proxy, are a quorum. If a Members meeting cannot be held because a quorum is not present, a majority of the Voting Members who are present may adjourn the meeting. At the reconvened meeting, [percent (if the association is a nonprofit corporation, must be more than ten; if the association is a for-profit corporation, consult Tex. Bus. Orgs. Code § 21.358)] percent of the Voting Members is a quorum. If a quorum is not present, a majority of the Voting Members who are present may adjourn the meeting. At the second reconvened meeting, [percent (if the association is a nonprofit corporation, must be more than ten; if the association is a for-profit corporation, consult Tex. Bus. Orgs. Code § 21.358)] percent of the Voting Members is a quorum. Written notice of the place, date, and hour of each reconvened meeting must be given to each Member not more than [number (if the association is a nonprofit corporation, must be sixty)] nor less than [number (if the association is a nonprofit corporation, must be ten)] days before the reconvened meeting.

A.8. **Majority Vote.** Votes representing more than 50 percent of the votes at a meeting at which a quorum is present are a majority vote.

A.9. **Proxies.** Voting Members may vote by written proxy.
A.10. **Conduct of Meetings.** The president will preside over Members meetings. The secretary will keep minutes of the meetings and will record Member action at the meeting in the minutes book.

**B. Board**

B.1. **Governing Body; Composition.** The affairs of the Association are governed by the Board. Each director has one vote. The initial Board is composed of the directors appointed in the certificate of formation. Each director must be a Member or, in the case of an entity Member, a person designated in writing to the secretary.

B.2. **Number of Directors.** The Board consists of not less than three nor more than [number] directors. Within those limits, the Board may change the number of directors. No decrease may shorten the term of a director.

B.3. **Term of Office.** The initial directors serve until the first annual meeting of Members.

Select one of the following.

The terms of directors will be staggered. At least one-third of the Board will be elected each year. The initial Board will determine the initial term, not to exceed three years, of each director. At the expiration of the initial term of a director, each successor will have a term of [number] years.

Or

Successor directors will have a term of one year.

Continue with the following.

Directors may serve consecutive terms.
B.4. **Election.** Within 120 days after Declarant has conveyed 50 percent of the Units to Owners other than Declarant, the Members shall elect not less than one-third of the Board members at a meeting held for such purpose. Not later than the 120th day after conveyance of 75 percent of the Units to Owners other than Declarant, the Voting Members will elect the directors of the Association and its officers as herein provided. At subsequent annual Members meetings, successors for each director whose term is expiring will be elected. Cumulative voting is prohibited. The candidate or candidates receiving the most votes will be elected. The directors elected by the Voting Members will hold office until their respective successors have been elected.

B.5. **Removal of Directors and Vacancies**

B.5.a. **Removal by Members.** Any director may be removed, with or without cause, by a majority of the Voting Members. Any director whose removal is sought will be given notice of the proposed removal.

B.5.b. **Removal by Board.** Any director may be removed at a Board meeting if the director—

i. failed to attend [number] consecutive Board meetings;

ii. failed to attend [percent] percent of Board meetings within one year;

iii. is delinquent in the payment of any Assessment for more than [number] days; or

iv. is the subject of an enforcement action by the Association for violation of the Dedicatory Instruments.

B.5.c. **Vacancies.** A director’s position becomes vacant if the director dies, becomes incapacitated, resigns, or is no longer a Member.
B.5.d. Successors. If a director is removed or a vacancy exists, a successor will be elected by the remaining directors for the remainder of the term.

B.6. Compensation. Directors will not receive compensation. A director may be reimbursed for expenses approved by the Board.

B.7. Powers. The Board has all powers necessary to administer the Association’s affairs.

B.8. Management. The Board may employ a managing agent and delegate specified powers of the Board to the managing agent. Declarant, or an affiliate of Declarant, may be the managing agent.

B.9. Accounts and Reports. Accounting must conform to good accounting practices. The Association shall obtain an annual audit of its records in accordance with section 82.114(c) of the Act. Accounts will not be commingled with accounts of other persons. The following financial reports will be prepared at least annually:

a. An income statement reflecting all income and expense activity for the preceding period.

b. A statement reflecting all cash receipts and disbursements for the preceding period.

c. A variance report reflecting the status of all accounts in an “actual” versus “approved” budget format.

d. A balance sheet as of the last day of the preceding period.

e. A delinquency report listing all Owners who are delinquent by more than [number] days in paying any Assessment and describing the status of any action to collect those delinquent Assessments.
B.10. **Borrowing.** The Board may borrow money to maintain, repair, or restore the Common Elements without the approval of the Members. If approved in advance by the Members in the same manner as approving a Special Assessment, the Board may borrow money for any other purpose.

B.11. **Rights of Association.** With respect to the Common Elements, and in accordance with the Declaration, the Association will have the right to contract with any person for the performance of various duties and functions. Such agreements require the approval of the Board.

C. **Board Meetings**

C.1. **Regular Meetings.** Regular meetings of the Board will be held at such time and place as determined by the Board, but at least [number] such meeting[s] will be held during each fiscal year. Notice of the time and place of the meeting[s] will be given to directors not less than [number] days and not more than [number] days before the meeting[s]. Board meetings must be open to Members, subject to the right of the Board to adjourn a meeting of the Board and convene in executive session to consider actions involving personnel, pending litigation, contract negotiations, enforcement actions, matters involving the invasion of privacy of Members, or matters that are to remain confidential by request of the affected parties and agreement of the Board. The general nature of any business to be considered in executive session must first be announced at the open meeting.

C.2. **Special Meetings.** Special meetings will be held when called by written notice signed by the president or by any [number] directors. The notice will specify the time and place of the meeting and the matters to be covered at the meeting.

C.3. **Subsequent Meetings.** Upon written request of a Member, the Association shall inform the Member of the time and place of the next regular or special meeting of the Board.
C.4. Meetings at which Amendments Considered. The Board cannot meet to adopt an amendment or other change to the Declaration, articles of incorporation, bylaws, or rules of the Association (the “Governing Documents”) unless the Board gives written notice to each Member, in a document showing the specific amendment or other change that would be made to the Governing Documents, after the twentieth day but before the tenth day preceding the meeting, by either (a) personal delivery as shown by a receipt signed by the Member, or (b) deposit in the United States mail as shown on the postmark date.

C.5. Waiver of Notice. The actions of the Board at any meeting are valid if (a) a quorum is present and (b) either (i) proper notice of the meeting was given to each director and all Members who are entitled to notice of the meeting or (ii) a written waiver of notice is given by any director who did not receive proper notice of the meeting and all Members who are entitled to notice of the meeting. Proper notice of a meeting will be deemed given to any director or Member who attends the meeting without protesting before or at its commencement about the lack of proper notice.

C.6. Quorum of Board. At all meetings, a majority of the Board will constitute a quorum, and the votes of a majority of the directors present at a meeting at which a quorum is present constitutes the decision of the Board. If the Board cannot act because a quorum is not present, a majority of the directors who are present may adjourn the meeting to a date not less than [number] nor more than [number] days from the date the original meeting was called. At the reconvened meeting, if a quorum is present, any business that may have been transacted at the meeting originally called may be transacted without further notice.

C.7. Conduct of Meetings. The president will preside at Board meetings. The secretary will keep minutes of the meetings and will record in a minute book the votes of the directors.
C.8. **Action without Meeting.** Unless the Association’s certificate of formation or the Declaration provides otherwise, the Board may act by unanimous written consent of all the directors, without a meeting, if (a) the Board action does not involve voting on a fine, damage assessment, appeal from a denial of architectural control approval, or suspension of a right of a particular Association Member before the Member has an opportunity to attend a Board meeting to present the Member’s position, including any defense on the issue; and (b) a record of the Board action is filed with the minutes of Board meetings.

Or

C.8. **Action without Meeting.** The Board may not act without a meeting.

Include if the association is a nonprofit corporation.

C.9. **Proxies.** Directors may vote by written proxy provided, however, that any director present through written proxy may not be counted towards a quorum.

D. **Officers**

D.1. **Officers.** The officers of the Association are a president, [vice president,] secretary, treasurer, and any other position designated by the Board. The officers have the authority and duties prescribed by the Board. Any two or more offices may be held by the same person, except the offices of president and secretary.

D.2. **Election, Term of Office, and Vacancies.** Officers will be elected annually by the Board at the first meeting of the Board following each annual meeting of the Voting Members. A vacancy in any office may be filled by the Board for the unexpired portion of the term.

D.3. **Removal.** The Board may remove any officer whenever, in the Board’s judgment, the interests of the Association will be served thereby.
D.4. **Powers and Duties.** Officers have such powers and duties as are generally associated with their respective offices and as may be specifically conferred by the Board. The president is the chief executive officer of the Association. The treasurer has primary responsibility for the preparation of the budget and financial reports and may delegate all or part of the preparation and notification duties to a finance committee, management agent, or both.

D.5. **Resignation.** Any officer may resign at any time by giving written notice to the Board, the president, or the secretary. Resignation takes effect on the date of the receipt of the notice or at any later time specified in the notice.

**E. Committees**

The Board may establish committees by resolution and authorize the committees to perform the duties described in the resolution.

**F. Miscellaneous**

F.1. **Fiscal Year.** The Board may establish the Association’s fiscal year by resolution. In the absence of a Board resolution determining otherwise, the Association’s fiscal year is a calendar year.

F.2. **Rules for Meeting.** The Board may adopt rules for the conduct of meetings of Members, Board, and committees.

F.3. **Conflict.** The Declaration controls over these Bylaws.

F.4. **Examination of Books and Records**

F.4.a. **Examination by Member.** After a written request to the Association, a Member may examine and copy, in person or by agent, any Association books and records relevant to that purpose. The Board may establish rules concerning the (i) form of the request;
(ii) reasonable hours and days of the week for the inspection; and (iii) payment of costs related to a Member’s inspection and copying of books and records.

**F.4.b. Examination by Director.** A director has the right, at any reasonable time and at the Association’s expense, to examine and copy the Association’s books and records at the Association’s Principal Office and to inspect the Association’s properties.

**F.5. Notices.** Any notice required or permitted by the Dedicatory Instruments must be in writing. Notices regarding enforcement actions must be given by certified mail, return receipt requested. All other notices may be given by regular mail. Notice is deemed delivered (whether actually received or not) when properly deposited with the United States Postal Service, addressed to a Member at the Member’s last known address according to the Association’s records and the Association, the Board, or a managing agent at the Association’s Principal Office or another address designated in a notice to the Members. Unless otherwise required by law or the Dedicatory Instruments, actual notice, however delivered, is sufficient.

**F.6. Amendment.** These Bylaws may be amended only by [the vote of [percent] percent of the Voting Members in the Association/the vote of [percent] percent of the Members of the Board].

The officers who are authorized to prepare, execute, certify, and record amendments to the Declaration on behalf of the Association are as follows: [specify officers].

[Name of association]

By ______________________________

[Name and title]
Management Certificate

[Tex. Prop. Code § 82.116]

Name of Condominium: [name of condominium]
Name of Property Owners Association: [name of association]
Condominium Location: [street address, city, state]
Plat [and Plan] Recording Data: The plat [and plan] of the condominium is recorded in [recording data] of the real property records of [county] County, Texas
Declaration Recording Data: The Declaration recorded in [recording data] of the real property records of [county] County, Texas
Mailing Address of Association: [address, city, state]

Include the following if applicable.

Name of Person Managing Association or Association’s Designated Representative: [name of person managing association or association’s designated representative]

Mailing Address of Person Managing Association or Association’s Designated Representative: [address, city, state]
The undersigned hereby certifies that [he/she] is the duly elected and qualified president of [name of association], that [name] is the duly elected and qualified [secretary/[other officer]] of [name of association], that the signature above is [name]’s genuine signature, and that the foregoing certificate is true and correct.

[Name of president]
Resale Certificate

[Tex. Prop. Code § 82.157]

Basic Information

Date:

Unit:

Condominium:

Association:

Association’s Address:

Managing agent of Condominium:

Managing agent’s Address:

Notice

The Unit [is/is not] subject to a right of first refusal or other restraint that restricts the Owner’s right to transfer the Unit.

Current regular assessment: \$[amount] per [time period, e.g., month]

Unpaid regular assessments and special assessments attributable to the Unit: \$[amount]
Other unpaid fees or amounts payable to the Association by the Owner: $[amount]

Capital expenditures approved by Association for current fiscal year: $[amount]

Reserves for capital expenditures and any portions of the reserves dedicated for specified projects: $[amount]

Unsatisfied judgments against Association: $[amount] or state “none”

Nature of any pending suits against the Association: There [are/are not any] suits pending against the Association. [Include if applicable: The style and cause number of each pending suit are [describe any pending suits].]

Insurance coverage provided for the benefit of Unit Owners: [describe insurance coverage]

Transfer fee(s): [describe each fee in detail, including who it is payable to and the amount]

The Board has [knowledge/no knowledge] that any alterations or improvements to the Unit or the limited common elements assigned to the Unit violate the Declaration, Bylaws, or Association Rules.

The Association [has/has not] received notice from any governmental authority regarding health or building code violations with respect to the Unit, the limited common elements
assigned to the Unit, or any other portion of the Condominium. [Include if applicable:]
A summary or copy of each notice is attached.]

 Include the following if applicable.

The remaining term of any leasehold estate that affects the condominium is [description of remaining term], and the provisions governing an extension or renewal of the lease are as follows: [Describe provisions.]

Continue with the following.

A copy of the current Operating Budget and the current Balance Sheet for the Association is attached.

[Name of association]

By ____________________________
[Name and title]
Form 24-7

Pursuant to Tex. Prop. Code § 82.156, if the purchaser from a seller other than a declarant has not received a resale certificate before the purchaser executes the contract, the purchaser has the right to cancel the contract before the sixth day after the purchaser receives the resale certificate or executes a waiver pursuant to Tex. Prop. Code § 82.157, whichever occurs first. A copy of a condominium resale certificate promulgated by the Texas Real Estate Commission is available at https://www.trec.texas.gov/pdf/contracts/32-4.pdf.

Pursuant to Tex. Prop. Code § 82.157, a condominium association is required to furnish a resale certificate no later than the tenth day after the date of receiving a written request from the selling unit owner. If a condominium association fails to furnish the resale certificate within the ten-day period, the selling unit owner may deliver to the purchaser a sworn affidavit in lieu of the resale certificate and the seller and purchaser may agree in writing to waive the requirement of the seller delivering the resale certificate.

This form may be modified to use as additional clauses in the sales contract.

Waiver of Condominium Resale Certificate

Seller:

Buyer:

Contract Effective Date:

Condominium Association:

Description of Condominium:

Seller has advised Buyer that the Condominium Association has failed to issue a resale certificate within ten days after Seller’s written request for the Condominium Association to issue the resale certificate. Seller has delivered to Buyer a sworn affidavit setting out the information required in the resale certificate. Seller and Buyer hereby waive the requirement for the Condominium Association to issue a resale certificate incident to sale of the [Property/Condominium described above].
Waiver of Condominium Resale Certificate

[Name of seller]
Date:

[Name of buyer]
Date:
Acknowledgment of Receipt of Condominium Documents

Seller:

Buyer:

Contract Effective Date:

Condominium Owners Association:

Description of Condominium:

Select one of the following.

Buyer has received copies of the declaration, bylaws, rules of the Condominium Owners Association, and the [Declarant’s Condominium Information Statement/Resale Certificate]. Seller has recommended to Buyer that Buyer read these documents before executing the contract.

Or

Buyer has not received copies of the declaration, bylaws, rules of the Condominium Owners Association, and the [Declarant’s Condominium Information Statement/Resale Certificate]. Seller will deliver these documents to Buyer within [number] days after the Contract Effective Date. Buyer has the right to cancel the contract before the sixth day after Buyer receives copies of these documents by delivering written notice of cancellation to Seller.

Continue with the following.

[Name of seller]
Date:
[Name of buyer]

Date:
Certificate of Condominium Association’s Waiver of Right of First Refusal

Basic Information

Date:

Association:

Condominium:

Address:

Recording Information under Which Right of First Refusal Arises: [include volume and page number where right of first refusal can be found in declaration.]

Include information in the contract of sale for which the association is waiving right of first refusal.

Contract of Sale

Seller:

Buyer:

Date:

Unit:

Waiver

The Association hereby certifies that—
1. the Seller of the Condominium Unit has complied with the requirements that the Unit be first offered for sale to the Association; and

2. the Association has declined to purchase the Unit and hereby waives its right of first refusal to purchase the Unit under the Contract of Sale.

The Association reserves its Right of First Refusal regarding any future sales of the Unit or under terms other than as set forth in the Contract of Sale.

[Name of association]

Include acknowledgment as necessary.
Pursuant to Texas Property Code section 82.114(e), each owner of a condominium unit is required to provide the condominium association with the following information related to the unit:

1. Owner name(s)

2. Owner mailing address(es)

3. Owner telephone number(s)

4. Owner driver’s license number(s), including state

5. Owner e-mail address(es) (Optional)

6. Lienholder name(s)

7. Lienholder address(es)

8. Loan number(s)

9. Name and telephone number of each person occupying the unit other than owner
10. Name, address and telephone number of any person managing the unit as agent of owner

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

If you need more space to provide this information, please add the information on a blank sheet and attach it to this sheet.

Texas Property Code section 82.114(f) states, “A unit owner shall notify the association not later than the 30th day after the date the owner has notice of a change in any information required by Subsection (e), and shall provide the information on request by the association from time to time.”
Form 24-11

Rules of [name of condominium owners association][, Inc.]

Date:

Association: [name], established by the certificate of formation filed with the secretary of state of Texas on [date] under file number [number].

Association’s Address:

Declaration: The Declaration of [name of condominium], a condominium, [include recording information].

Definitions: Capitalized terms used but not defined in the Rules have the meaning set forth in the Declaration or Bylaws.

The Association adopts these Rules, which will be enforceable on the recording of this document in the real property records of the [county/counties] in which the property described by the Declaration is located. On violation of these Rules, owners may be subject to Penalties for Violation.

A. Rules
B. Penalties for Violation

Insert penalties for violation by type of violation.

C. Enforcement Procedures

1. Charges and Fines. Before the Association may charge a Unit Owner for property damage or levy a fine for violation of the Declaration, Bylaws, or these Rules, the Association must give to the Unit Owner a written notice that (a) describes the violation or property damage; (b) states the amount of the proposed fine or damage charge; (c) states that not later than the thirtieth day after the date of the notice, the Unit Owner may request a hearing before the Board to contest the fine or damage charge; and (d) allows the Unit Owner a reasonable time, by a specified date, to cure the violation and avoid the fine unless the Unit Owner was given notice and a reasonable opportunity to cure a similar violation within the preceding twelve months.

2. Notices. The Association must give notice of a levied fine or damage charge to the Unit Owner not later than the thirtieth day after the date of levy.

Insert any additional procedures for enforcement of the rules, consistent with the foregoing.
D. Amendments to Rules

No Rule can be amended unless the Association gives written notice to each Unit Owner in a document stating the specific amendment or other change that would be made to the Rule, after the twentieth day but before the tenth day preceding the meeting at which the Rule amendment is to be considered, by either (a) personal delivery as shown by a receipt signed by the Unit Owner, or (b) deposit in the United States mail as shown on the postmark date.

[Name of association]

By ____________________________
[Name and title]

Include acknowledgment.
Form 24-12

Unanimous Written Consent of Condominium Association Board of Directors for Approval of Secured Loan under Texas Property Code § 82.102(f)

Effective Date:

Condominium Association: [name], a Texas [for-profit/nonprofit] corporation

Lender:

Loan Amount:

Security Documents: Security Agreement

Transfer of Assessment Lien

Authorized Representative:

WHEREAS the board of directors of the Condominium Association has determined that it is in the best interest of the Association to borrow the Loan Amount from Lender (the “Loan”), and to secure the Loan with the Security Documents;

AND WHEREAS the Condominium dedicatory instruments require a vote of the members of the Condominium Association to borrow money or assign the Condominium Association’s lien rights;

THEREFORE, the undersigned, being all the members of the board of directors of the Condominium Association, acting pursuant to the provisions of section 82.108(c)(2) of the
Texas Property Code and section 6.201 of the Texas Business Organizations Code, adopt by consent the following resolutions:

RESOLVED, that [include if applicable: upon approval by [select one of the following: the number of the Condominium Association members required by the Condominium dedicatory instruments/67 percent of all voting interests], with members casting votes [select one or more of the following: electronically/by absentee ballot /in person or by proxy at a meeting called for the purpose of the vote/by written consent], the Condominium Association is authorized to borrow the Loan Amount from Lender and to sign a promissory note in the Loan Amount payable to the order of Lender (the “Note”).

RESOLVED FURTHER, that to secure the payment of the Note, the Condominium Association is authorized to enter into and sign a Security Agreement and a Transfer of Assessment Lien on the individual condominium units (the “Lien”) and any necessary modifications, extensions, increases, and renewals of the Note and Lien, as applicable.

RESOLVED FURTHER, that the Condominium Association is authorized to enter into any assignments, pledges, security agreements, and other documents and instruments concerning any personal property, or any interest therein, and [include the following for condominiums for which the declaration was recorded after December 31, 1993, unless the condominium formed before January 1, 1994, has elected to be governed exclusively by Texas Property Code chapter 82 pursuant to section 82.002(a): mortgages, deeds of trust, and other documents and instruments governing any real property, or any interest therein] owned by the Condominium Association that may be necessary or appropriate, or required by Lender, to evidence and secure the payment of the Note.

RESOLVED FURTHER, that the Authorized Representative is authorized to execute and deliver, on behalf of and in the name of the Association, the Note, the Security Documents, and any other agreements, documents, or instruments, and to take or cause to be taken
Unanimous Written Consent for Approval of Secured Loan

any action necessary or appropriate in connection with the Note and the Security Documents or to accomplish the purposes of these resolutions, in the form and with the provisions the Authorized Representative may deem proper.

[Name of director]
Date:

Repeat for each director. If the association is a nonprofit corporation, the consent must state the date of each director's signature. Tex. Bus. Orgs. Code § 22.220.
Form 24-13

Security Agreement and Transfer of Lien
(from Condominium Association)
[Tex. Prop. Code § 82.102(f)]

Basic Information

Date:

Borrower/Condominium Association:

Borrower/Condominium Association’s Mailing Address:

Condominium Declaration: [insert recording information, including amendments]

Lender/Secured Party:

Lender/Secured Party’s Mailing Address:

Collateral: All of Condominium Association’s interest in the following personal property and
all supporting obligations and proceeds of (1) Condominium Association’s rights to
future income, including the right to receive assessments from the owner(s) of the Con-
dominium Units; and (2) Condominium Association’s lien rights under Texas Property
Code section 82.113 and the Condominium Declaration (“Lien Rights”).

Property (including any improvements): Each of the individual Condominium Units and their
appurtenant common elements (collectively a “Unit”).

Note

Date:

Original principal amount:
Maturity date:

Prior Lien(s): [as stated in the condominium declaration and Texas Property Code section 82.113(b)]

Unit Owners Assessment Obligations: [as set forth in Texas Property Code sections 82.112 and 82.113 and the condominium declaration]

Granting Clause; Transfer of Lien; Subordination of Payment Rights; Power of Attorney and Indemnification

To secure the Note and all renewals, modifications, and extensions of the Note, Condominium Association (1) grants to Secured Party a security interest in the Collateral and all its proceeds; (2) authorizes Secured Party to file a financing statement describing the Collateral; (3) assigns, transfers, and conveys to Secured Party all amounts due on the Unit Owners Assessment Obligations; and (4) warrants that the Lien Rights are valid against the Property in the priority indicated. Condominium Association expressly subordinates its right to payment from enforcement of Lien Rights to Lender’s right to payment. If a default exists on the Note or any other agreement with Lender related to the Note, Condominium Association assigns to Lender the right to levy assessments against the owners of and the individual condominium Units in the Property to pay the Note.

Condominium Association indemnifies Lender from all claims made against or incurred by Lender from any action in connection with the Unit Owners Assessment Obligations or the Lien Rights documents.

A. Condominium Association Represents the Following:
A.1. Condominium Association’s place of business is located at [select one of the following: the management office identified in Condominium Association’s Management Certificate recorded in the county in which Condominium Association is located/[address, city, state]].

A.2. [Select one of the following: Condominium Association’s state of organization is Texas/Condominium Association is an unincorporated association], and Condominium Association’s name, as shown in any public organic record, as amended, is exactly as set forth above.

A.3. Condominium Association’s records concerning the Collateral are located at [select one of the following: the management office identified in Condominium Association’s Management Certificate recorded in the county in which Condominium Association is located/[address, city, state]].

A.4. No financing statement covering the Collateral is filed in any public office [include if the secured party has prefiled a financing statement or otherwise has a financing statement on file: except any financing statement in favor of Secured Party].

A.5. Condominium Association owns the Collateral and has the authority to grant this security interest, free from any setoff, claim, restriction, security interest, or encumbrance except liens for taxes not yet due and the Prior Liens.

A.6. All information about Condominium Association’s financial condition is or will be accurate when provided to Secured Party.

A.7. If Texas Property Code section 82.102(g) applies to this transaction, the Note and pledge of Collateral have been approved in the manner set forth in Condominium Association’s dedicatory instruments.

A.8. There are no defenses or offsets to the Unit Owners Assessment Obligations.
A.9. The Unit Owners Assessment Obligations represents the valid, legally enforceable obligation of each Condominium Unit owner.

A.10. Secured Party is the holder of the Lien Rights and the sole party with power to appoint a person to exercise the power of sale under the Lien Rights or request such person to act. Any foreclosure action requested by Condominium Association is voidable at the election of Lender.

B. Condominium Association Agrees to—

B.1. Defend the Collateral against all claims adverse to Secured Party’s interest; pay any taxes imposed on the Collateral; keep the Collateral free from liens, except for liens in favor of Secured Party or for taxes not yet due; and keep the Collateral in Condominium Association’s possession and ownership except as otherwise provided in this agreement.

B.2. Pay all Secured Party’s expenses, including reasonable attorney’s fees and legal expenses, incurred to (a) obtain, preserve, perfect, defend, or enforce this agreement; (b) retake, hold, prepare for disposition, dispose of, collect, or enforce the Collateral; or (c) collect or enforce the Note or Lien Rights. These expenses will bear interest from the date of advance at the rate stated in the Note for matured, unpaid amounts and are payable on demand at the place where the Note is payable. These expenses and interest are part of the Note and are secured by this agreement.

B.3. Sign and deliver to Secured Party any documents or instruments that Secured Party considers necessary to obtain, maintain, and perfect this security interest in the Collateral.

B.4. Notify Secured Party immediately of (a) any delay in payment of any Unit Owners Assessment Obligation, (b) any event of default, and (c) any change (i) in the Collateral or claim made in regard to the Collateral, (ii) in Condominium Association’s Name or
Mailing Address, (iii) in the location of any Collateral, (iv) in any other representation or warranty in this agreement, or (v) that may affect this security interest.

B.5. Maintain accurate records of the Collateral at the address set forth above, furnish Secured Party any requested information related to the Collateral, and permit Secured Party to inspect and copy all records relating to the Collateral.

B.6. Cause the Unit owners to pay and perform all obligations related to the Unit Owners Assessment Obligations, and preserve (a) the liability of all obligors on the Collateral and (b) the priority of all security for the Collateral.

B.7. On Secured Party’s demand, deposit and hold payments, including instruments, items, and money received as proceeds of the Collateral, separate and in an express trust for Secured Party and deposit all such payments received as proceeds of the Collateral in a special bank account designated by Secured Party, who alone will have power of withdrawal.

B.8. Levy assessments sufficient to pay the Note and all other Condominium Association obligations.

B.9. Apply all proceeds from the Unit Owners Assessment Obligations in excess of funds needed for usual and customary Condominium Association obligations to pay the Note, but if the proceeds exceed the amount due under the Note, Condominium Association may retain the excess.

C. Condominium Association Agrees Not to—

C.1. Sell, transfer, or encumber the Collateral.

C.2. Change its name or jurisdiction of organization, merge or consolidate with any person, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.
C.3. Modify any provision of the Condominium documents relating to the levy of assessments, Condominium Association’s lien to secure payment of assessments, or the enforcement of Condominium Association’s lien.

C.4. Forgive, extend, or modify the Unit Owners Assessment Obligations or grant releases of any part of the property securing the Unit Owners Assessment Obligations.

C.5. Modify any terms of the Unit Owners Assessment Obligations except as may be required by law.

D. Default and Remedies

D.1. A default exists if—

a. Condominium Association fails to timely pay or perform any obligation, covenant, or liability in any written agreement between Secured Party and Condominium Association related to the Note;

b. any representation in this agreement or in any other written agreement between Secured Party and Condominium Association is materially false when made;

c. a receiver is appointed for Condominium Association or any Collateral;

d. any Collateral is assigned for the benefit of creditors;

e. a bankruptcy or insolvency proceeding is commenced by Condominium Association [include if applicable: or any Unit Owner];

f. a bankruptcy or insolvency proceeding is commenced against Condominium Association [include if applicable: or Unit Owner(s) representing [percent] percent ownership interests in the common elements] and the
proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered;

g. any of the following parties is terminated, begins to wind up its affairs, is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of any of the following parties: Condominium Association [include if applicable: or Unit Owner(s) representing [percent] percent ownership interests in the common elements]; or

h. any Collateral or Condominium Unit is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly replaced with collateral of like kind and quality or restored to its former condition.

D.2. If a default exists, Secured Party may—

a. demand, collect, convert, redeem, settle, compromise, release, receipt for, realize on, sue for, foreclose on, and adjust any Collateral either in Secured Party’s or Condominium Association’s name, as Secured Party desires, or take control of any proceeds of the Collateral and apply the proceeds against the Note;

b. take possession and control of any Collateral not already in Secured Party’s possession, without demand or legal process, and for that purpose Condominium Association grants Secured Party the right to enter any premises where the Collateral may be located;
c. without taking possession, sell, lease, or otherwise dispose of the Collateral through or at any public or private sale in accordance with law;

d. exercise any rights and remedies granted by law or this agreement;

e. notify obligors on the Collateral to pay Secured Party directly and enforce Condominium Association’s rights against such obligors;

f. as Condominium Association’s agent, make any endorsements in Condominium Association’s name and on Condominium Association’s behalf; or

g. permit Condominium Association to use any Collateral to pay other Association obligations.

D.3. Foreclosure on any Collateral Lien Rights or of this security interest by suit does not limit Secured Party’s remedies, including the right to sell the Collateral under the terms of this agreement. Secured Party may exercise all remedies at the same or different times, and no remedy is a defense to any other. Secured Party’s rights and remedies include all those granted by law and those specified in this agreement.

D.4. Secured Party’s delay in exercising, partial exercise of, or failure to exercise any of its remedies or rights does not waive Secured Party’s rights to subsequently exercise those remedies or rights. Secured Party’s waiver of any default does not waive any other default by Condominium Association. Secured Party’s waiver of any right in this agreement or of any default is binding only if it is in writing. Secured Party may remedy any default without waiving it.

D.5. Secured Party has no obligation to prepare the Collateral for sale.

D.6. At any time Secured Party may contact obligors on the Collateral directly to verify information furnished by Condominium Association.
D.7. Secured Party has no obligation to collect the Collateral and is not liable for failure to collect the Collateral, for failure to preserve any rights pertaining to the Collateral, or for any act or omission on the part of Secured Party or Secured Party’s officers, agents, or employees, except willful misconduct.

D.8. Secured Party has no obligation to satisfy the Note by attempting to collect the Note from any other person liable for it. Secured Party may release, modify, or waive any collateral provided by any other person to secure the Note. If Secured Party attempts to collect the Note from any other person liable for it or releases, modifies, or waives any collateral provided by any other person, that will not affect Secured Party’s rights against Condominium Association. Condominium Association waives any right Condominium Association may have to require Secured Party to pursue any third person for the Note.

D.9. If Secured Party must comply with any applicable state or federal law requirements in connection with a disposition of the Collateral, such compliance will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

D.10. Secured Party may sell the Collateral without giving any warranties as to the Collateral. Secured Party may specifically disclaim any warranties of title or the like. This procedure will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

D.11. If Secured Party sells the Collateral on credit, Condominium Association will be credited only with payments actually made by the purchaser and received by Secured Party for application to the indebtedness of the purchaser. If the purchaser fails to pay for the Collateral, Secured Party may resell the Collateral and Condominium Association will be credited with the proceeds of the sale.

D.12. If Secured Party purchases any Collateral foreclosed on or being sold, Secured Party may pay for the Collateral by crediting the purchase price against the Note.
D.13. Secured Party has no obligation to marshal any assets in favor of Condominium Association or against or in payment of the Note or any other obligation owed to Secured Party by Condominium Association or any other person.

D.14. If any foreclosure under Lien Rights occurs or any Collateral is sold after default, recitals in the deed, bill of sale, or transfer will be prima facie evidence of their truth and all prerequisites to the sale specified by this agreement and by law will be presumed satisfied.

D.15. Secured Party may elect not to collect the Unit Owners Assessment Obligations, but that election will not prejudice Secured Party’s right to collect the Unit Owners Assessment Obligations subsequently. Secured Party will never be liable for failure to collect the Unit Owners Assessment Obligations but will be accountable for the Unit Owners Assessment Obligations received.

D.16. By exercising rights and remedies under this assignment, Secured Party does not waive the right to enforce the Note or any other agreement.

D.17. Secured Party’s collection of the Unit Owners Assessment Obligations does not relieve Condominium Association of any obligations in the Note or any other agreement.

D.18. Secured Party may exercise its rights and remedies without taking possession of the Collateral or of any Unit after foreclosure.

E. General

E.1. Notice is reasonable if it is mailed, postage prepaid, to Condominium Association at Condominium Association’s Mailing Address at least ten days before any public sale of any Collateral or ten days before the time when the Collateral may be otherwise disposed of without further notice to Condominium Association.
E.2. This security interest will neither affect nor be affected by any other security for the Note. Neither extensions of the Note nor releases of the Collateral will affect the priority or validity of this security interest.

E.3. This agreement binds, benefits, and may be enforced by the successors in interest of Secured Party and will bind all persons who become bound as debtors to this agreement. Assignment of any part of the Note and Secured Party’s delivery of any part of the Collateral will fully discharge Secured Party from responsibility for that part of the Collateral. If such an assignment is made, Condominium Association will render performance under this agreement to the assignee. Condominium Association waives and will not assert against any assignee any claims, defenses, or setoffs that Condominium Association could assert against Secured Party except defenses that cannot be waived.

E.4. This agreement may be amended only by an instrument in writing signed by Secured Party and Condominium Association.

E.5. The unenforceability of any provision of this agreement will not affect the enforceability or validity of any other provision.

E.6. This agreement will be construed according to Texas law, without regard to choice-of-law rules of any jurisdiction. This agreement is to be performed in Texas.

E.7. Interest on the Note secured by this agreement will not exceed the maximum amount of nonusurrious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Note or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Note or, if the principal of the Note has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Note.
E.8. At Condominium Association’s expense, upon payment of the Note and any other obligations to Secured Party, Secured Party will sign a release in recordable form.

E.9. Secured Party does not have or assume any obligations as a condominium association to any Unit owner or occupant of any Unit.

E.10. When the context requires, singular nouns and pronouns include the plural.

E.11. Any term defined in sections 1.101 to 9.709 of the Texas Business and Commerce Code and not defined in this agreement has the meaning given to the term in the Code.

[Name of condominium association]

By ________________________________
Printed Name: _______________________
Its Authorized Representative

Include acknowledgement.
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§ 25.1 General Considerations

The basic lease form (form 25-1 in this chapter) contains the minimal terms necessary for a lease. Although the form could be used as written in appropriate circumstances, its primary purpose is as a drafting tool, a core lease from which to draft for the particular situation. This lease has been adapted for use in various circumstances. Form 25-5 is a residential lease form derived from the basic lease form but containing the necessary modifications to convert the basic lease into a residential lease. The basic lease has also been adapted for use as a retail lease (form 25-2), an office lease (form 25-3), an industrial lease (form 25-6), and a manufactured-home community lease (form 25-29).

§ 25.1:1 Definition of a Lease

A lease is a conveyance of real property for a designated period of time with a reversionary interest in the lessor. Over time, the newer concepts of contract law have crept into use with the older property law, and the lease has become a hybrid of a conveyance and a contract between the landlord and the tenant. The landlord-tenant relationship is governed by title 8 of the Texas Property Code as well as by other statutes and a large body of case law. Title 8 of the Texas Property Code is divided into four chapters: chapter 91 (Provisions Generally Applicable to Landlords and Tenants), chapter 92 (Residential Tenancies), chapter 93 (Commercial Tenancies), and chapter 94 (Manufactured Home Tenancies).

§ 25.1:2 Statute of Frauds

If the term of the lease is more than one year, the lease is unenforceable unless it is in writing and signed by the party to be charged with its covenants. Tex. Bus. & Com. Code § 26.01; Tex. Prop. Code § 5.021. Certain provisions of the Property Code require that the lease be signed by both parties for the lease to serve as an exception to the statutory provisions. See, e.g., Tex. Prop. Code § 91.001(e)(1). Other provisions of the Property Code may not be waived by the lease. See, e.g., Tex. Prop. Code § 92.008(g). Manufactured-home community leases must be in writing and signed by both the landlord and the tenant. Tex. Prop. Code § 94.053(a).

§ 25.1:3 Caution: Property Description

As a general rule a lease must contain, within itself or by reference to some other existing writing, the means or data by which the premises to be leased may be identified with reasonable certainty. Heibsen v. Nassau Development Co., 754 S.W.2d 345, 351 (Tex. App.—Houston [14th Dist.] 1988, writ denied), overruled on other grounds by Formosa Plastics Corp. v. Presidio Engineers & Contractors, Inc., 960 S.W.2d 41 (Tex. 1998). The rule for leases is derived from the general rule for sales and conveyance of real estate. See, e.g., Pick v. Bartel, 659 S.W.2d 636, 637 (Tex. 1983); Morrow v. Shotwell, 477 S.W.2d 538, 539 (Tex. 1972). A manufactured-home community lease agreement must contain the address or number of the manufactured-home lot. Tex. Prop. Code § 94.053(c)(1).
If the lease agreement contains no adequate description of the leased premises, it is unenforceable. If the leased premises are identified only by a suite number or a diagram on an example or an attached exhibit, such as a schematic of an undesignated floor of the building or project of which the leased premises are a part, the lease may be unenforceable. Sometimes the schematic of the undesignated floor shows a certain section by crosshatches, but if there is no metes-and-bounds or lot and block number from a plat description of the entire project there is no legal description of the leased premises. See, e.g., *River Road Neighborhood Ass’n v. South Texas Sports*, 720 S.W.2d 551 (Tex. App.—San Antonio 1986, writ dism’d); *Lubel v. J.H. Uptmore & Associates*, 680 S.W.2d 518 (Tex. App.—San Antonio 1984, no writ).

§ 25.1:4 Cautions: Risk Allocation

**Indemnities and Waivers:** The indemnity provisions of the multitenant building or project lease forms are designed to protect the respective parties from their own ordinary negligence (but not gross negligence or willful misconduct) on a geographic basis; that is, the tenant indemnifies the landlord for any damage or injury occurring within the premises, whether or not the ordinary negligence of the landlord is a cause of the damage or injury, and the landlord indemnifies the tenant for any damage or injury occurring within the common areas, whether or not the ordinary negligence of the tenant is a cause of the damage or injury. The waiver of subrogation provision contained in the multitenant building or project lease forms releases both parties from liability for property damage and loss of revenues up to the limits of the property insurance coverages required to be carried under the lease, notwithstanding the ordinary negligence of the party causing the property damage or loss of revenues. The indemnity and waiver provisions are designed to comply with the two-pronged “fair notice doctrine” under Texas case law: (1) the “express negligence rule” set forth in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987), and (2) the “conspicuousness rule” enunciated in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993).

**Insurance:** It is critical that the parties consult with their insurance professionals to determine the exact insurance coverages to be included on the insurance addendum incorporated into the lease form or, if applicable, the separate insurance addendum (forms 25-34 and 25-35 in this chapter) and that the attorneys tailor the indemnity and casualty provisions in response to the actual insurance policies that will be carried by the parties.

**Rebuilding Obligations:** The restoration obligations of the parties after a casualty are tied to the description of “Tenant’s Rebuilding Obligations” contained in the Basic Terms of the lease. The tenant is expected to restore those leasehold improvements described in “Tenant’s Rebuilding Obligations” in addition to replacing its personal property (including inventory, furniture, trade fixtures, and equipment). Because the tenant should carry property insurance to cover its restoration obligations, a detailed description is imperative. See clauses 25-10-8, 25-10-9, and 25-10-10. The landlord’s restoration obligations are defined in terms of the portions of the premises that the tenant is not required to rebuild.

For example, the tenant may be receiving the space in shell condition and be responsible for the initial construction of all leasehold improvements. The parties may decide that the tenant will restore all of the leasehold improvements inside the shell if the premises are destroyed. At the other extreme, the tenant may be receiving the premises with existing leasehold improvements, and the parties may decide that the landlord should restore all leasehold improvements after a casualty. Obviously the possibilities are infinite and depend on the economic underpinnings of the transaction as well as the relative sophistication of the parties. However, the question must be asked at the outset of the transaction so that both parties are clear about the allocation of the risk for restoration and that adequate property insurance is obtained.
§ 25.1:5  Fair Credit Reporting Act

The Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x, applies to landlords who use consumer reports in screening prospective tenants. If the landlord takes adverse action based in whole or in part on a consumer report, the landlord is required to provide the prospective tenant with a notice of adverse action meeting the requirements of section 1681m of the Act. 15 U.S.C. § 1681m(a)(1). A consumer report includes a credit report from a credit bureau or from a tenant-screening service. See 15 U.S.C. § 1681(d). Adverse action includes a denial of the application or a requirement for a deposit, a higher deposit, or higher rent than would have been required of other tenants. See 15 U.S.C. § 1681(k).

Landlords who furnish information regarding a tenant to a credit reporting agency must comply with the duties set out in section 1681s–2 of the Act, including the duty to furnish correct information, to correct and update information, and to investigate disputed information. See 15 U.S.C. § 1681s–2.

§ 25.1:6  Condemnation

The lease forms in this chapter provide that a lease will terminate if, as a result of condemnation or conveyance in lieu thereof, the premises cannot be used for the purposes provided by the lease. They also provide that the tenant is not entitled to any proceeds from the condemnation except for relocation benefits or awards that are available to the tenant but that do not reduce the award or proceeds payable to the landlord. The federal government provides relocation benefits, moving expenses, and similar payments to persons relocated as a result of condemnation under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601–4655. The state of Texas and local governments are authorized to provide similar payments as part of the cost of acquisition of the real property. See Tex. Prop. Code § 21.046. Under Texas law, however, if a lease provides that the lease terminates on condemnation, the tenant is not entitled to any condemnation proceeds because the tenant no longer has a compensable leasehold interest. Motiva Enterprises, LLC v. McCrabb, 248 S.W.3d 211 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Consequently, it is possible that a condemnor could find that a tenant who is not a party to the condemnation proceeding is not eligible for relocation or other benefits or awards.

§ 25.2  General Instructions for Completing Forms

For information about completing the forms generally, see chapter 3 in this manual. In most forms, the information that the attorney must provide is listed at the beginning of the form. Of course the attorney may add other specific provisions and references to exhibits and riders at the end of the form.

For general information about designation of parties, see section 3.9. Information relevant to some conveyances, such as those involving homestead property, is not relevant to a lease and need not be included with the party designations.

§ 25.3  General Considerations for Retail Lease

The retail lease, form 25-2 in this chapter, is an adaptation of the basic lease including provisions tailored to leasing retail space in a shopping center. The modifications deal with the specifics associated with a typical retail business operation, including provisions concerning trade name, description of the shopping center, payment of percentage rental, and pass-through of common area maintenance charges. To provide for payment of percentage rental, a definition of gross sales is added, as is a covenant for operating a business within the premises so as to maximize gross sales. The definition of “gross sales” used in this lease is basic, and the attorney should consider whether some amendment or amplification is appropriate for
the situation at hand. Other specific provisions apply to the landlord and the tenant concerning various operational and main-
tenance issues. The attorney may desire to include more specific provisions dealing with such matters as parking and signage,
which may be proper subjects for inclusion in the rules and regulations exhibit. In this lease, the percentage rent is due on the
tenth of the month, rather than the first, to give the tenant time to close its books for the previous month and to compute per-
centage rent.

§ 25.4 General Considerations for Office Lease

The office lease, form 25-3 in this chapter, is an adaptation of the basic lease containing specific provisions tailored to a com-
mercial office tenancy. The variations are provisions for passing through operating expenses, a fairly common practice in leas-
ing office space; for parking rights; and for rights to use common areas. The lease is also more specific about the services
required to be provided by the landlord, again with a view toward comporting with what is typical industry practice. Form
25-4 provides a rider for parking facilities.

§ 25.5 General Considerations for Residential Lease

The residential lease, form 25-5 in this chapter, is an adaptation of the basic lease tailored to a residential tenancy. The form is
designed for simple residential tenancies such as a lease of a home or a townhouse unit. It is not particularly suited for use
with a multifamily project with on-site management. It varies from the basic lease in providing specific provisions relating to
residential occupancy, such as the landlord’s duty to maintain the premises to comply with applicable law.

§ 25.5:1 Rent Payment by Check

If the landlord wants to require payment by check or other traceable means of payment, a residential lease must state so in
writing. Tex. Prop. Code § 92.011(a). This clause appears as paragraph A.12. in the “Clauses and Covenants” section of the
residential lease but may be omitted if the parties desire.

§ 25.5:2 Right to Terminate Residential Leases in Certain Circumstances

Residential tenants have special statutory rights to terminate leases under certain circumstances. A tenant may terminate his
rights and obligations under a residential lease, vacate the residence, and avoid liability for future rent (1) if the tenant or an
occupant of the dwelling unit is a victim of family violence or (2) if the tenant is a victim of sexual assault or the parent or
guardian of a victim of sexual assault, indecency with a child, sexual performance by a child, continual sexual abuse of a
child, or any attempt to commit any of the foregoing offenses under section 21.02 of the Texas Penal Code. The Texas Prop-
erty Code imposes specific prerequisites, documentation, and deadlines for a tenant to exercise these statutory rights of early
termination. Tex. Prop. Code §§ 92.016, 92.0161. The Property Code requires specific language in the residential lease advis-
ing the tenant of these remedies. For circumstances involving family violence, the relevant statutorily provided lease provi-
sion reads, “Tenants may have special statutory rights to terminate the lease early in certain situations involving family
violence or a military deployment or transfer.” See Tex. Prop. Code § 92.017(g). For circumstances involving sexual violence,
the relevant statutorily provided lease provision reads, “Tenants may have special statutory rights to terminate the lease early
in certain situations involving sexual assault or sexual abuse.” See Tex. Prop. Code § 92.0161(g). Paragraph D.20. of the resi-
dential lease, form 25-5 in this chapter, combines these two advisories. If the advisories are not in the residential lease, the
tenant, if he follows the procedural requirements, may not only terminate the lease and avoid paying future rent, but will also
not be liable for delinquent unpaid rent.
A tenant who is a servicemember or dependent of a servicemember similarly may terminate a lease, vacate the dwelling, and avoid liability for future rent if the tenant enters the military service after executing a residential lease or, if the tenant was a servicemember at the time of execution, the tenant receives orders for a permanent change of station or deployment with a military unit for a period of ninety days or more. Tex. Prop. Code § 92.017(b). The relevant statute provided lease provision reads, “Tenants may have special statutory rights to terminate the lease early in certain situations involving family violence or military deployment or transfer.” See Tex. Prop. Code § 92.017(g). Specific notice and delivery requirements are set forth in the statute. The right to terminate in the case of family violence may not be waived, but the right of a servicemember or a dependent may be waived in certain circumstances specified in the Property Code. Additionally, if the residential lease form does not contain a specific notice provision, the vacating tenant may also avoid liability for delinquent unpaid rent. Form 25-5 contains this provision.

Form 25-5 also contains the required provisions regarding landlord liabilities and tenant remedies for repair of conditions that materially affect the physical health and safety of an ordinary tenant as authorized by Property Code sections 92.056–.0563. Tex. Prop. Code § 92.056(g) requires a lease to “contain language in underlined or bold print that informs the tenant of the remedies available under this section [§ 92.056] and Section 92.0561.” If these provisions or substantially equivalent language is not in the lease, the tenant who terminates a lease under these sections is released from all liability for any delinquent, unpaid rent owed to the landlord by the tenant on the effective date of the lease termination. See Tex. Prop. Code §§ 92.056, 92.0561.

§ 25.5:3 Caution: Residential Lease

Texas Property Code provisions and case law applicable to residential tenancies vary in significant ways from the law applicable to commercial tenancies. The attorney should carefully review chapter 92 of the Property Code. No attempt has been made to cover all aspects of or duties relating to a residential situation. For example, a residential landlord has a duty to install smoke alarms. See Tex. Prop. Code § 92.255. The liability of a guarantor of a residential lease is subject to certain limitations. See Tex. Prop. Code § 92.021. A residential landlord is subject to restrictions on the right to lock out a tenant for nonpayment of rent that are not applicable to the commercial landlord. Compare Tex. Prop. Code § 92.0081, with Tex. Prop. Code §§ 93.002–.003. Also, the law concerning interruptions of utilities in residential tenancies differs from that for commercial tenancies. Compare Tex. Prop. Code §§ 92.008, 92.0091, 92.301, with Tex. Prop. Code § 93.002.

§ 25.6 General Considerations for Industrial Lease

The industrial lease, form 25-6 in this chapter, is an adaptation of the basic lease including clauses necessary to convert the basic lease to an industrial lease. The industrial lease has more similarities to the retail lease than other lease forms minus, of course, percentage rental, covenant of continuous operations, and common area maintenance provisions. The main additions to the industrial lease deal with the tenant’s obligation to pay for industrial waste introduced into the sanitary sewer system; to maintain dilution tanks, grease traps, and so forth; and to share in the joint maintenance of rail services, if any. Attorneys using the industrial lease as a drafting form might also consider using the asbestos disclosure notice, form 25-27, particularly if the building was constructed before 1981.

§ 25.7 General Considerations for Hunting, Agricultural, and Grazing Leases

The hunting lease, form 25-7 in this chapter, is an adaptation of the basic lease tailored for the use of agricultural land for hunting. There is a technical distinction between a hunting lease, which is actually a license or profit à prendre, and a lease
that conveys an interest in real property. See *Digby v. Hatley*, 574 S.W.2d 186 (Tex. Civ. App.—San Antonio 1978, no writ). In most transactions this distinction is not significant, and the form uses the common term *lease* rather than draw attention to the distinction. This form applies to the surface only. If improvements on the premises are to be available for the tenant’s use, additions must be made to describe and provide for that use.

The agricultural lease, form 25-8, is an adaptation of the basic lease for growing crops. The rent clause is different, and the obligations of the tenant and the landlord have been modified slightly to take into account this different use.

The grazing lease, form 25-9, is an adaptation of the basic lease for grazing. It differs only slightly from the basic lease.

The agricultural lease and the grazing lease both contain clauses granting a contractual landlord’s lien in the tenant’s crops and livestock located on the leased premises. Complete perfection of a security interest in farm products requires compliance with both article 9 of the Texas Business and Commerce Code and the federal Food Security Act of 1985. See section 9.7.2 and accompanying forms in chapter 9 in this manual.

§ 25.7:1 Instructions for Completing Hunting Lease

A list of persons authorized to hunt on the premises should be contained in an exhibit to the hunting lease. This list may be specific (for example, “Bob Smith, Ed Jones”) or more general (for example, “Martha Stuart and four guests” or “six guns”).

§ 25.7:2 Caution: Hunting Lease

There are many laws that regulate the taking of game and the recreational use of land of which parties to hunting leases should be aware. As with the other forms in the manual, no attempt has been made to reiterate the duties imposed by statute and case law. In particular, the attorney should carefully review Texas Parks and Wildlife Code chapter 43, subchapter D, which governs hunting lease licenses. For a general discussion of this topic, see the articles cited in “Additional Resources” at the end of these practice notes. See also the section titled “Landowner Liability” in chapter 2 of this manual referring to chapter 75 of the Texas Civil Practice and Remedies Code.

§ 25.8 General Considerations for Manufactured-Home Community Lease

The manufactured-home community lease, form 25-29 in this chapter, is an adaptation of the basic lease tailored to a manufactured-home community tenancy. It varies from the basic lease by providing specific provisions necessitated by the enactment of Texas Property Code chapter 94. Chapter 94 governs the landlord-tenant relationship in manufactured-home communities in which four or more lots are offered for lease for the purpose of the tenant’s placing on the landlord’s property a manufactured home that is not owned by the landlord. Tex. Prop. Code § 94.002. See also Tex. Prop. Code § 94.001. This legislation regulates the form and content of the lease agreement (Tex. Prop. Code §§ 94.051–.057), security deposits (Tex. Prop. Code §§ 94.101–.109), the landlord’s warranty of suitability and duty to maintain and repair (Tex. Prop. Code §§ 94.151–.162), and other aspects of the landlord-tenant relationship in manufactured-home community tenancies.

§ 25.8:1 Disclosures at Time of Application

At the time a landlord receives an application from a prospective tenant of a lot in a manufactured-home community, the landlord must provide a copy of the proposed lease, the rules of the manufactured-home community, and a separate statutory
notice of the tenant’s legal right to a six-month initial lease term and sixty days’ notice of nonrenewal or, in the case of a change in land use of the manufactured-home community, 180 days’ notice of nonrenewal. Tex. Prop. Code § 94.051. Form 25-30 in this chapter gives the statutorily required notice.

§ 25.8:2 Manufactured-Home Community Rules

Manufactured-home communities may adopt written rules, which are considered part of the lease agreement, establishing the policies and regulations of the manufactured-home community, including regulations relating to use, occupancy, quiet enjoyment, and health, safety, and welfare of tenants of the manufactured-home community. Tex. Prop. Code § 94.008.

§ 25.8:3 Cash Rent Payment

Unless the manufactured-home community lease requires payment of rent by check or other traceable means, a landlord must accept and give receipts for cash rental payments. Tex. Prop. Code § 94.007. A clause requiring payment of rent by traceable means appears as paragraph B.1.m. of the manufactured-home community lease (form 25-29 in this chapter) but may be omitted if the parties desire.

§ 25.8:4 Disclosure of Ownership and Management

The landlord must disclose the name and address of the record title holder of the leased lot in the manufactured-home community and the names and addresses of any off-site property managers. Tex. Prop. Code § 94.010(a). The disclosure may be contained in the lease agreement, in the rules, in a notice continuously posted in the community or the manager’s office, or in writing, delivered within seven days of the landlord’s receipt of a written request for the information. Tex. Prop. Code § 94.010(b).

§ 25.8:5 Minimum Initial Lease Term

Manufactured-home community landlords are required to offer prospective tenants an initial lease term of at least six months, but the parties may agree to a shorter or longer initial lease term if requested by the tenant. Tex. Prop. Code § 94.052(a).

§ 25.8:6 Landlord’s Notice to Vacate or Offer to Renew

Manufactured-home community landlords are required to provide a tenant with a notice to vacate the leased premises or an offer to renew the lease at least sixty days before the expiration of the lease. Tex. Prop. Code § 94.055(a). If the landlord offers to renew the lease, the renewal offer must notify the tenant of any changes in the current lease terms and include a statement notifying the tenant that the tenant’s failure to timely reject the renewal offer will result in the automatic renewal of the lease as modified by the terms contained in the landlord’s renewal offer beginning on the first day after the expiration of the current lease. Tex. Prop. Code § 94.055(b). To avoid the automatic renewal of the lease as modified by the terms contained in the renewal offer, the tenant must notify the landlord not later than the thirtieth day before the date the current lease term expires that the tenant rejects the landlord’s renewal offer and intends to vacate the leased premises on expiration of the current lease term. Tex. Prop. Code § 94.055(c). This statutory provision is a noted departure from the well-established common-law principle that silence does not bind a party to a contract.
§ 25.8:7 Notice of Nonrenewal

Regardless of the term of a manufactured-home community lease, a landlord must give a tenant at least sixty days’ prior written notice if the landlord is not going to renew the lease or, in the case of a change in land use, 180 days’ notice of nonrenewal. Tex. Prop. Code §§ 94.051, 94.052(b).

§ 25.8:8 Landlord’s Maintenance Obligations

A manufactured-home community landlord is required to maintain all common areas, utility lines not maintained by a public utility or political subdivision, roads, mailboxes, and garbage collection and to repair or remedy any condition materially affecting the physical health and safety of an ordinary tenant of the manufactured-home community. Tex. Prop. Code § 94.152. The landlord must make a diligent effort to repair or remedy such a condition after a written request specifying the condition to be repaired is given to the landlord by a tenant who is not delinquent in the payment of rent at the time the notice is given. Tex. Prop. Code § 94.153(b). A manufactured-home community landlord has no duty to maintain or repair a condition present in or on a tenant’s manufactured home. Tex. Prop. Code § 94.153(a).

§ 25.8:9 Eviction Procedures

Unlike with other types of tenancies, a manufactured-home community landlord may prevent a tenant from entering the tenant’s manufactured-home lot, evict a tenant, or require removal of the tenant’s manufactured home from the lot only after obtaining a writ of possession. Tex. Prop. Code § 94.203(a). The writ of possession cannot issue before the expiration of thirty days after the date of the judgment granting possession if the tenant has paid the rent due for that thirty-day period. Tex. Prop. Code § 94.203(d).

§ 25.8:10 Caution: Manufactured-Home Community Lease

The Texas Property Code provisions applicable to manufactured-home community tenancies vary in significant ways from the law applicable to either residential or commercial tenancies. The attorney should carefully review chapter 94 of the Property Code because the rights, duties, and liabilities of the parties under chapter 94 cannot be waived. See Tex. Prop. Code § 94.003. No attempt has been made in this manual to cover all aspects of or duties relating to the landlord-tenant relationship in a manufactured-home community. Appropriate modifications are required if the attorney elects to use the manufactured-home community lease for transactions not governed by chapter 94.

§ 25.9 General Considerations for Commercial Lease

Commercial leases are considered by the legislature to be quite different from residential leases and manufactured-home community leases. Chapter 92 of the Texas Property Code contains the statutes concerned with residential leases, and chapter 94 contains the statutes concerned with manufactured-home community leases, whereas chapter 93 deals with commercial leases. Chapters 92 and 94 impart an air of legislative protectionism for the residential tenant, with numerous restrictions on the landlord; chapter 93 has a more laissez-faire policy and allows the parties to contract as they see fit. The drafter using the Texas Real Estate Forms Manual should be aware of these three Property Code chapters (as well as chapter 91, which deals with all tenancies) and should realize that the numerous legislative restrictions on a residential or manufactured-home community landlord do not apply to a commercial landlord.
§ 25.9:1 Broker Lien in Commercial Lease

The Broker’s and Appraiser’s Lien on Commercial Real Estate Act, chapter 62 of the Texas Property Code, gives brokers a lien by reason of the sale or lease of real property. Section 62.021 sets forth the prerequisites for a broker to acquire a lien. See Tex. Prop. Code § 62.021. Section 62.021 gives the broker a lien against the landlord’s property for the commission on the lease if—

1. the broker earned the commission (pursuant to a written commission agreement (see Tex. Prop. Code § 62.003(4))), and

2. the broker recorded a notice of the lien (see Tex. Prop. Code § 62.024).


Section 62.022(b)(2) automatically waives the broker’s lien in a commercial lease if the broker’s commission agreement is included as a provision in the lease. Tex. Prop. Code § 62.022(b)(2). For this reason, the drafter may wish to include the real estate commission rider, form 25-28 in this chapter, as part of the lease. The drafter, however, should be careful to consider what effect renewal options might have on the real estate commission rider.

§ 25.9:2 Security Deposit in Commercial Lease

A landlord is liable for failure to return a tenant’s security deposit within sixty days after the date the tenant surrenders possession of the premises and provides a forwarding address to the landlord or landlord’s agent. Tex. Prop. Code § 93.005(a). If a landlord retains all or part of the security deposit, the landlord must provide the tenant with an itemized list of deductions. Tex. Prop. Code § 93.006(c). There is a presumption of bad faith on the part of the landlord if the security deposit is not returned to the tenant or if the landlord fails to provide the tenant with an itemized list of deductions on or before sixty days after the date the tenant surrenders possession. Tex. Prop. Code § 93.011(d). See also Tex. Prop. Code §§ 93.004–.011. The lease forms in this chapter have an agreement by the landlord to return the security deposit within sixty days.

§ 25.9:3 Assessment of Charges in Commercial Lease

Texas Property Code section 93.012 deals with assessment of charges by a commercial landlord against a commercial tenant. Section 93.012(a) reads as follows:

A landlord may not assess a charge, excluding a charge for rent or physical damage to the leased premises, to a tenant unless the amount of the charge or the method by which the charge is to be computed is stated in the lease, an exhibit or attachment that is part of the lease, or an amendment to the lease.

Tex. Prop. Code § 93.012(a). Most commercial landlords assess charges against the tenant on a regular basis for things such as extra keys; overtime heating, ventilating, and air conditioning; proportionate utilities and taxes; proportionate common-area expenses; and estimated operating expenses. Because Tex. Prop. Code § 93.012 requires either the amount of the charge or the method by which the charge is to be computed to be stated in the lease, the drafter may wish to add language covering most of the expected expenses to be assessed and a statement that the charge to be assessed will be the landlord’s actual cost. The lease forms in this chapter provide for assessment of charges to the tenant, but the method by which the charge is calculated is stated (for example, “Tenant’s pro rata share” of utility charges, common-area maintenance, taxes and insurance, and so forth). How-
ever, commercial landlords who assess to tenants charges other than rent for which the amount or method of computation is not specified in the lease, should be aware of section 93.012 of the Property Code.

§ 25.10 Environmental Considerations for Leases

Attorneys drafting leases should be aware of environmental statutes dealing with hazardous materials and waste, such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§ 9601–9675; the Resource Conservation Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 and the Land Disposal Program Flexibility Act of 1996, 42 U.S.C. §§ 6901–6992k; and the Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692. These environmental statutes, along with similar state statutes, may impose cleanup costs at the termination of a lease term on the “owner” or “operator” (landlord or tenant) of the “facility” (leased premises).

Landlords must provide tenants of residential property constructed before 1978 with a “Lead Warning Statement.” 42 U.S.C. §§ 4851b(27), 4852d. See the section titled “Lead-Based Paint Disclosures” in chapter 2 of this manual. The disclosure form appears as form 25-26 in this chapter.

Federal law requires building and facility owners (landlords) to notify tenants of public and commercial buildings of the presence, location, and quantity of asbestos-containing materials or presumed asbestos-containing materials in tenant-occupied areas. This notice must be either in writing or in a personal communication before any demolition, construction, alteration, repair, maintenance, or renovation of structures, substrates, or portions thereof. See 29 C.F.R. §§ 1910.1001, 1926.1101. See form 25-27 for the disclosure.

§ 25.11 Additional Clauses

Additional clauses that may be useful in lease transactions, such as arbitration, landlord’s lien subordination, and expansion rights, appear in form 25-10 in this chapter.

§ 25.11:1 Subordination of Landlord’s Lien

If the tenant’s lender requires a first lien over the statutory landlord’s lien found in chapter 54 of the Texas Property Code and the security interest granted in the lease, insert clause 25-10-1 in this chapter. Form 25-20 (landlord’s lien waiver) also may be used for this purpose.

§ 25.11:2 Base Rent Adjustment

In a commercial lease, there is frequently a provision for adjusting the base rent. The landlord and tenant may agree to scheduled, specific, periodic increases or to adjustments based on the Consumer Price Index; in the latter case, the attorney may insert the inflation adjustment clause found at 25-10-2 in this chapter.

§ 25.11:3 Expansion Option

If the landlord wants to grant the tenant the right to lease additional space, insert clause 25-10-4 in this chapter and attach the expansion space rider at form 25-1.
§ 25.11:4 Extension Option

If the landlord wants to grant the tenant the right to extend the lease term, insert clause 25-10-5 in this chapter and attach the extension option rider at form 25-12.

§ 25.11:5 Waiver of Tenant’s Right to Protest Appraised Value

If a property owner does not file a valuation protest, a tenant who is contractually obligated to reimburse the owner for property taxes is entitled to pursue an administrative protest before the appraisal review board. Tex. Tax Code § 41.413. A tenant contractually obligated to reimburse a landlord for taxes imposed on the property may also appeal an appraisal review board order determining a protest brought by the party. Tex. Tax Code § 42.015. The statutory language is fairly vague, but it seems apparent that any tenant who, pursuant to its lease, is obligated to reimburse a landlord for a portion of real property taxes is entitled to exercise these rights and in so doing may request the appraisal review board to issue subpoenas to the landlord to provide relevant information and documentation regarding value. This, in turn, may require the landlord to disclose information, such as the rent roll for the property, that the landlord may wish to keep confidential. In addition, multitenant situations could result in unwieldy protests. The landlord who wishes to avoid these possibilities should consider including in the lease a provision like clause 25-10-6 in this chapter.

§ 25.11:6 Margin Tax

Chapter 171 of the Tax Code applies the Texas “margin tax” to most businesses, including limited partnerships previously exempt from the franchise tax. General partnerships, sole proprietorships, and businesses that do not meet the annual revenue minimum continue to be exempt. Landlords and tenants might negotiate any of the following treatments of the margin tax: (1) an express carve-out of the margin tax from real property taxes (tenant position), (2) reliance on the landlord’s general right to pass through the margin tax as a tax imposed in lieu of real property taxes (landlord position), or (3) the landlord’s right to pass through the margin tax as a tax in lieu of real estate taxes, but limiting the pass-through amount based on a formula or a cap (compromise position).

§ 25.12 Additional Forms

Additional forms that may be useful in lease transactions, such as an assignment, guaranty, and tenant estoppel certificate, are found at forms 25-13 through 25-18 in this chapter.

§ 25.12:1 Subordination, Attornment, and Nondisturbance Agreement

If the landlord’s lender requires a first or prior lien on the landlord’s estate and a lease has been executed, use the subordination, attornment, and nondisturbance agreement at form 25-13 in this chapter to subordinate the lease but still protect the tenant’s rights following a foreclosure.

§ 25.12:2 Tenant’s Subordination to Deed-of-Trust Lien

A lender may require that an existing lease be subordinated to its new lien. Foreclosure of the lien will then extinguish the lease. Form 25-14 in this chapter may be used to subordinate the lease.
§ 25.12:3 Tenant’s Acceptance Letter

If the landlord requires the tenant to acknowledge that the premises are satisfactory, especially if the lease requires any improvements as a condition to the beginning of the lease, use the tenant’s acceptance letter at form 25-16 in this chapter.

§ 25.12:4 Landlord’s Lien Waiver

By using form 25-20 in this chapter, the owner of real property waives statutory and contractual landlord’s liens on any of the lessee’s personal property subject to the security interests of a third-party lender. Clause 25-10-1 also may be used for this purpose.

§ 25.12:5 Lockout Notice

The lockout notice, form 25-23 in this chapter, is to be posted at the premises. See Tex. Prop. Code § 93.002. It is for use with commercial leases only. Do not use it with residential leases, which are governed by Tex. Prop. Code § 92.0081.

§ 25.12:6 Notice of Change of Locks

Form 25-24 in this chapter is used if the lease does not contain language superseding Tex. Prop. Code § 93.002. The letter is to be given by the owner or property manager and is for use with commercial leases only. Do not use it for residential leases. See Tex. Prop. Code § 92.0081.

§ 25.12:7 Tenant Improvements Rider to Lease or Work Letter

Form 25-25 in this chapter may be used with the basic lease, the retail lease, the office lease, or the industrial lease if the parties wish to provide for construction of tenant improvements to the leased premises. The work letter provides a general outline for a description of the work and the allocation of responsibility for preparation of plans, performance of work, and payment of any allowances or other amounts by the landlord. The form also requires the contractor to maintain insurance and sets out the effect of construction delays on the commencement date of the lease.

§ 25.12:8 Lead-Based Paint Hazards Disclosure

Form 25-26 in this chapter is based on the sample disclosure format for target housing rentals and leases issued by the Environmental Protection Agency and the Department of Housing and Urban Development. See 61 Fed. Reg. 9074 (1996); see also 40 C.F.R. § 745.113. The rule does not require the use of any specific format as long as all the required elements are included in the disclosure. See the section titled “Lead-Based Paint Disclosures” in chapter 2 of this manual for additional information.

§ 25.12:9 Asbestos Disclosure

Form 25-27 in this chapter is for disclosure of asbestos-containing material or presumed asbestos-containing material by commercial building or facility owners. The Occupational Safety and Health Administration rules require commercial building or facility owners to notify tenants of the presence of asbestos-containing materials or, if the building was constructed before

§ 25.12:10  Modification of Lease

The modification of lease, form 25-31 in this chapter, is used to document changes to the lease during the lease term.

§ 25.12:11  Termination of Lease

The termination of lease, form 25-32 in this chapter, is used if the parties agree to terminate the lease before the end of the lease term.


Form 25-1

Lease
[Basic]

Basic Information

Date:

Landlord:

Landlord’s Address:

Tenant:

Tenant’s Address:

[Include if applicable: Guarantors: [see guaranty agreement at form 25-18 in this chapter]]

[Include if applicable: Guarantors’ Addresses:]

Premises

Approximate square feet:

Street address/suite:

City, state, zip:

Include or attach any additional necessary legal description.

Term (months):

Commencement Date:

Termination Date:
Base Rent (monthly):

Tenant’s Pro Rata Share: [percent] percent ([percent]%)

Security Deposit:

Permitted Use:

Tenant’s Insurance: As required by Insurance Addendum

Landlord’s Insurance: As required by Insurance Addendum

Tenant’s Rebuilding Obligations: If the Premises are damaged by fire or other elements, Tenant will be responsible for repairing or rebuilding the following leasehold improvements: [see section 25.1:4]

A. Definitions

A.1. “Agent” means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. “Essential Services” means utility connections reasonably necessary for occupancy of the Premises for the Permitted Use.

A.3. “Injury” means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) “personal and advertising injury” as defined in the form of liability insurance Tenant is required to maintain.

A.4. “Lienholder” means the holder of a deed of trust covering the Premises.

A.5. “Rent” means Base Rent plus any other amounts of money payable by Tenant to Landlord.
B. Tenant’s Obligations

B.1. Tenant agrees to—

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition “AS IS,” the Premises being currently suitable for the Permitted Use.

B.1.c. Obey (i) all laws relating to Tenant’s use, maintenance of the condition, and occupancy of the Premises and Tenant’s use of any common areas and (ii) any requirements imposed by utility companies serving or insurance companies covering the Premises.

B.1.d. Pay monthly, in advance, on the first day of the month, the Base Rent to Landlord at Landlord’s Address.

B.1.e. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.f. Obtain and pay for all utility services used by Tenant and not provided by Landlord.

B.1.g. Pay Tenant’s Pro Rata Share of any utility services provided by Landlord.

B.1.h. Allow Landlord to enter the Premises to perform Landlord’s obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.i. Repair, replace, and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, normal wear excepted.

B.1.j. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.
B.1.k. Allow Landlord to file a financing statement perfecting the security interest created by this lease.

B.1.l. Vacate the Premises on the last day of the Term.

B.1.m. Indemnify, defend, and hold Landlord and Lienholder, and their respective agents, harmless from any injury (and any resulting or related claim, action, loss, liability, or reasonable expense, including attorney’s fees and other fees and court and other costs) occurring in any portion of the Premises. The indemnity contained in this paragraph (i) is independent of Tenant’s Insurance, (ii) will not be limited by comparative negligence statutes or damages paid under the Workers’ Compensation Act or similar employee benefit acts, (iii) will survive the end of the Term, and (iv) will apply even if an injury is caused in whole or in part by the ordinary negligence or strict liability of Landlord but will not apply to the extent an injury is caused by the gross negligence or willful misconduct of Landlord and Lienholder, and their respective agents.

B.2. Tenant agrees not to—

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create a nuisance.

B.2.c. Permit any waste.

B.2.d. Use the Premises in any way that would increase insurance premiums or void insurance on the Premises.

B.2.e. Change Landlord’s lock system.

B.2.f. Alter the Premises.
B.2.g. Allow a lien to be placed on the Premises.

B.2.h. Assign this lease or sublease any portion of the Premises without Landlord’s written consent.

C. **Landlord’s Obligations**

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Obey all laws relating to Landlord’s operation of the Premises.

C.1.c. Provide the Essential Services.

C.1.d. Repair, replace, and maintain the (i) roof, (ii) foundation, and (iii) structural soundness of the exterior walls, excluding windows and doors.

C.1.e. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.

C.2. **Landlord agrees not to—**

C.2.a. Interfere with Tenant’s possession of the Premises as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. **General Provisions**

Landlord and Tenant agree to the following:
D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant’s expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant’s covenant to pay Rent and Landlord’s covenants are independent. Except as otherwise provided, Tenant will not be entitled to abate Rent for any reason.

D.3. Insurance. Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.

D.4. Release of Claims/Subrogation. Landlord and Tenant release each other and Lienholder, and their respective Agents, from all claims or liabilities for damage to the Premises, damage to or loss of personal property within the Premises, and loss of business or revenues that are covered by the releasing party’s property insurance or that would have been covered by the required insurance if the party fails to maintain the property coverages required by this lease. The party incurring the damage or loss will be responsible for any deductible or self-insured retention under its property insurance. Landlord and Tenant will notify the issuing property insurance companies of the release set forth in this paragraph and will have the property insurance policies endorsed, if necessary, to prevent invalidation of coverage. This release will not apply if it invalidates the property insurance coverage of the releasing party. The release in this paragraph will apply even if the damage or loss is caused in whole or in part by the ordinary negligence or strict liability of the released party or its Agents but will not apply to the extent the damage or
D.5. Casualty/Total or Partial Destruction

D.5.a. If the Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, and structural soundness of the exterior walls of the Premises and any leasehold improvements within the Premises that are not within Tenant’s Rebuilding Obligations to substantially the same condition that existed before the casualty and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant’s Rebuilding Obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to Landlord of the casualty, Tenant may terminate this lease by written notice to Landlord before Landlord completes Landlord’s restoration obligations.

D.5.b. If Landlord cannot complete the portion of the restoration for which Landlord is responsible within ninety days, Landlord has an option to restore the Premises. If Landlord chooses not to restore, this lease will terminate. If Landlord chooses to restore, Landlord will notify Tenant in writing of the estimated time to restore and give Tenant an option to terminate this lease by notifying Landlord in writing within ten days from receipt of Landlord’s estimate. If Tenant does not notify Landlord timely of Tenant’s election to terminate this lease, the lease will continue and Landlord will restore the Premises as provided in D.5.a. above.

D.5.c. To the extent the Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.
D.6. **Condemnation/Substantial or Partial Taking**

D.6.a. If the Premises cannot be used for the purposes contemplated by this lease because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.6.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, Landlord will, at Landlord’s expense, restore the Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.6.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.7. **Uniform Commercial Code.** Tenant grants Landlord a security interest in Tenant’s personal property now or subsequently located on the Premises. This lease is a security agreement under the Uniform Commercial Code. Landlord may file financing statements or continuation statements to perfect or continue the perfection of the security interest.

D.8. **Default by Landlord/Events.** Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to provide Essential Services to Tenant within ten days after written notice.

D.9. **Default by Landlord/Tenant’s Remedies.** Tenant’s remedies for Landlord’s default are to sue for damages and, if Landlord does not provide an Essential Service for thirty days after default, terminate this lease.

D.10. **Default by Tenant/Events.** Defaults by Tenant are (a) failing to pay timely Rent, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).
D.11. Default by Tenant/Landlord’s Remedies. Landlord’s remedies for Tenant’s default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant’s obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be occupying the Premises, until the default is cured, without being liable for damages.

D.12. Default/Waiver. It is not a waiver of default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of a remedy does not preclude pursuit of another remedy.

D.13. Mitigation. Landlord has mitigated the loss of rent if Landlord, within thirty days after Tenant’s loss of possession, (a) places a “For Lease” sign at the Premises, (b) places the Premises on Landlord’s inventory of properties for lease, (c) makes Landlord’s inventory available to area brokers on a monthly basis, (d) advertises the Premises for lease in a suitable trade journal in the county in which the Premises are located, and (e) shows the Premises to prospective tenants who request to see it.

D.14. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.15. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.
D.16. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.17. Attorney’s Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and other fees and court and other costs.

D.18. Venue. Exclusive venue is in the county in which the Premises are located.

D.19. Entire Agreement. This lease [include if applicable: , its exhibits, addenda, and riders] [is/are] the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in this lease [include if applicable: and any exhibits, addenda, and riders].

D.20. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.21. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF MERCHANDABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.22. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, per-
sonal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.23. Abandoned Property. Landlord may retain, destroy, or dispose of any property left on the Premises at the end of the Term.

Attach insurance addendum, form 25-34 or 25-35. If applicable, include additional clauses like those suggested in form 25-10 and/or a list of exhibits and riders.

[Name of landlord]

[Name of tenant]
Form 25-2

Retail Lease

Basic Information

Date:

Landlord:

Landlord’s Address:

Tenant:

Tenant’s Address:

Tenant’s Trade Name:

[Include if applicable: Guarantors: [see guaranty agreement at form 25-18 in this chapter]]

[Include if applicable: Guarantors’ Addresses:]

Premises

Approximate square feet:

Name of Shopping Center:

Street address/suite:

City, state, zip:

Include or attach any additional necessary legal description.

Term (months):
Commencement Date:

Termination Date:

Base Rent (monthly):

Percentage Rent: The excess of [percent] percent ([percent]%) of monthly Gross Sales over Base Rent

Tenant’s Pro Rata Share: [percent] percent ([percent]%)  

Initial Monthly CAM Charge:

Initial Monthly Tax and Insurance Charge:

Security Deposit:

Permitted Use:

Operating Hours

   Weekdays: ______ to ______

   Saturdays: ______ to ______

   Sundays: _____ to _____

Tenant’s Insurance: As required by Insurance Addendum

Landlord’s Insurance: As required by Insurance Addendum

Tenant’s Rebuilding Obligations: If the Premises are damaged by fire or other elements,
   Tenant will be responsible for repairing or rebuilding the following leasehold improve-
ments: [see section 25.1:4]
A. Definitions

A.1. “Agent” means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. “CAM Charge” means the reasonable cost of ownership, operation, and maintenance of the Common Areas.

A.3. “Common Areas” means all facilities and areas of the Shopping Center that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the Shopping Center, including parking lots. Landlord has the exclusive control over and right to manage the Common Areas.

A.4. “Essential Services” means utility connections reasonably necessary for occupancy of the Premises for the Permitted Use.

A.5. “Gross Sales” means the entire amount of the sales price, whether for cash or otherwise, of all sales of merchandise (including Internet sales and gift and merchandise certificates), services, and all other receipts of all business conducted in or from the Premises. Each sale on installment or credit will be treated as a sale for the full price in the month during which the sale was made, irrespective of when Tenant receives payment from its customer. Gross Sales, however, will not include any sums collected and paid out for any sales or excise tax.

A.6. “Injury” means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) “personal and advertising injury” as defined in the form of liability insurance Tenant is required to maintain.

A.7. “Lienholder” means the holder of a deed of trust covering the Premises.
A.8. “Rent” means Base Rent plus any other amounts of money payable by Tenant to Landlord.

A.9. “Taxes and Insurance” means all ad valorem taxes and all insurance costs incurred by Landlord with respect to the Shopping Center.

B. Tenant’s Obligations

B.1. Tenant agrees to—

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition “AS IS,” the Premises being currently suitable for the Permitted Use.

B.1.c. Obey (i) all laws relating to Tenant’s use, maintenance of the condition, and occupancy of the Premises and Tenant’s use of any Common Areas in the Shopping Center; (ii) any requirements imposed by utility companies serving or insurance companies covering the Premises or Shopping Center; and (iii) any rules and regulations of the Shopping Center adopted by Landlord.

B.1.d. Pay monthly, in advance, on the first day of the month, the Base Rent to Landlord at Landlord’s Address.

B.1.e. Pay the Percentage Rent applicable to the previous month on or before the tenth day of each month. With each payment of Percentage Rent, Tenant will deliver a written statement substantiating the amount of the payment. Tenant will keep a permanent, accurate set of books and records of all sales available for Landlord’s inspection.

B.1.f. Pay Tenant’s Pro Rata Share of the monthly CAM Charge and monthly Taxes and Insurance on or before the first day of each month. The initial charges are based on Land-
lord’s estimates and are set forth in the Basic Terms. Landlord may adjust the monthly payment from time to time by notice to Tenant. If the actual amount of Tenant’s Pro Rata Share of actual costs for any period exceeds the amount paid by Tenant, Tenant will pay to Landlord the deficiency within fifteen days following notice from Landlord; if the amount paid by Tenant exceeds Tenant’s Pro Rata Share of the actual cost, then the surplus will be credited to the next payment due by Tenant, or Landlord may refund the net surplus.

B.1.g. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.h. Obtain and pay for all utility services used by Tenant and not provided by Landlord.

B.1.i. Pay Tenant’s Pro Rata Share of any utility services provided by Landlord.

B.1.j. Allow Landlord to enter the Premises to perform Landlord’s obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.k. Repair, replace, and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, normal wear excepted.

B.1.l. Keep the sidewalks, service ways, and loading areas adjacent to the Premises clean and unobstructed.

B.1.m. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.n. (i) Continuously and in good faith conduct on the entire Premises the type of business for which the Premises are leased in an efficient and reputable manner and (ii) except during reasonable periods for repairing, cleaning, and decorating, keep the Premises open to
the public for business during Operating Hours so as to produce the maximum amount of Gross Sales.

**B.1.o.** Vacate the Premises on the last day of the Term.

**B.1.p.** On request, execute an estoppel certificate that states the Commencement Date and Termination Date of the lease, identifies any amendments to the lease, describes any rights to extend the Term or purchase rights, lists defaults by Landlord, and provides any other information reasonably requested.

**B.1.q.** **INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY’S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE PREMISES. THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT’S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS’ COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD AND LIENHOLDER AND THEIR RESPECTIVE AGENTS.**

**B.2.** **Tenant agrees not to—**

**B.2.a.** Use the Premises for any purpose other than the Permitted Use.

**B.2.b.** Create a nuisance.

**B.2.c.** Interfere with any other tenant’s normal business operations or Landlord’s management of the Shopping Center.
B.2.d. Permit any waste.

B.2.e. Use the Premises in any way that would increase insurance premiums or void insurance on the Shopping Center.

B.2.f. Change Landlord’s lock system.

B.2.g. Alter the Premises.

B.2.h. Allow a lien to be placed on the Premises.

B.2.i. Assign this lease or sublease any portion of the Premises without Landlord’s written consent.

B.2.j. Use the roof of the Shopping Center.

B.2.k. Place any signs on the Premises without Landlord’s written consent.

C. Landlord’s Obligations

C.1. Landlord agrees to—

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Obey all laws relating to Landlord’s operation of the Shopping Center.

C.1.c. Provide the Essential Services.

C.1.d. Repair, replace, and maintain the (i) roof, (ii) foundation, (iii) Common Areas, and (iv) structural soundness of the exterior walls, excluding windows, store fronts, and doors.

C.1.e. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.
C.1.f. INDEMNIFY, DEFEND, AND HOLD TENANT HARMLESS FROM ANY INJURY AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY’S FEES AND OTHER FEES AND COURT AND OTHER COSTS, OCCURRING IN ANY PORTION OF THE COMMON AREAS. THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF LANDLORD’S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS’ COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.

C.2. Landlord agrees not to—

C.2.a. Interfere with Tenant’s possession of the Premises as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant’s expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.
D.2. *Abatement.* Tenant’s covenant to pay Rent and Landlord’s covenants are independent. Except as otherwise provided, Tenant will not be entitled to abate Rent for any reason.

D.3. *Insurance.* Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.

D.4. *Release of Claims/Subrogation.* LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR SHOPPING CENTER, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE SHOPPING CENTER, AND LOSS OF BUSINESS OR REVENUES THAT ARE COVERED BY THE RELEASING PARTY’S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN COVERED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGE REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.

D.5. *Casualty/Total or Partial Destruction*

D.5.a. If the Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, Common Areas, and structural
soundness of the exterior walls of the Premises and any leasehold improvements within the Premises that are not within Tenant’s Rebuilding Obligations to substantially the same condition that existed before the casualty and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant’s Rebuilding Obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to Landlord of the casualty, Tenant may terminate this lease by written notice delivered to Landlord before Landlord completes Landlord’s restoration obligations.

D.5.b. If Landlord cannot complete the portion of the restoration for which Landlord is responsible within ninety days, Landlord has an option to restore the Premises. If Landlord chooses not to restore, this lease will terminate. If Landlord chooses to restore, Landlord will notify Tenant in writing of the estimated time to restore and give Tenant an option to terminate this lease by notifying Landlord in writing within ten days from receipt of Landlord’s estimate. If Tenant does not notify Landlord timely of Tenant’s election to terminate this lease, the lease will continue and Landlord will restore the Premises as provided in D.5.a. above.

D.5.c. To the extent the Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.

D.6. Condemnation/Substantial or Partial Taking

D.6.a. If the Premises cannot be used for the purposes contemplated by this lease because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.6.b. Whether or not any portion of the Premises is taken by condemnation or purchase in lieu of condemnation, Landlord or Tenant may elect to terminate this lease if 50 percent or more of the Common Area is taken.
D.6.c. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, Landlord will, at Landlord’s expense, restore the Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.6.d. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation, except for relocation or other benefits that are payable to Tenant by the condemning authority but that do not reduce the award or proceeds payable to Landlord.

D.7. Uniform Commercial Code. Tenant grants Landlord a security interest in Tenant’s personal property now or subsequently located on the Premises. This lease is a security agreement under the Uniform Commercial Code. Landlord may file financing statements or continuation statements to perfect or continue the perfection of its security interest.

D.8. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to provide Essential Services to Tenant within ten days after written notice.

D.9. Default by Landlord/Tenant’s Remedies. Tenant’s remedies for Landlord’s default are to sue for damages and, if Landlord does not provide an Essential Service for thirty days after default, terminate this lease.

D.10. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay timely Rent, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.11. Default by Tenant/Landlord’s Remedies. Landlord’s remedies for Tenant’s default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to
reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant’s obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be occupying the Premises, until the default is cured, without being liable for damages.

D.12. Default/Waiver. It is not a waiver of default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of a remedy does not preclude pursuit of another remedy.

D.13. Mitigation. Landlord has mitigated the loss of rent if Landlord, within thirty days after Tenant’s loss of possession, (a) places a “For Lease” sign at the Premises, (b) places the Premises on Landlord’s inventory of properties for lease, (c) makes Landlord’s inventory available to area brokers on a monthly basis, (d) advertises the Premises for lease in a suitable trade journal in the county in which the Premises are located, and (e) shows the Premises to prospective tenants who request to see it.

D.14. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.15. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.16. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.
D.17. Attorney’s Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and other fees and court and other costs.

D.18. Venue. Exclusive venue is in the county in which the Premises are located.

D.19. Entire Agreement. This lease, its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in this lease and any exhibits, addenda, and riders.

D.20. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.21. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.22. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.
D.23. *Use of Common Areas.* Tenant will have the nonexclusive right to use the Common Areas subject to such reasonable rules and regulations that Landlord may prescribe.

D.24. *Merchants’ Association.* If Landlord organizes a merchants’ association, Tenant must join and maintain membership and comply with its rules.

D.25. *Abandoned Property.* Landlord may retain, destroy, or dispose of any property left on the Premises at the end of the Term.

Attach insurance addendum, form 25-34 or 25-35. If applicable, include additional clauses like those suggested in form 25-10 and/or a list of exhibits and riders.

[Name of landlord]

[Name of tenant]
Form 25-3

Office Lease

Basic Information

Date:

Landlord:

Landlord’s Address:

Tenant:

Tenant’s Address:

[Include if applicable: Guarantors: [see guaranty agreement at form 25-18 in this chapter]]

[Include if applicable: Guarantors’ Addresses:]

Premises

Approximate square feet:

Name of Building:

Street address/suite:

City, state, zip:

Include or attach necessary legal description.

Term (months):

Commencement Date:
Termination Date:

Base Rent (monthly):

Security Deposit:

Tenant’s Pro Rata Share: [percent] percent ([percent]%)  

Permitted Use:

Tenant’s Insurance: As required by Insurance Addendum

Landlord’s Insurance: As required by Insurance Addendum

Tenant’s Rebuilding Obligations: If the Premises are damaged by fire or other elements,
Tenant will be responsible for repairing or rebuilding the following leasehold improvements: [see section 25.1:4]

A. Definitions

A.1. “Agent” means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. “Building Operating Hours” means 8:00 A.M. to 6:00 P.M. Monday through Friday, except holidays.

A.3. “Common Areas” means all facilities and areas of the Building [include if applicable: and Parking Facilities] and the related land that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the Building. Landlord has the exclusive control over and right to manage the Common Areas.

A.4. “Essential Services” means the following services: (a) air-conditioning and heating to the Premises reasonable for the Permitted Use (exclusive of air-conditioning or
heating for electronic data-processing or other specialized equipment) during Building Operating Hours and at such other times at such additional cost as Landlord and Tenant may agree on, (b) hot and cold water for lavatory and drinking purposes, (c) janitorial service and periodic window washing, (d) elevator service, if necessary, to provide access to and from the Premises, (e) electric current for normal office machines and the Building’s standard lighting reasonable for the Permitted Use, and (f) lighting in Common Areas and fluorescent lights in the Building’s standard light fixtures on the Premises.

A.5. “Injury” means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) “personal and advertising injury” as defined in the form of liability insurance Tenant is required to maintain.

A.6. “Lienholder” means the holder of a deed of trust covering the Premises.

A.7. “Operating Expenses” means all reasonable expenses, including real property taxes, that Landlord pays in connection with the ownership, operation, and maintenance of the Building, except principal and interest on any debt, expenditures classified as capital expenditures for federal income tax purposes, and expenses for which Tenant is required to reimburse Landlord.

A.8. “Parking Facility” means the facility or area described in the attached parking facility rider.

A.9. “Rent” means Base Rent plus any other amounts of money payable by Tenant to Landlord.
B. Tenant’s Obligations

B.1. Tenant agrees to—

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition “AS IS,” the Premises being currently suitable for the Permitted Use.

B.1.c. Obey (i) all laws relating to Tenant’s use, maintenance of the condition, and occupancy of the Premises and Tenant’s use of any Common Areas in the Building; (ii) any requirements imposed by utility companies serving or insurance companies covering the Premises or Building; and (iii) any rules and regulations for the Building and Common Areas adopted by Landlord.

B.1.d. Pay monthly, in advance, on the first day of the month, the Base Rent to Landlord at Landlord’s Address.

B.1.e. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.f. Obtain and pay for all utility services used by Tenant and not provided by Landlord.

B.1.g. Pay (i) monthly, in advance, Tenant’s Pro Rata Share of the monthly estimated Operating Expenses and (ii) annually, any amount by which the actual Operating Expenses exceed the estimated Operating Expenses, within thirty days of receiving notice of such difference from the Landlord.

B.1.h. Allow Landlord to enter the Premises to perform Landlord’s obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.
B.1.i. Repair, replace, and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, normal wear excepted.

B.1.j. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.k. If requested, deliver to Landlord a financing statement perfecting the security interest created by this lease.

B.1.l. Vacate the Premises and return all keys to the Premises on the last day of the Term.

B.1.m. On request, execute an estoppel certificate that states the Commencement Date and Termination Date of the lease, identifies any amendments to the lease, describes any rights to extend the Term or purchase rights, lists defaults by Landlord, and provides any other information reasonably requested.

B.1.n. Arrange with Landlord in advance for any heating, air-conditioning, or electrical needs in excess of the services provided by Landlord and pay for such additional services as billed by Landlord.

B.1.o. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY’S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE PREMISES. THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT’S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS’ COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIA-
ABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD AND LIENHOLDER AND THEIR RESPECTIVE AGENTS.

B.2. Tenant agrees not to—

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create a nuisance.

B.2.c. Interfere with any other tenant’s normal business operations or Landlord’s management of the Building.

B.2.d. Permit any waste.

B.2.e. Use the Premises in any way that would increase insurance premiums or void insurance on the Building.

B.2.f. Change Landlord’s lock system.

B.2.g. Alter the Premises.

B.2.h. Allow a lien to be placed on the Premises.

B.2.i. Assign this lease or sublease any portion of the Premises without Landlord’s written consent.

C. Landlord’s Obligations

C.1. Landlord agrees to—

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.
C.1.b. Obey all laws relating to Landlord’s operation of the Building and Common Areas.

C.1.c. Provide the Essential Services.

C.1.d. Repair, replace, and maintain the (i) roof, (ii) foundation, (iii) Common Areas, (iv) structural soundness of the exterior walls, doors, corridors, and windows, and (v) other structures or equipment serving the Premises.

C.1.e. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.

C.1.f. Provide Tenant promptly after receipt of a written request from Tenant with a reconciliation of Tenant’s Pro Rata Share of the actual Operating Expenses incurred by Landlord during the preceding calendar year and the estimated Operating Expenses paid by Tenant for the same period and reimburse Tenant for the amount of any estimated Operating Expenses paid by Tenant in excess of Tenant’s Pro Rata Share of actual Operating Expenses for the preceding calendar year.

C.1.g. Provide Tenant with detailed invoices for all heating, air-conditioning, and electrical charges in excess of the Essential Services for which Landlord requests reimbursement.

C.1.h. INDEMNIFY, DEFEND, AND HOLD TENANT HARMLESS FROM ANY INJURY AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY’S FEES AND OTHER FEES AND COURT AND OTHER COSTS, OCCURRING IN ANY PORTION OF THE COMMON AREAS. THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF LANDLORD’S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS’ COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDI-
NARY NEGLIGENCE OR STRICT LIABILITY OF TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.

C.2. Landlord agrees not to—

C.2.a. Interfere with Tenant’s possession of the Premises as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant’s expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant’s covenant to pay Rent and Landlord’s covenants are independent. Except as otherwise provided, Tenant will not be entitled to abate Rent for any reason.

D.3. Insurance. Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.

D.4. Release of Claims/Subrogation. LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR BUILDING, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE BUILDING, AND LOSS OF BUSINESS OR REVENUES THAT ARE COVERED BY THE
RELEASING PARTY’S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN COVERED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.

D.5. Casualty/Total or Partial Destruction

D.5.a. If the Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, Common Areas, and structural soundness of the exterior walls of the Premises and any leasehold improvements within the Premises that are not within Tenant’s Rebuilding Obligations to substantially the same condition that existed before the casualty and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant’s Rebuilding Obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to Landlord of the casualty, Tenant may terminate this lease by written notice delivered to Landlord before Landlord completes Landlord’s restoration obligations.

D.5.b. If the Premises cannot be restored within ninety days, Landlord has an option to restore the Premises. If Landlord chooses not to restore, this lease will terminate. If Landlord
chooses to restore, Landlord will notify Tenant of the estimated time to restore and give Tenant an option to terminate this lease by notifying Landlord within ten days. If Tenant does not terminate this lease, the lease will continue and Landlord will restore the Premises as provided in D.5.a. above.

D.5.c. To the extent the Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.

D.6. Condemnation/Substantial or Partial Taking

D.6.a. If the Premises cannot be used for the purposes contemplated by this lease because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.6.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, Landlord will, at Landlord’s expense, restore the Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.6.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.7. Uniform Commercial Code. Tenant grants Landlord a security interest in Tenant’s personal property now or subsequently located on the Premises. This lease is a security agreement under the Uniform Commercial Code. Landlord may file financing statements or continuation statements to perfect or continue the perfection of the security interest.

D.8. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to provide Essential Services to Tenant within ten days after written notice.
D.9. **Default by Landlord/Tenant’s Remedies.** Tenant’s remedies for Landlord’s default are to sue for damages and, if Landlord does not provide an Essential Service within thirty days after default, terminate this lease.

D.10. **Default by Tenant/Events.** Defaults by Tenant are (a) failing to pay timely Rent, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.11. **Default by Tenant/Landlord’s Remedies.** Landlord’s remedies for Tenant’s default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant’s obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be occupying the Premises, until the default is cured, without being liable for damages.

D.12. **Default/Waiver.** It is not a waiver of default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of a remedy does not preclude pursuit of another remedy.

D.13. **Mitigation.** Landlord has mitigated the loss of rent if Landlord, within thirty days after Tenant’s loss of possession, (a) places a “For Lease” sign at the Premises, (b) places the Premises on Landlord’s inventory of properties for lease, (c) makes Landlord’s inventory available to area brokers on a monthly basis, (d) advertises the Premises for lease in a suitable trade journal in the county in which the Premises are located, and (e) shows the Premises to prospective tenants who request to see it.
D.14. **Security Deposit.** If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.15. **Holdover.** If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.16. **Alternative Dispute Resolution.** Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.17. **Attorney’s Fees.** If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and other fees and court and other costs.

D.18. **Venue.** Exclusive venue is in the county in which the Premises are located.

D.19. **Entire Agreement.** This lease, its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in this lease and any exhibits, addenda, and riders.

D.20. **Amendment of Lease.** This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.21. **Limitation of Warranties.** There are no implied warranties of merchantability, of fitness for a particular purpose, or of any other kind arising
OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.22. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.23. Use of Common Areas. Tenant will have the nonexclusive right to use the Common Areas subject to any reasonable rules and regulations that Landlord may prescribe.

D.24. Abandoned Property. Landlord may retain, destroy, or dispose of any property left on the Premises at the end of the Term.

Attach insurance addendum, form 25-34 or 25-35. If applicable, include additional clauses like those suggested in form 25-10 and/or a list of exhibits and riders.

__________________________________________________________
[Name of landlord]

__________________________________________________________
[Name of tenant]
Parking Facility Rider to Office Lease

Parking Facility:

Number of Reserved Spaces:

Identification of spaces:

Basic charge:

Number of Nonreserved Spaces:

Basic charge:

Basic Charge Adjustment:

Adjustment Stop:

General Provisions

1. Tenant leases from Landlord, for the Term, the parking spaces indicated above in the Parking Facility.

2. Basic charge payment is due on the first day of each month during the Term.

3. Landlord may adjust the basic charge as provided above but not more frequently than once a year and never in excess of the Adjustment Stop.

4. Default in the payment of any basic charge constitutes a default in the payment of Rent under the lease.
5. Tenant may not assign or sublet any parking space without Landlord’s prior written consent.

[Name of landlord]

[Name of tenant]
Form 25-5

Residential Lease

Basic Information

Date:

Landlord:

Landlord’s Address:

Tenant:

Tenant’s Address:

Premises

Street address/suite:

City, state, zip:

Include or attach any additional necessary legal description.

Monthly Rent:

Term (months):

Commencement Date:

Termination Date:

Security Deposit:

Permitted Use: Private residence
Occupants (other than Tenant):

Utilities to Be Provided by Landlord:

Tenant’s Insurance: As required by Insurance Addendum

Landlord’s Insurance: As required by Insurance Addendum

A. Definitions

A.1. “Agent” means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. “Injury” means (a) harm to or impairment or loss of property or its use or (b) harm to or death of a person.

A.3. “Rent” means Monthly Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant’s Obligations

B.1. Tenant agrees to—

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition “AS IS,” the Premises being currently suitable for the Permitted Use.

B.1.c. Obey all laws relating to Tenant’s Permitted Use, maintenance of condition, and occupancy of the Premises.

B.1.d. Pay monthly, in advance, on the first day of the month, the Monthly Rent to Landlord at Landlord’s Address.
B.1.e. Pay, as additional Rent, all other amounts due under this lease.

B.1.f. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.g. Pay for all utility services used by Tenant and not provided by Landlord.

B.1.h. Allow Landlord to enter the Premises to perform Landlord’s obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.i. Repair any damage to the Premises caused by Tenant or the occupants listed under “Occupants (other than Tenant).”

B.1.j. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.k. Move out of the Premises at the end of the Term.

B.1.l. Pay Rent by check, money order, or other traceable or negotiable instrument.

B.2. Tenant agrees not to—

B.2.a. Use the Premises other than as a residence occupied by the named Tenant and the occupants listed under “Occupants (other than Tenant).”

B.2.b. Create or permit a nuisance or interfere with any neighbor’s use of its Premises.

B.2.c. Change Landlord’s lock system.

B.2.d. Alter the Premises.

B.2.e. Allow a lien to be placed on the Premises.
B.2.f. Assign this lease or sublease any portion of the Premises without Landlord’s written consent.

C. Landlord’s Obligations

Landlord agrees to—

C.1. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.2. Obey all laws, ordinances, orders, rules, regulations, and covenants applicable to the use, condition, and occupancy of the Premises.

C.3. Provide the utilities specified in the lease.

C.4. Use reasonable efforts to make repairs to the Premises, but Landlord will not be required to repair a condition unless Tenant notifies Landlord of the condition and Tenant has paid all Rent then due. Landlord will not be required to repair conditions caused by Tenant or the occupants listed under “Occupants (other than Tenant),” unless caused by normal wear and tear, and will not be required to recarpet or repaint the Premises.

C.5. Return the Security Deposit to Tenant on or before the thirtieth day after the date Tenant surrenders the Premises, after subtracting from the Security Deposit all amounts applied to cure any breach of the lease by Tenant as provided below, provided that Tenant has given Landlord written notice of Tenant’s new address.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Insurance. Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.
D.2. Release of Claims/Subrogation. LANDLORD AND TENANT RELEASE EACH OTHER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE PREMISES THAT ARE COVERED BY THE RELEASING PARTY’S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN COVERED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.

D.3. Casualty/Condemnation. If the Premises are damaged by fire or other casualty or are condemned, then either Landlord or Tenant may terminate this lease by notifying the other. Any Rent prepaid by Tenant will be returned to Tenant on termination.

D.4. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to remedy a condition that materially affects the physical health or safety of an ordinary tenant within ten days after written notice, unless such condition results from Tenant’s actions.

D.5. Default by Landlord/Tenant’s Remedies. Tenant’s remedies for Landlord’s default are to sue for damages and, if Landlord does not remedy a condition (not
resulting from Tenant’s actions) that materially affects the physical health or safety of an ordinary tenant for thirty days after notice, terminate this lease.

a. Provided Tenant is not delinquent in the payment of Rent when Tenant provides Landlord any required notices and subject to applicable limitations in section 92.056 of the Texas Property Code, if Landlord has not repaired or remedied within a reasonable time or if Landlord is not making a diligent effort to repair or remedy any condition that materially affects the physical health or safety of an ordinary tenant, and Landlord is obligated under this lease to repair or remedy the condition, then Tenant may, following notice to Landlord (i) by certified mail, return receipt requested, or by registered mail or (ii) by notice to the person to whom or at the place where Tenant’s Rent is normally paid, followed by a subsequent written notice if the condition is not remedied or repaired within a reasonable period of time following the first notice—

i. terminate this lease;

ii. have the condition repaired or remedied according to section 92.0561 of the Texas Property Code if the condition involves any of the following and at least one of Tenant’s notices to Landlord includes a reasonable description of the proposed repair or remedy, along with a statement that Tenant intends to repair or remedy the condition:

(a) the backup or overflow of raw sewage inside the Premises or the flooding from broken pipes or natural drainage inside the Premises;
(b) potable water service to the Premises is not available, and Landlord has expressly or impliedly agreed in this lease to furnish potable water to the Premises;

(c) heating or cooling equipment serving the Premises is producing inadequate heat or cooled air, Landlord has expressly or impliedly agreed in this lease to furnish heating or cooling equipment, and Landlord has been notified in writing by the appropriate local housing, building, or health official or other official having jurisdiction that the lack of heat or cooling materially affects the health or safety of an ordinary tenant; or

(d) any other condition exists at the Premises that materially affects the health or safety of an ordinary tenant, and Landlord has been notified in writing by the appropriate local housing, building, or health official or other official having jurisdiction of such condition;

iii. deduct from Tenant’s Rent, without necessity of judicial action, the cost of the repair or remedy of any condition listed in section D.5.a.ii. in compliance with section 92.0561 of the Texas Property Code; or

iv. obtain judicial remedies according to section 92.0563 of the Texas Property Code.

b. If Tenant elects to terminate this lease, Tenant is—

i. entitled to a pro rata refund of Rent from the date of termination or the date Tenant moves out, whichever is later;
ii. entitled to deduct Tenant’s Security Deposit from Tenant’s Rent without the necessity of lawsuit or to obtain a refund of Tenant’s Security Deposit according to law; and

iii. not entitled to the other repair-and-deduct remedies under section 92.0561 of the Texas Property Code or the judicial remedies under subdivisions (1) and (2) of subsection (a) of section 92.0563 of the Texas Property Code.

c. If Tenant elects to have the condition repaired or remedied following the requirements of section 92.0561 of the Texas Property Code, Tenant may have the condition repaired or remedied—

i. immediately following Tenant’s notice of intent to repair if the condition involves sewage or flooding;

ii. within three days following Tenant’s delivery of notice of intent to repair if the condition involves a cessation of potable water or inadequate heat or cooled air; or

iii. within seven days following Tenant’s notice of intent to repair or remedy the condition if the condition involves any other matter affecting the physical health or safety of an ordinary tenant; and

Tenant may deduct the cost to repair or remedy the condition from a subsequent Rent payment, but the deduction may not exceed the amount of one month’s Rent under the lease or $500, whichever is greater. When deducting the cost of repairs from the Rent, Tenant must furnish Landlord, along with payment of the balance of the Rent, a copy of the repair bill and the receipt for its payment. A repair bill and receipt may be the
same document. Repairs and deductions may be made as often as necessary as long as Tenant otherwise complies with section 92.0561 of the Texas Property Code and the total repairs and deductions in any one month do not exceed one month’s Rent or $500, whichever is greater.

d. If Tenant’s Rent is subsidized in whole or in part by a governmental agency, the deduction limitation of one month’s Rent shall mean the fair market rent for the dwelling and not the Rent that Tenant pays. The fair market rent shall be determined by the governmental agency subsidizing the Rent, or in the absence of such a determination, it shall be a reasonable amount of rent under the circumstances.

e. Tenant repairs pursuant to section 92.0561 of the Texas Property Code must be made by a company, contractor, or repairman listed in the yellow or business pages of the telephone directory or in the classified advertising section of a newspaper of the local city, county, or adjacent county at the time of Tenant’s notice of intent to repair and must be made in compliance with applicable building codes, including a building permit when required. Unless otherwise agreed between Tenant and Landlord, any repairs made pursuant to section 92.0561 of the Texas Property Code may not be made by Tenant, Tenant’s immediate family, Tenant’s employer or employees, or a company in which Tenant has an ownership interest. In addition, repairs may not be made by Tenant under section 92.0561 of the Texas Property Code to the foundation or load-bearing structural elements of a building of which the Premises is a part if the building contains two or more dwelling units.

f. If Landlord repairs or remedies the condition or delivers to Tenant an affidavit for delay under section 92.0562 of the Texas Property Code
after Tenant has contacted a repairman but before the repairman commences work, Landlord shall be liable for the cost incurred by Tenant for the repairman’s trip charge and Tenant may deduct the charge from Tenant’s Rent as if it were a repair cost.

g. If Tenant elects to pursue judicial remedies against Landlord pursuant to section 92.0563 of the Texas Property Code, those remedies include—

i. an order directing Landlord to take reasonable action to repair or remedy the condition;

ii. an order reducing Tenant’s Rent, from the date of the first repair notice, in proportion to the reduced rental value resulting from the condition until the condition is repaired or remedied;

iii. a judgment against Landlord for a civil penalty of one month’s Rent plus $500;

iv. a judgment against Landlord for the amount of Tenant’s actual damages; and

v. court costs and attorney’s fees, excluding any attorney’s fees for a cause of action for damages relating to a personal injury.

D.6. **Default by Tenant/Events.** Defaults by Tenant are (a) failing to timely pay Rent, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.7. **Default by Tenant/Landlord’s Remedies.** Landlord’s remedies for Tenant’s default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b)
enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant’s obligations; and (d) terminate this lease by written notice and sue for possession or damages or both.

D.8. **Mitigation.** Landlord and Tenant have a duty to mitigate damages.

D.9. **Security Deposit.** If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.10. **Holdover.** If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.11. **Alternative Dispute Resolution.** Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.12. **Attorney’s Fees.** If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and any other costs.

D.13. **Venue.** Exclusive venue is in the county in which the Premises are located.

D.14. ** Entire Agreement.** This lease, its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or
representations of any agent of Landlord, that are not in this lease and any exhibits, addenda, and riders.

D.15. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.16. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.17. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.18. Texas Property Code. Landlord and Tenant each acknowledge that chapter 92 of the Texas Property Code, which deals with residential tenancies, affords certain rights and imposes certain duties on them.

D.19. Abandoned Property. Landlord may retain, destroy, or dispose of any property left on the Premises at the end of the Term.

D.20. Tenant’s Statutory Right to Terminate. Tenant may have special statutory rights to terminate the lease early in certain situations involving family violence, military deployment or transfer, or certain sexual offenses or stalking.
D.21. **Emergencies.** Tenant may call [**telephone number**] to report emergencies that affect the Premises and that threaten Tenant’s physical health or safety.

Attach insurance addendum. If applicable, include additional clauses like those suggested in form 25-25 in this chapter and/or a list of exhibits and riders.

______________________________
[Name of landlord]

______________________________
[Name of tenant]
Insurance Addendum to Lease

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

A. Tenant agrees to—

1. Maintain the property and liability insurance policy required below during the Term and any period before or after the Term when Tenant is present on the Premises:

<table>
<thead>
<tr>
<th>Type of Insurance</th>
<th>Minimum Policy Limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tenant’s homeowner’s (also known as tenant’s or renter’s)</td>
<td>Personal Liability:</td>
</tr>
<tr>
<td></td>
<td>Per occurrence: $__________</td>
</tr>
<tr>
<td></td>
<td>Aggregate: $__________</td>
</tr>
<tr>
<td></td>
<td>Property:</td>
</tr>
<tr>
<td></td>
<td>100 percent of replacement cost of all Tenant’s furniture, fixtures, equipment, and other personal property located in the Premises</td>
</tr>
</tbody>
</table>

2. Deliver a certificate of insurance to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

B. Landlord agrees to maintain the property insurance policy required below during the Term:
<table>
<thead>
<tr>
<th>Type of Insurance</th>
<th>Minimum Policy Limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Causes of loss—special form property</td>
<td>100 percent of replacement cost of the building in which Premises are located, exclusive of foundation, footings, infrastructure, and sitework</td>
</tr>
</tbody>
</table>
Form 25-6

Industrial Lease

Basic Information

Date:

Landlord:

Landlord’s Address:

Tenant:

Tenant’s Address:

[Include if applicable: Guarantors: [see guaranty agreement at form 25-18 in this chapter]]

[Include if applicable: Guarantors’ Addresses:]

Premises

Approximate square feet:

Name of Building:

Street address/suite:

City, state, zip:

Include or attach any additional necessary legal description.

Term (months):

Commencement Date:
Termination Date:

Base Rent (monthly):

Tenant’s Pro Rata Share: [percent] percent ([percent]%)

Security Deposit:

Permitted Use:

Tenant’s Insurance: As required by Insurance Addendum

Landlord’s Insurance: As required by Insurance Addendum

Tenant’s Rebuilding Obligations: If the Premises are damaged by fire or other elements, Tenant will be responsible for repairing or rebuilding the following leasehold improvements: [see section 25.1:4]

A. Definitions

A.1. “Agent” means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. “Common Areas” means all facilities and areas of the Building that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the Building, including parking lots. Landlord has the exclusive control over and right to manage the Common Areas.

A.3. “Essential Services” means utility connections reasonably necessary for occupancy of the Premises for the Permitted Use.
A.4. “Injury” means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) “personal and advertising injury” as defined in the form of liability insurance Tenant is required to maintain.

A.5. “Lienholder” means the holder of a deed of trust covering the Premises.

A.6. “Rent” means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant’s Obligations

B.1. Tenant agrees to—

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition “AS IS,” the Premises being currently suitable for the Permitted Use.

B.1.c. Obey (i) all laws relating to Tenant’s use, maintenance of the condition, and occupancy of the Premises and Tenant’s use of any Common Areas in the Building; (ii) any requirements imposed by utility companies serving or insurance companies covering the Premises or Building; and (iii) any rules and regulations for the Building and Common Areas adopted by Landlord.

B.1.d. Pay monthly, in advance, on the first day of the month, the Base Rent to Landlord at Landlord’s Address.

B.1.e. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.g. Obtain and pay for all utility services used by Tenant and not provided by Landlord.

B.1.h. Pay Tenant’s Pro Rata Share of any utility services provided by Landlord.

B.1.i. Allow Landlord to enter the Premises to perform Landlord’s obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.j. Repair, replace, and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, reasonable wear excepted.

B.1.k. Keep the sidewalks, service ways, and loading areas adjacent to the Premises clean and unobstructed.

B.1.l. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.m. If requested, deliver to Landlord a financing statement perfecting the security interest created by this lease.

B.1.n. Vacate the Premises and return all keys to the Premises on the last day of the Term.

B.1.o. Pay all costs caused by Tenant’s introduction of materials, other than ordinary human waste, into the sanitary sewer system.

B.1.p. Install and maintain any dilution tanks, holding tanks, settling tanks, sewer sampling devices, sand traps, grease traps, or other devices required by law for the Permitted Use of the sanitary sewer system.
B.1.q. If the Premises are served by rail and if requested by the railroad, enter into a joint maintenance agreement with the railroad and bear Tenant’s Pro Rata Share of the cost of maintaining the railroad spur.

B.1.r. On request, execute an estoppel certificate that states the Commencement Date and Termination Date of the lease, identifies any amendments to the lease, describes any rights to extend the Term or purchase rights, lists defaults by Landlord, and provides any other information reasonably requested.

B.1.s. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY’S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE PREMISES. THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT’S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS’ COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD’S AGENTS BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD AND LIENHOLDER AND THEIR RESPECTIVE AGENTS.

B.2. Tenant agrees not to—

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create a nuisance.

B.2.c. Interfere with any other tenant’s normal business operations or Landlord’s management of the Premises.
B.2.d. Permit any waste.

B.2.e. Use the Premises in any way that would increase insurance premiums or void insurance on the Premises.

B.2.f. Change Landlord’s lock system.

B.2.g. Alter the Premises.

B.2.h. Allow a lien to be placed on the Premises.

B.2.i. Assign this lease or sublease any portion of the Premises without Landlord’s written consent.

B.2.j. Use the roof on the Premises.

B.2.k. Place any signs on the Premises without Landlord’s written consent.

C. **Landlord’s Obligations**

C.1. **Landlord agrees to**—

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Obey all laws relating to Landlord’s operation of the Building.

C.1.c. Repair, replace, and maintain the (i) roof, (ii) foundation, (iii) Common Areas, and (iv) structural soundness of the exterior walls, excluding windows, window glass, plate glass, and doors.

C.1.d. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.
C.1.e. **Indemnify, Defend, and Hold Tenant Harmless from Any Injury and Any Resulting or Related Claim, Action, Loss, Liability, or Reasonable Expense, Including Attorney’s Fees and Other Fees and Court and Other Costs, Occurring in Any Portion of the Common Areas.** The indemnity contained in this paragraph (i) is independent of Landlord’s Insurance, (ii) will not be limited by comparative negligence statutes or damages paid under the Workers’ Compensation Act or similar employee benefit acts, (iii) will survive the end of the Term, and (iv) will apply even if an Injury is caused in whole or in part by the ordinary negligence or strict liability of Tenant but will not apply to the extent an Injury is caused by the gross negligence or willful misconduct of Tenant.

C.2. **Landlord agrees not to—**

C.2.a. Interfere with Tenant’s possession of the Premises as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. **General Provisions**

**Landlord and Tenant agree to the following:**

D.1. **Alterations.** Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant’s expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.
D.2. **Abatement.** Tenant’s covenant to pay Rent and Landlord’s covenants are independent. Except as otherwise provided, Tenant will not be entitled to abate Rent for any reason.

D.3. **Insurance.** Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.

D.4. **Release of Claims/Subrogation.** LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR BUILDING, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE BUILDING, AND LOSS OF BUSINESS OR REVENUES THAT ARE COVERED BY THE RELEASING PARTY’S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN COVERED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGE REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.

D.5. **Casualty/Total or Partial Destruction**

D.5.a. If the Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, Common Areas, and structural
soundness of the exterior walls of the Premises and any leasehold improvements within the Premises that are not within Tenant’s Rebuilding Obligations to substantially the same condition that existed before the casualty and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant’s Rebuilding Obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to Landlord of the casualty, Tenant may terminate this lease by written notice delivered to Landlord before Landlord completes Landlord’s restoration obligations.

**D.5.b.** If Landlord cannot complete the portion of the restoration for which Landlord is responsible within ninety days, Landlord has an option to restore the Premises. If Landlord chooses not to restore, this lease will terminate. If Landlord chooses to restore, Landlord will notify Tenant in writing of the estimated time to restore and give Tenant an option to terminate this lease by notifying Landlord in writing within ten days from receipt of Landlord’s estimate. If Tenant does not notify Landlord timely of Tenant’s election to terminate this lease, the lease will continue and Landlord will restore the Premises as provided in **D.5.a.** above.

**D.5.c.** To the extent the Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.

**D.6. Condemnation/Substantial or Partial Taking**

**D.6.a.** If the Premises cannot be used for the purposes contemplated by this lease because of condemnation or purchase in lieu of condemnation, this lease will terminate.

**D.6.b.** If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, Landlord will, at Landlord’s expense, restore the Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.
D.6.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.7. Uniform Commercial Code. Tenant grants Landlord a security interest in Tenant’s personal property now or subsequently located on the Premises. This lease is a security agreement under the Uniform Commercial Code. Landlord may file financing statements or continuation statements to perfect or continue the perfection of the security interest.

D.8. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to provide Essential Services to Tenant within ten days after written notice.

D.9. Default by Landlord/Tenant’s Remedies. Tenant’s remedies for Landlord’s default are to sue for damages and, if Landlord does not provide an Essential Service for thirty days after default, terminate this lease.

D.10. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay timely Rent, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.11. Default by Tenant/Landlord’s Remedies. Landlord’s remedies for Tenant’s default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant’s obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be occupying the Premises, until the default is cured, without being liable for damages.
D.12. Default/Waiver. It is not a waiver of default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of a remedy does not preclude pursuit of another remedy.

D.13. Mitigation. Landlord has mitigated the loss of rent if Landlord, within thirty days after Tenant’s loss of possession, (a) places a “For Lease” sign at the Premises, (b) places the Premises on Landlord’s inventory of properties for lease, (c) makes Landlord’s inventory available to area brokers on a monthly basis, (d) advertises the Premises for lease in a suitable trade journal in the county in which the Premises are located, and (e) shows the Premises to prospective tenants who request to see it.

D.14. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.15. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.16. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.17. Attorney’s Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and other fees and court and other costs.

D.18. Venue. Exclusive venue is in the county in which the Premises are located.

D.19. Entire Agreement. This lease, its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There
are no representations, warranties, agreements, or promises pertaining to the Premises or the
lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or
representations of any agent of Landlord, that are not in this lease and any exhibits, addenda,
and riders.

D.20. Amendment of Lease. This lease may be amended only by an instrument in
writing signed by Landlord and Tenant.

D.21. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF MER-
CHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING
OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE
EXPRESSLY STATED IN THIS LEASE.

D.22. Notices. Any notice required or permitted under this lease must be in writing.
Any notice required by this lease will be deemed to be given (whether received or not) the ear-
ier of receipt or three business days after being deposited with the United States Postal Ser-
vice, postage prepaid, certified mail, return receipt requested, and addressed to the intended
recipient at the address shown in this lease. Notice may also be given by regular mail, per-
sonal delivery, courier delivery, or e-mail and will be effective when received. Any address
for notice may be changed by written notice given as provided herein.

D.23. Use of Common Areas. Tenant will have the nonexclusive right to use the
Common Areas subject to any reasonable rules and regulations that Landlord may prescribe.

D.24. Abandoned Property. Landlord may retain, destroy, or dispose of any prop-
erty left on the Premises at the end of the Term.

Attach insurance addendum, form 25-34 or 25-35. If
applicable, include additional clauses like those sug-
gested in form 25-10 and/or a list of exhibits and riders.
Industrial Lease

[Name of landlord]

[Name of tenant]
Hunting Lease

Basic Information

Date:

Landlord:

Landlord’s Address:

Tenant:

Tenant’s Address:

Premises: SURFACE ONLY of approximately [number] acres of land, situated in [county] County, Texas, as described in Exhibit [exhibit number/letter] (“Land”).

Excluded Improvements: Any structure, improvement, or equipment situated on the Land and constructed or installed by any person other than Tenant, except for the following: [specify].

Base Rent:

Term (months):

Commencement Date:

Termination Date:
Permitted Use: Solely for hunting of the following game: [specify].

Tenant’s Insurance: As required by Insurance Addendum

A. Definitions

A.1. “Agent” means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. “Injury” means (a) harm to or impairment or loss of property or its use or (b) harm to or death of a person.

A.3. “Rent” means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant’s Obligations

B.1. Tenant agrees to—

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition “AS IS,” the Premises being suitable for the Permitted Use.

B.1.c. Obey all laws relating to (i) Tenant’s Permitted Use; (ii) Tenant’s activities while on the Premises, including times and manner for hunting and removing game (and keeping of any applicable records), handling and discharging firearms, operating motor vehicles, and consuming alcoholic beverages; (iii) Tenant’s use of any existing structure, improvement, or equipment that Tenant is permitted to use pursuant to this lease; or (iv) Tenant’s use of any structure, improvement, or equipment erected or installed by Tenant on the Premises in accordance with this lease.
B.1.d. Pay, in advance, Base Rent to Landlord at Landlord’s Address.

B.1.e. Pay for all utility services used by Tenant.

B.1.f. Pay all taxes on Tenant’s property located on the Premises.

B.1.g. Repair, replace, and maintain any part of the crops, livestock, or Improvements damaged by Tenant.

B.1.h. Operate vehicles on the Land in a manner that will not damage existing roads, trails, or vegetation.

B.1.i. Keep all gates on the Land closed and locked.

B.1.j. Enter and exit the Premises only at those places designated by Landlord.

B.1.k. Vacate the Premises on the last day of the Term.

B.1.l. Maintain the insurance coverages described in the attached Insurance Addendum.

B.1.m. Properly supervise all persons present on the Premises at the invitation or request of Tenant.

B.1.n. Deliver to Landlord a Release, Indemnity, and Assumption of Risks in the form attached to this lease as Exhibit B, executed by each individual (including Tenant) who will enter the Premises at the invitation or request of Tenant before entry by any such individual.

B.1.o. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LANDLORD’S AGENTS HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY’S FEES AND OTHER FEES AND COURT AND OTHER COSTS) ARISING FROM OR RELATED TO TENANT’S OR TENANT’S AGENTS’ USE OF THE PREMISES. THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF
TENANT’S INSURANCE, (ii) WILL SURVIVE THE END OF THE TERM, AND (iii) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD’S AGENTS BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR LANDLORD’S AGENTS.

B.2. Tenant agrees not to—

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create or allow a nuisance or permit any waste or injury to the Premises or the crops or livestock thereon.

B.2.c. Change Landlord’s lock system.

B.2.d. Alter the Premises, including clearing new roads or trails, digging ponds or tanks, moving or erecting any fences, or locating on the Premises any type of manufactured housing or mobile home.

B.2.e. Allow a lien to be placed on the Premises.

B.2.f. Assign this lease or sublease any portion of the Premises without Landlord’s written consent.

B.2.g. Litter or leave trash, debris, or shell casings on the Premises.

B.2.h. Allow anyone other than those persons listed in Exhibit A to hunt on the Premises.

B.2.i. Construct any kennel, blind, feeder, or stand on the Premises without Landlord’s prior written consent.
C.  **Landlord’s Obligations**

   **C.1. Landlord agrees to—**

   **C.1.a.** Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

   **C.1.b.** Obey all laws relating to Landlord’s operation of the Premises.

   **C.2. Landlord agrees not to—**

   **C.2.a.** Allow any use of the Premises inconsistent with Tenant’s Permitted Use as long as Tenant is not in default.

   **C.2.b.** Unreasonably withhold consent to a proposed assignment or sublease.

D. **General Provisions**

   **Landlord and Tenant agree to the following:**

   **D.1. Alterations.** Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at termination of this lease and at Tenant’s expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

   **D.2. Abatement.** Tenant’s covenant to pay Rent and Landlord’s covenants are independent. Except as otherwise provided, Tenant will not be entitled to an abatement or refund of Rent for any reason.

   **D.3. Release of Claims.** TENANT RELEASES LANDLORD AND LANDLORD’S AGENTS FROM ALL CLAIMS OR LIABILITIES FOR ANY INJURY TO TENANT AND TENANT’S AGENTS WHILE PRESENT ON THE PREMISES OR TO TENANT’S OR TENANT’S AGENTS’ PROPERTY
located on the premises. The release in this paragraph will apply even if the damage or loss is caused in whole or in part by the ordinary negligence or strict liability of landlord or landlord’s agents but will not apply to the extent the damage or loss is caused by the gross negligence or willful misconduct of landlord or landlord’s agents.

D.4. Condemnation/Substantial or Partial Taking

D.4.a. If the Premises cannot be used for the Permitted Use because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.4.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.4.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.5. Default by Landlord/Events. A default by Landlord is the failure to comply with any provision of this lease that is not cured within thirty days after written notice.

D.6. Default by Landlord/Tenant’s Remedies. Tenant’s remedies for Landlord’s default are to sue for damages and terminate this lease.

D.7. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay timely Rent, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.8. Default by Tenant/Landlord’s Remedies. Landlord’s remedies for Tenant’s default are to (a) enter and take possession of the Premises and sue for Rent as it accrues;
(b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant’s obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be hunting on the Premises, until the default is cured, without being liable for damages.

D.9. Default/Waiver. It is not a waiver of default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of a remedy does not preclude pursuit of another remedy.

D.10. Mitigation. Landlord has mitigated the loss of rent if Landlord, within thirty days after Tenant’s loss of possession, (a) places a “For Lease” sign at the Premises, (b) places the Premises on Landlord’s inventory of properties for lease, (c) makes Landlord’s inventory available to area brokers on a monthly basis, (d) advertises the Premises for lease in a suitable trade journal in the county in which the Premises are located, and (e) shows the Premises to prospective tenants who request to see it.

D.11. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.12. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.13. Attorney’s Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and other fees and court and other costs.
D.14. **Venue.** Exclusive venue is in the county in which the Premises are located.

D.15. ** Entire Agreement.** This lease, its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in this lease and any exhibits, addenda, and riders.

D.16. ** Amendment of Lease.** This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.17. ** Limitation of Warranties.** THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.18. ** Notices.** Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.19. ** Mineral Interests.** This lease is subordinate to any present or future oil, gas, or other mineral exploration agreements and leases relating to the Land. Landlord will not be liable to Tenant for any damages for actions attributable to those agreements and will receive all consideration paid therefor.
D.20. **Landlord’s Use.** Landlord, both for Landlord and for third parties, retains the right to enter on and use the Land for grazing, farming, erecting telecommunications towers or antennas, and other uses that do not materially interfere with the Permitted Use.

D.21. **Identity.** Landlord reserves the right to verify the identity of all persons on the Premises.

D.22. **Option to Terminate.** Landlord will have the option to terminate this lease with respect to any portion of the Land that is sold. Landlord’s option will be exercisable by written notice delivered to Tenant no later than thirty days before the date of termination. The Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable. Tenant will receive a refund of any prepaid Base Rent fairly and reasonably allocable to the portion of the Premises for which this lease has been terminated.

If applicable, include additional clauses like those suggested in form 25-10 in this chapter and/or a list of exhibits and riders.

[Name of landlord]

[Name of tenant]
Insurance Addendum to Hunting Lease

The landowner’s liability for injuries and damages from the tenant’s use of the property may be limited by compliance with the requirements of Tex. Civ. Prac. & Rem. Code ch. 75.

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

Tenant agrees to—

1. Maintain the property and/or liability insurance policies required below (mark applicable boxes) during the lease Term and any period before or after the lease Term when Tenant is present on the Premises:

<table>
<thead>
<tr>
<th>Type of Insurance</th>
<th>Minimum Policy Limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hunting lease liability</td>
<td>Per occurrence: $__________</td>
</tr>
<tr>
<td></td>
<td>Aggregate: $______________</td>
</tr>
</tbody>
</table>

Or

- Endorsement extending homeowner’s policy liability to Premises
- Texas personal auto Minimum limits required by law
2. Comply with the following additional insurance requirements: (a) the hunting lease liability or homeowner’s insurance policy must be endorsed to name Landlord as “additional insured,” (b) additional insured endorsements must not exclude coverage for the ordinary negligence of Landlord, (c) any property insurance policies covering Tenant’s property on the Premises must contain a waiver of subrogation of claims against Landlord, and (d) certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

If Tenant is a business entity:

☐ Hunting lease liability

Per occurrence: $___________

Aggregate: $___________

☐ Business automobile $___________

Or

☐ Texas personal auto Minimum limits required by law

If Tenant is a business entity:

☐ Hunting lease liability Per occurrence: $___________

Aggregate: $___________

☐ Business automobile $___________

Or

☐ Texas personal auto Minimum limits required by law
Exhibit A

Individuals Who Will Hunt on the Premises

List names of those individuals who are permitted to hunt on the premises.
Exhibit B

Release, Indemnity, and Assumption of Risks

Lease

Date:

Landlord:

Tenant:

1. **Assumption of Risks.** The undersigned acknowledges that (a) dangerous natural or man-made conditions may exist or occur on the premises described in the lease, including streams and rivers with currents and water that may be deep or flood, hazardous driving and walking conditions, uneven terrain, the presence of wild, domestic, poisonous, or diseased animals, elevated hunting stands, and/or camouflaged sunken hunting blinds; and (b) hunting is an inherently dangerous activity involving the use of firearms and other lethal implements and the presence of other hunters. The undersigned assumes all such dangers and risks.

2. **Indemnity.** The undersigned will indemnify, defend, and hold landlord and its agents, employees, invitees, licensees, or visitors (collectively, “landlord”) harmless against all claims, damages, and costs (collectively, “claims”) incurred by or alleged against landlord and arising out of or relating to any act or omission of the undersigned or any of the undersigned’s agents, employees, contractors, licensees, or visitors (collectively, “hunter”) while at the premises, including any claims based on any (a) injury to or death of any person(s), (b) damage to or loss of property, or (c) failure of hunter to comply with any applicable laws or the lease.
3. **Release.** The undersigned waives all claims against landlord and releases landlord from any liability, based on any (a) injury to or death of hunter or (b) damage to or loss of any property belonging to hunter.

4. **Negligence of Landlord.** The foregoing indemnities, waivers, and releases will apply even if the incident giving rise to the claim is caused in whole or in part by the condition of the premises or by the sole or concurrent ordinary negligence of landlord (but not the gross negligence or willful misconduct of landlord).

[Name of tenant]

[Date]
Agricultural Lease

Basic Information

Date:

Landlord:

Landlord’s Address:

Tenant:

Tenant’s Address:

Premises: SURFACE ONLY of approximately [number] acres of land, situated in [county] County, Texas, as described in Exhibit [exhibit number/letter] (“Land”).

The Premises do not include and Tenant will not be permitted to use the Excluded Improvements.

Excluded Improvements: Any structure, improvement, or equipment situated on the Land and constructed or installed by any person other than Tenant, except for the following:

[specify].

Base Rent:

$[amount] payable on execution of this lease.
$[\text{amount}]$ (monthly) due on the first day of the month

[\text{percent}]$\%$ percent of all cotton produced on the Premises delivered to the gin of Tenant’s choice.

[\text{percent}]$\%$ percent of all corn, wheat, and other grains produced on the Premises delivered at the turnrow.

[\text{percent}]$\%$ percent of all crops produced on and harvested from the Premises.

[\text{percent}]$\%$ percent of the gross sales proceeds from the sale of all [\text{specify}] raised on and harvested from the Premises less [\text{percent}]$\%$ percent of the cost of [\text{specify}] payable on the sale of the [\text{specify}].

[\text{percent}]$\%$ percent of all USDA agricultural program payments.

Term (months):

Commencement Date:

Termination Date:

Security Deposit:

Permitted Use: Solely for planting, raising, and harvesting [\text{specify}] and no other purpose.
Tenant’s Insurance: As required by Insurance Addendum

A. Definitions

A.1. “Agent” means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. “Injury” means (a) harm to or impairment or loss of property or its use or (b) harm to or death of a person.

A.3. “Rent” means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant’s Obligations

B.1. Tenant agrees to—

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition “AS IS,” the Premises being currently suitable for the Permitted Use.

B.1.c. Obey all laws relating to Tenant’s use, maintenance of condition, and occupancy of the Premises, including the rules and regulations of the United States Department of Agriculture and the Texas Agriculture Commissioner.

B.1.d. Pay the Base Rent when it is due to Landlord at Landlord’s Address.

B.1.e. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.f. Pay for all labor, fuel, and utility services used by Tenant.
B.1.g. Pay all taxes on the crops raised on and Tenant’s property located on the Premises.

B.1.h. Allow Landlord to enter the Premises to inspect the Premises and show the Premises to prospective purchasers or tenants.

B.1.i. Repair, replace, and maintain any part of the Premises used by Tenant.

B.1.j. Repair any damage to the Premises, Land, or Excluded Improvements caused by Tenant.

B.1.k. Maintain the insurance coverages described in the attached Insurance Addendum.

B.1.l. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LANDLORD’S AGENTS HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY’S FEES AND OTHER FEES AND COURT AND OTHER COSTS) ARISING OUT OF TENANT’S OR TENANT’S AGENTS’ USE OF THE PREMISES. THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT’S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS’ COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD’S AGENTS BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR LANDLORD’S AGENTS.

B.1.m. Deliver to Landlord a financing statement perfecting the security interest.

B.1.n. Vacate the Premises on the last day of the Term.
B.1.o. Pay all costs of planting, raising, and harvesting the crops, unless Landlord elects to receive payment in kind, in which case costs will be shared in the same proportion as the crops.

B.1.p. Cultivate the Premises in a timely, thorough, and farmerlike manner, employing the best methods of farming customarily practiced on like crops in the area.

B.1.q. Maintain adequate records on all matters related to farming the Premises and provide Landlord with a copy.

B.1.r. Keep all gates on the Premises closed and locked.

B.1.s. Enter and exit the Premises only at those places designated by Landlord.

B.2. Tenant agrees not to—

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create or allow a nuisance or permit any waste of the Premises.

B.2.c. Change Landlord’s lock system.

B.2.d. Alter the Premises, including clearing new roads, moving or erecting any fences, or locating on the Premises any type of manufactured housing or mobile home.

B.2.e. Assign this lease or sublease any portion of the Premises without Landlord’s written consent.

B.2.f. Make any new or change any existing agreement with any governmental entity.

B.2.g. Hunt or fish on the Land or allow anyone else to do so.

B.2.h. Litter or leave trash or debris on the Premises.
B.2.i. Allow a lien to be placed on the Premises.

B.2.j. Allow a lien to be placed on the crops raised on or harvested from the Premises.

C. Landlord’s Obligations

C.1. Landlord agrees to—

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.

C.1.c. Obey all laws relating to Landlord’s operation of the Premises.

C.2. Landlord agrees not to—

C.2.a. Allow any use of the Premises inconsistent with the Permitted Use as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at termination of this lease and at Tenant’s expense, remove any physical additions and improvements,
repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

**D.2. Abatement.** Tenant’s covenant to pay Rent and Landlord’s covenants are independent. Except as otherwise provided, Tenant will not be entitled to abate Rent for any reason.

**D.3. Release of Claims/Subrogation.** Tenant releases Landlord and Landlord’s Agents from all claims or liabilities for any injury to Tenant and Tenant’s Agents or to Tenant’s or Tenant’s Agents’ property located on the Premises. The release in this paragraph will apply even if the damage or loss is caused in whole or in part by the ordinary negligence or strict liability of Landlord or Landlord’s Agents but will not apply to the extent the damage or loss is caused by the gross negligence or willful misconduct of Landlord or Landlord’s Agents.

**D.4. Condemnation/Substantial or Partial Taking**

**D.4.a.** If the Premises cannot be used for the Permitted Use because of condemnation or purchase in lieu of condemnation, this lease will terminate.

**D.4.b.** If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

**D.4.c.** Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

**D.5. Landlord’s Lien.** Tenant grants to Landlord a security interest in the collateral to secure payment and performance by Tenant of all obligations and payments due from Tenant under this lease. The collateral will include all of Tenant’s crops, livestock, and per-
sonal property located on or to be located on the Premises, and all products, proceeds, offspring, increase, governmental payments, insurance proceeds, documents of title, and warehouse receipts relating to such property.

This lease is a security agreement under both article 9 of the Texas Business and Commerce Code and the federal Food Security Act of 1985. Landlord may file financing statements or continuation statements to perfect or continue the perfection of the security interest. Tenant agrees to furnish to Landlord a list of the names and addresses of any buyer, commission merchant, or selling agent to or through whom Tenant may sell the collateral. Tenant agrees to notify Landlord of the identity of any buyer, commission merchant, selling agent, or warehouse to or with whom Tenant intends to sell or store the collateral within seven days before any sale or storage of the collateral.

**D.6. Default by Landlord/Events.** A default by Landlord is the failure to comply with any provision of this lease that is not cured within thirty days after written notice.

**D.7. Default by Landlord/Tenant’s Remedies.** Tenant’s remedies for Landlord’s default are to sue for damages and terminate this lease.

**D.8. Default by Tenant/Events.** Defaults by Tenant are (a) failing to pay timely Rent, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

**D.9. Default by Tenant/Landlord’s Remedies.** Landlord’s remedies for Tenant’s default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant’s obligations; and (d) terminate this lease by written notice and sue for dam-
ages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be farming the Premises, until the default is cured, without being liable for damages.

D.10. Default/Waiver. It is not a waiver of default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of a remedy does not preclude pursuit of another remedy.

D.11. Mitigation. Landlord has mitigated the loss of rent if Landlord, within thirty days after Tenant’s loss of possession, (a) places a “For Lease” sign at the Premises, (b) places the Premises on Landlord’s inventory of properties for lease, (c) makes Landlord’s inventory available to area brokers on a monthly basis, (d) advertises the Premises for lease in a suitable trade journal in the county in which the Premises are located, and (e) shows the Premises to prospective tenants who request to see it.

D.12. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.13. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.14. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.15. Attorney’s Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and other fees and court and other costs.
D.16. **Venue.** Exclusive venue is in the county in which the Premises are located.

D.17. **Entire Agreement.** This lease, its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in this lease and any exhibits, addenda, and riders.

D.18. **Amendment of Lease.** This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.19. **Limitation of Warranties.** THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.20. **Notices.** Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.21. **Mineral Interests.** This lease is subordinate to any present or future oil, gas, or other mineral exploration agreements and leases relating to the Land. Landlord will not be liable to Tenant for any damages for actions attributable to those agreements and will receive all consideration paid therefor. Any damages to growing crops arising from an oil, gas, or min-
eral interest will be divided between Landlord and Tenant in the same proportions as the crops are divided.

D.22. **Landlord’s Use.** Landlord retains the right to enter on and use and/or permit third parties to enter on and use the Premises for hunting, fishing, and other uses that do not materially interfere with Tenant’s farming rights.

D.23. **Crops Grown for Tenant’s Use.** If Tenant uses any of the Premises for crops for Tenant’s use, Tenant will obtain Landlord’s written consent and will pay Landlord the average market price for the crop harvested.

D.24. **Marketing Landlord’s Share.** If Landlord elects to receive payment in kind, Landlord will give written notice to Tenant within [number] days after the Commencement Date. Landlord’s share will be delivered to Landlord in [county] County, Texas.

D.25. **Governmental Payments.** If Tenant receives any payment from any governmental agency because of growing or not growing crops on the Premises and the Rent payable hereunder is based on a crop share, that payment will be divided between Tenant and Landlord in the same proportion as set out in the Rent clause.

D.26. **Tenant’s Use of Water**

D.26.a. **Surface.** [Describe permitted use, if any.]

D.26.b. **Subsurface.** [Describe permitted use, if any.]

If applicable, include additional clauses like those suggested in form 25-10 in this chapter and/or a list of exhibits and riders.
[Name of landlord]

[Name of tenant]
Insurance Addendum to Lease

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

Tenant agrees to—

1. Maintain the liability insurance policies required below (mark applicable boxes) during the Term and any period before or after the Term when Tenant is present on the Premises:

<table>
<thead>
<tr>
<th>Type of Insurance</th>
<th>Minimum Policy Limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ Commercial general liability (occurrence basis) endorsed to cover farm operations</td>
<td>Per occurrence: $___________ Aggregate: $___________</td>
</tr>
<tr>
<td>Or</td>
<td></td>
</tr>
<tr>
<td>☐ Farm owner’s on a renter’s form such as AAIS Form No. FO-4</td>
<td></td>
</tr>
<tr>
<td>Or</td>
<td></td>
</tr>
<tr>
<td>☐ Farm liability policy</td>
<td></td>
</tr>
<tr>
<td>☐ Workers’ compensation</td>
<td>$500,000</td>
</tr>
<tr>
<td>☐ Employer’s liability</td>
<td>$___________</td>
</tr>
<tr>
<td>☐ Business automobile liability</td>
<td>$___________</td>
</tr>
<tr>
<td>☐ Umbrella/excess liability (occurrence basis)</td>
<td>$___________</td>
</tr>
</tbody>
</table>
2. Comply with the following additional insurance requirements:

   a. All liability policies must be endorsed to name Landlord as an “additional insured” on a form that does not exclude coverage for the sole or contributory ordinary negligence of Landlord and must not be endorsed to exclude the sole negligence of Landlord from the definition of “insured contract.”

   b. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.
Form 25-9

Grazing Lease

Basic Information

Date:

Landlord:

Landlord’s Address:

Tenant:

Tenant’s Address:

Premises: SURFACE ONLY of approximately [number] acres of land, situated in [county] County, Texas, as described in Exhibit [exhibit number/letter] (“Land”).

Include or attach any additional necessary legal description.

The Premises do not include crops or Excluded Improvements located on the Land.

Tenant will not be permitted to use the Excluded Improvements.

Excluded Improvements: Any structure, improvement, or equipment situated on the Land and constructed or installed by any person other than Tenant, except for the following:

[specify].

Term (months):

Commencement Date:

Termination Date:

Permitted Use: Solely for grazing of [specify].
Base Rent (monthly):

Security Deposit:

Tenant’s Insurance: As required by Insurance Addendum

A. Definitions

A.1. “Agent” means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. “Injury” means (a) harm to or impairment or loss of property or its use or (b) harm to or death of a person.

A.3. “Rent” means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant’s Obligations

B.1. Tenant agrees to—

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition “AS IS,” the Premises being currently suitable for the Permitted Use.

B.1.c. Obey all laws relating to Tenant’s use, maintenance of condition, and occupancy of the Premises.

B.1.d. Pay monthly, in advance, on the first day of the month, the Base Rent to Landlord at Landlord’s Address.
B.1.e. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.f. Pay for all labor, fuel, and utility services used by Tenant.

B.1.g. Pay all taxes on Tenant’s property located on the Premises.

B.1.h. Allow Landlord to inspect the Premises and show the Premises to prospective purchasers or tenants.

B.1.i. Repair, replace, and maintain any part of the Premises used by Tenant.

B.1.j. Repair any damage to the Premises, Land, or Excluded Improvements caused by Tenant.

B.1.k. Maintain the insurance coverages described in the attached Insurance Addendum.

B.1.l. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LANDLORD’S AGENTS HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY’S FEES AND OTHER FEES AND COURT AND OTHER COSTS) ARISING OUT OF TENANT’S OR TENANT’S AGENTS’ USE OF THE PREMISES. THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT’S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS’ COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD’S AGENTS BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR LANDLORD’S AGENTS.
B.1.m. Deliver to Landlord a financing statement perfecting the security interest.

B.1.n. Vacate the Premises on the last day of the Term.

B.1.o. Use the highest standards of animal husbandry in grazing the Premises.


B.1.q. Enter and exit the Premises at those places designated by Landlord.

B.2. **Tenant agrees not to**—

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create or allow a nuisance or permit any waste of the Premises.

B.2.c. Change Landlord’s lock system.

B.2.d. Alter the Premises, including clearing new roads, moving or erecting any fences, or locating on the Premises any type of manufactured housing or mobile home.

B.2.e. Allow a lien to be placed on the Premises.

B.2.f. Assign this lease or sublease any portion of the Premises without Landlord’s written consent.

B.2.g. Graze more than [number] head of [specify] on the Premises.

B.2.h. Hunt or fish on the Land or allow anyone else to do so.

B.2.i. Litter or leave trash or debris on the Premises.
C. **Landlord’s Obligations**

*C.1. Landlord agrees to—*

*C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.*

*C.1.b. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.*

*C.1.c. Obey all laws relating to Landlord’s operation of the Premises.*

*C.2. Landlord agrees not to—*

*C.2.a. Allow any use of the Premises inconsistent with the Permitted Use as long as Tenant is not in default.*

*C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.*

**D. General Provisions**

**Landlord and Tenant agree to the following:**

*D.1. Alterations.* Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at termination of this lease and at Tenant’s expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

*D.2. Abatement.* Tenant’s covenant to pay Rent and Landlord’s covenants are independent. Except as otherwise provided, Tenant will not be entitled to abate Rent for any reason.
D.3. Release of Claims. Tenant releases Landlord and Landlord’s Agents from all claims or liabilities for any injury to Tenant and Tenant’s Agents or to Tenant’s or Tenant’s Agents’ property located on the Premises. The release in this paragraph will apply even if the damage or loss is caused in whole or in part by the ordinary negligence or strict liability of Landlord or Landlord’s Agents but will not apply to the extent the damage or loss is caused by the gross negligence or willful misconduct of Landlord or Landlord’s Agents.

D.4. Condemnation/Substantial or Partial Taking

D.4.a. If the Premises cannot be used for the Permitted Use because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.4.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.4.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.5. Landlord’s Lien. Tenant grants to Landlord a security interest in the collateral to secure payment and performance by Tenant of all obligations and payments due from Tenant under this lease. The collateral will include all of Tenant’s crops, livestock, and personal property located or to be located on the Premises, and all products, proceeds, offspring, increase, governmental payments, insurance proceeds, documents of title, and warehouse receipts relating to such property.

This lease is a security agreement under both chapter 9 of the Texas Business and Commerce Code and the federal Food Security Act of 1985. Landlord may file financing state-
ments or continuation statements to perfect or continue the perfection of the security interest. Tenant agrees to furnish to Landlord a list of the names and addresses of any buyer, commission merchant, or selling agent to or through whom Tenant may sell the collateral. Tenant agrees to notify Landlord of the identity of any buyer, commission merchant, selling agent, or warehouse to or with whom Tenant intends to sell or store the collateral within seven days before any sale or storage of the collateral.

D.6. Default by Landlord/Events. A default by Landlord is the failure to comply with any provision of this lease that is not cured within thirty days after written notice.

D.7. Default by Landlord/Tenant’s Remedies. Tenant’s remedies for Landlord’s default are to sue for damages and terminate this lease.

D.8. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay timely Rent, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.9. Default by Tenant/Landlord’s Remedies. Landlord’s remedies for Tenant’s default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant’s obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be using the Premises for grazing, until the default is cured, without being liable for damages.
D.10. Default/Waiver. It is not a waiver of default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of a remedy does not preclude pursuit of another remedy.

D.11. Mitigation. Landlord has mitigated the loss of rent if Landlord, within thirty days after Tenant’s loss of possession, (a) places a “For Lease” sign at the Premises, (b) places the Premises on Landlord’s inventory of properties for lease, (c) makes Landlord’s inventory available to area brokers on a monthly basis, (d) advertises the Premises for lease in a suitable trade journal in the county in which the Premises are located, and (e) shows the Premises to prospective tenants who request to see it.

D.12. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.13. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.14. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.15. Attorney’s Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and other fees and court and other costs.

D.16. Venue. Exclusive venue is in the county in which the Premises are located.

D.17. Entire Agreement. This lease, its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There
are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in this lease and any exhibits, addenda, and riders.

**D.18. Amendment of Lease.** This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

**D.19. Limitation of Warranties.** THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

**D.20. Notices.** Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

**D.21. Mineral Interests.** This lease is subordinate to any present or future oil, gas, or other mineral exploration agreements and leases relating to the Land. Landlord will not be liable to Tenant for any damages for actions attributable to those agreements and will receive all consideration paid therefor.

**D.22. Landlord’s Use.** Landlord retains the right to permit third parties to use the Premises for hunting, fishing, and other uses that do not materially interfere with Tenant’s grazing rights.
If applicable, include additional clauses like those suggested in form 25-10 in this chapter and/or a list of exhibits and riders.

[Name of landlord]

[Name of tenant]
Insurance Addendum to Lease

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

Tenant agrees to—

1. Maintain the liability insurance policies required below (mark applicable boxes) during the Term and any period before or after the Term when Tenant is present on the Premises:

<table>
<thead>
<tr>
<th>Type of Insurance</th>
<th>Minimum Policy Limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>□ Commercial general liability (occurrence basis) endorsed to cover farm and ranch operations</td>
<td>Per occurrence: $________________ Aggregate: $____________</td>
</tr>
</tbody>
</table>

Or

□ Farm owner’s on a renter’s form such as AAIS Form No. FO-4

Or

□ Farm liability policy

□ Workers’ compensation $500,000

□ Employer’s liability $____________

□ Business automobile liability $____________

□ Umbrella/excess liability (occurrence basis) $____________
2. Comply with the following additional insurance requirements:

   a. All liability policies must be endorsed to name Landlord as an “additional insured” on a form that does not exclude coverage for the sole or contributory ordinary negligence of Landlord and must not be endorsed to exclude the sole negligence of Landlord from the definition of “insured contract.”

   b. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.
Additional Clauses for Leases

Form 25-10

Subordination

Clause 25-10-1

Landlord subordinates its security interest and liens to purchase-money security interests in Tenant’s personal property.

Base Rent Adjustment

Clause 25-10-2

Beginning one year from the Commencement Date, the Base Rent will be adjusted on each anniversary of the Commencement Date (the “Adjustment Date”) to reflect increases in the Consumer Price Index for “All Urban Consumers, U.S. City Average, All Items,” issued by the Bureau of Labor Statistics of the United States Department of Labor.

a. The adjustments in the Base Rent will be determined by multiplying the Base Rent specified in the lease (“Initial Base Rent”) by a fraction, the numerator of which is the index number for the last month before the adjustment and the denominator of which is the index number for the first month of the first year of the Term. If the product is greater than the Initial Base Rent, Tenant will pay this greater amount as Base Rent until the next rental adjustment. Base Rent will never be less than the Initial Base Rent.

b. Landlord will notify Tenant of each adjustment to Base Rent no later than sixty days after the Adjustment Date.
Advertisement of Premises

Clause 25-10-3

During the last thirty days of the Term, Landlord may place a sign on the Premises advertising the Premises for rent or sale.

Expansion Option

Clause 25-10-4

Tenant has the option to lease the expansion space identified in the expansion space rider. Tenant may exercise the option by giving Landlord the prior written notice described in the expansion space rider. Tenant will lease the expansion space for the rent stated in the expansion space rider. The expansion space will be accepted in “AS IS” condition with any tenant improvements to be at the expense of Tenant. The expansion space will become part of the Premises and be subject to all the terms of this lease.

Extension Option

Clause 25-10-5

Tenant has the option to extend the Term as provided in the attached extension option rider.
Waiver of Property Tax Protest Rights

Clause 25-10-6

Tenant waives all rights to protest the appraised value of the Premises or to appeal the same and all rights to receive notices of reappraisal as set forth in sections 41.413 and 42.015 of the Texas Tax Code.

Asbestos

Clause 25-10-7

Buildings or structures located on the Premises may contain asbestos-containing material or presumed asbestos-containing material as defined by OSHA regulations. Tenant has inspected the Premises and conducted such tests and inspections as Tenant deems necessary or desirable. Tenant will provide Landlord with copies of all such test results and inspections. Tenant will comply with all rules and regulations relating to asbestos in performing any maintenance, housekeeping, construction, renovation, or remodeling of the premises, and Tenant will bear all costs related to removal and disposal of asbestos from the Premises.

Tenant’s Rebuilding Obligations

Clause 25-10-8

Include the following if the tenant will rebuild everything other than the building shell.

All partitions, walls, ceiling systems, wiring, light fixtures, floors, finishes, wall coverings, floor coverings, signs, doors, hardware, windows, window coverings, plumbing, heating, ventilating, and air-conditioning
equipment, and other improvements in the Premises, whether installed by Landlord or Tenant.

Clause 25-10-9

All partitions, walls, ceiling systems, wiring, light fixtures, floors, finishes, wall coverings, floor coverings, signs, doors, hardware, windows, window coverings, plumbing, heating, ventilating, and air-conditioning equipment, and other improvements originally installed in the Premises by Tenant.

Include the following if the tenant will rebuild everything installed by the tenant.

Clause 25-10-10

All improvements that are not building standard leasehold improvements. For purposes of this lease, building standard leasehold improvements are all partitions, walls, ceiling systems, wiring, light fixtures, floors, finishes, wall coverings, floor coverings, signs, doors, hardware, windows, window coverings, plumbing, heating, ventilating, and air-conditioning equipment, and other improvements preselected by Landlord for use throughout the [Building/Shopping Center] [and described in Exhibit [exhibit number/letter] attached hereto].

Include the following if the tenant will rebuild nonstandard improvements.
Expansion Space Rider

Form 25-11

Expansion Space Rider

Description: Approximately [number] square feet as outlined in Exhibit [exhibit number/letter].

Rent: [At the Base Rent applicable to the Premises/At the rate of $[amount] per month/[specify other rent]].

Exercise of Option: [At any time during the Term/[specify other time to exercise option]].

Prior Written Notice: At least [number] days before desired date of occupancy.

__________________________________________________________________________________________________________________________

[Name of landlord]

__________________________________________________________________________________________________________________________

[Name of tenant]
Form 25-12

Extension Option Rider

Landlord grants Tenant an option to extend the Term for the period from [date] to [date] (the “Additional Term”).

Tenant’s rights under this option terminate if (1) the lease or Tenant’s right to possession of the Premises is terminated, (2) Tenant assigns its interest in the lease or sublets any portion of the Premises, (3) Tenant fails to timely exercise the option, or (4) default exists at the time Tenant seeks to exercise the option.

Landlord and Tenant agree to the following:

Select one of the following.

1. During the Additional Term the lease will continue as written.

Or

1. During the Additional Term the lease will continue as written except that the Base Rent will be [the prevailing rental rate, at the commencement of the Additional Term, for space of equivalent quality, size, utility, and location, with the length of the extended term and the credit standing of Tenant to be taken into account][specify other rent]].

Continue with the following.

2. The option to extend for the Additional Term must be exercised by written notice delivered to Landlord ninety days before the Termination Date.

__________________________________________________________________________________________________________________________...
__________________________________________________________________________________________________________________________...

[Name of landlord]

[Name of tenant]
Subordination, Attornment, and Nondisturbance Agreement

Date:

Lender:

Lender’s Address:

Lease

Date:

Landlord:

Tenant:

Tenant’s Address for Notices:

Deed of Trust

Date:

Grantor:

Beneficiary:

Recording information (if known):

Property:

Tenant agrees to the following:
Subordination, Attornment, and Nondisturbance Agreement

1. The Lease is subordinate to the Deed of Trust and all modifications, renewals, and extensions.

2. Tenant will not prepay rent more than one month before its regular monthly payment date.

3. Tenant will pay rent as instructed by a notice in substantial compliance with Texas Property Code section 64.056, received by Tenant at Tenant’s Address for Notices.

4. Tenant will attorn to the purchaser at any foreclosure sale under the Deed of Trust.

5. Lender will have no obligations and incur no liability under the Lease beyond Lender’s equity in the Property.

6. Tenant will not terminate the Lease until Tenant has given written notice of Landlord’s default to Lender and Lender has failed to cure the default within thirty days.

Lender agrees to the following:

1. Tenant may change Tenant’s Address for Notices by delivering to Lender at Lender’s Address a signed notification of the change.

2. The Lease will not be terminated in any foreclosure pursuant to the Deed of Trust.

3. The purchaser at foreclosure sale will take title to the Property subject to the terms of the Lease, and Tenant’s occupancy will not be disturbed except in accordance with the Lease.

[Name of lender]

[Name of tenant]
Include acknowledgments if agreement is to be recorded.
Tenant’s Subordination to Deed of Trust Lien

Date:

Borrower:

Borrower’s Address:

Lender:

Lender’s Address:

Lease

Date:

Landlord:

Tenant:

Recording information:

Note

Date:

Maker: Borrower

Payee: Lender

Original principal amount:

Deed of Trust
To secure a loan from Lender, Borrower executed the Note and Deed of Trust, which created a lien on the premises described in the Lease. Tenant is in possession of all or part of the premises. As a condition for closing the loan, advancing the funds, and accepting the Note and Deed of Trust, Lender requires that Tenant make the following agreements and warranties.

In return for valuable consideration, Tenant (1) subordinates the Lease and all of Tenant’s rights under it to the Deed of Trust lien, (2) agrees that the Deed of Trust lien will remain superior to the Lease and all of Tenant’s rights under it, regardless of the frequency and manner of renewal, extension, or alteration of the Note and the liens securing it, and (3) warrants that the rent specified in the Lease is being paid to Landlord.
Form 25-15

Lease Assignment

Date:

Assignor:

Assignee:

Lease

Date:

Landlord:

Tenant:

Premises:

Assignor assigns to Assignee Tenant’s interest in the Lease. Assignor agrees that Assignor remains liable on the Lease.

Assignee agrees to assume Tenant’s obligations under the Lease and to accept the premises in their present “AS IS” condition.

Landlord consents to this assignment.

[Name of assignee]

[Name of assignor]
[Name of landlord]

Include acknowledgement(s) as necessary.
Tenant’s Acceptance Letter

Date:

Lease

Date:

Landlord:

Tenant:

Premises:

Tenant acknowledges that—

1. Tenant has taken possession of the Premises.

2. Tenant has inspected the Premises.

3. The Premises are satisfactory to Tenant in the present condition and for the purpose for which they were leased.

4. Tenant has ratified the Lease.

5. Landlord has completed all improvements required by the terms of the Lease to the satisfaction of Tenant [include if applicable: except as follows: [list any improvements not completed]].

[Name of tenant]
Tenant Estoppel Certificate

Form 25-17

Tenant Estoppel Certificate

Date:

Lease

Date:

Landlord:

Tenant:

Premises:

Addressee:

Tenant certifies to Addressee that—

1. Tenant has accepted and is in possession of the Premises.

2. All required improvements have been completed to the satisfaction of Tenant.

3. Neither Landlord nor Tenant is in default in the performance of the Lease.

4. No rent under the Lease has been paid more than thirty days in advance of its due date.

5. Tenant, as of this date, has no claim of offset against the rent.

6. Tenant understands that Addressee is relying on the representations in this certificate.

7. The current monthly base rent is $[amount]. The next payment is due on [date].
8. The Lease is valid, enforceable, and unmodified [include if applicable: except as follows: [list any modifications]].

[Name of tenant]
Guaranty

Date:

Lease

Date:

Landlord:

Tenant:

Premises:

Guarantor:

Guarantor’s Address:

To induce Landlord to enter into the Lease and for other consideration, Guarantor agrees that—

1. Guarantor guarantees the performance of Tenant’s obligations under the Lease.

2. This is a primary, irrevocable, and unconditional guaranty of payment and performance and not of collection and is independent of Tenant’s obligations under the Lease.

3. Guarantor will make all payments to Landlord at Landlord’s address set forth in the Lease.

4. This guaranty will remain in effect regardless of any modification or extension of the Lease.
5. Guarantor’s obligations will not be diminished by any compromise or release agreed on by Tenant and Landlord or by the discharge, limitation, or modification of Tenant’s obligations in any bankruptcy or other debtor relief proceeding.

6. If there is more than one guarantor, the obligations of each guarantor will be joint and several.

7. Texas law applies to the guaranty.

Guarantor waives its rights—

1. To notices of acceptance, modification, extension, and default and any other notice.

2. To claim any defense arising out of lack of diligence; any failure to pursue Tenant; loss or impairment of any right of subrogation or reimbursement; release of any other guarantor or collateral; death, insolvency, or lack of corporate authority of Tenant; and waiver, release, or election, based on Landlord’s or Tenant’s rights and obligations under the Lease and the enforcement of its terms.


The prevailing party in any dispute arising out of this guaranty will be entitled to recover reasonable attorney’s fees.

__________________________________________________________

[Name of guarantor]
Form 25-19

Sublease

Basic Information

Date:

Sublessor:

Sublessor’s Address:

Sublessee:

Sublessee’s Address:

Subleased Premises:

Sublease Commencement Date:

Sublease Termination Date:

Sublease Term:

Sublease Rent:

Permitted Sublease Use:

Base Lease

Date:

Landlord:

Tenant:
Premises:

A. **Sublessee’s Obligations**

   A.1. **Sublessee agrees to—**

   A.1.a. Sublease the Subleased Premises for the Sublease Term beginning on the Sublease Commencement Date and ending on the Sublease Termination Date.

   A.1.b. Pay the Sublease Rent to Sublessor in advance of the first day of each month.

   A.1.c. Obey all laws relating to Sublessee’s use of the Subleased Premises and terms of the Base Lease as they apply to the Subleased Premises.

   A.1.d. Vacate the Subleased Premises and return all keys to the Subleased Premises on termination of this sublease.

   A.1.e. **INDEMNIFY, DEFEND, AND HOLD SUBLESSOR AND SUBLESSOR’S AGENTS HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY’S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE SUBLEASED PREMISES. THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF SUBLESSEE’S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS’ COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE SUBLEASE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF SUBLESSOR OR SUBLESSOR’S AGENTS, BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF SUBLESSOR OR SUBLESSOR’S AGENTS.**
A.1.f. Maintain liability insurance for the Subleased Premises and the conduct of Sublessee’s business, with Sublessor named as an additional insured, in the amounts stated in the Base Lease.

A.1.g. Maintain insurance on Sublessee’s personal property.

A.1.h. Deliver certificates of insurance to Sublessor before the Sublease Commencement Date and thereafter when requested.

A.2. Sublessee agrees not to—

A.2.a. Use the Subleased Premises for any purpose other than the Permitted Sublease Use.

A.2.b. Create a nuisance.

A.2.c. Interfere with any other tenant’s normal business operations or Landlord’s management of the building.

A.2.d. Permit any waste.

A.2.e. Use the Subleased Premises in any way that is extrahazardous, would increase insurance premiums, or would void insurance on the building.

A.2.f. Change Landlord’s lock system.

A.2.g. Alter the Subleased Premises.

A.2.h. Allow a lien to be placed on the Subleased Premises.

A.2.i. Assign this sublease or sublease any portion of the Subleased Premises without Sublessor’s written consent.
B. **Sublessor’s Obligations**

**Sublessor agrees to—**

**B.1.** Sublease the Subleased Premises to Sublessee for the Sublease Term.

**B.2.** Comply with Tenant’s obligations under the Base Lease.

**B.3.** Enforce Landlord’s obligations under the Base Lease.

**B.4.** Make available to the Subleased Premises all services and rights provided under the Base Lease.

**B.5.** Obey all laws relating to Sublessor’s operation of the Subleased Premises.

C. **General Provisions**

**Sublessor and Sublessee agree to the following:**

**C.1.** Defaults by Sublessee are (a) failing to pay timely Sublease Rent, (b) abandoning or vacating a substantial portion of the Subleased Premises, and (c) failing to comply within ten days after written notice with any provision of the Base Lease or sublease other than the defaults set forth in (a) or (b).

**C.2.** Sublessor’s remedies for Sublessee’s default are to (a) enter and take possession of the Subleased Premises, after which Sublessor may relet the Subleased Premises on behalf of Sublessee and receive the Sublease Rent directly by reason of the reletting, and Sublessee agrees to reimburse Sublessor for any expenditures made in order to relet, (b) enter the Subleased Premises and perform Sublessee’s obligations, and (c) terminate this sublease by written notice and sue for damages.

**C.3.** Default by Sublessor is failing to comply with any provision of this sublease within thirty days after written notice or for such lesser period provided in the Base Lease.
C.4. Sublessee’s remedy for Sublessor’s default is to sue for damages and, if the default is the failure to enforce Landlord’s obligations under the Base Lease to provide services reasonably necessary for Sublessee to occupy the Subleased Premises, terminate the Sublease.

C.5. This sublease is subordinate to the Base Lease, a copy of which Sublessee acknowledges as received.

C.6. Sublessor may retain, destroy, or dispose of any property left in the Subleased Premises at the end of the Sublease Term.

C.7. Sublessor has all the rights of Landlord under the Base Lease as to Sublessee.

C.8. If either party retains an attorney to enforce this sublease, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and other costs.

If applicable, include additional clauses like those suggested in form 25-10 in this chapter and/or a list of exhibits and riders.

[Name of sublessor]

[Name of sublessee]

Include acknowledgement(s) as necessary.

Consent of Landlord

Landlord consents to this sublease by Sublessor to Sublessee.

[Name of landlord]
Form 25-20

Landlord’s Lien Waiver

Date:

Landlord:

Landlord’s Mailing Address:

Tenant:

Tenant’s Mailing Address:

Lender:

Lender’s Mailing Address:

Lender’s Security Agreement of [date]:

Premises:

Tenant occupies the Premises under a lease from Landlord and maintains on the Premises personal property that Lender has a security interest in, or lien on, or that Lender owns.

For valuable consideration, Landlord waives all rights to maintain or enforce a statutory or contractual landlord’s lien, security interest, or any other claim against the personal property described in Lender’s Security Agreement. This waiver binds Landlord’s heirs and successors and inures to the benefit of Lender and its successors and assigns.

[Name of landlord]

Include acknowledgement as necessary.
Form 25-21

Notice of Default

[Date]

[Name and address of tenant]

Re: Lease dated [date] (the “Lease”), between [name] (“Landlord”) and [name] (“Tenant”), for [describe space or give suite number] at [address] (“the Premises”)

[Salutation]

We represent Landlord in connection with the Lease. You are in default under the Lease for the following reason[s]: [describe default[s]]. If you do not cure [this/these] default[s] by [deadline for cure], Landlord will pursue [his/her/its] available remedies.

Nothing in this letter waives any rights Landlord may have regarding [this/these] or other defaults. Landlord demands strict and timely compliance with all terms of the Lease, including the timely payment of rent.

Sincerely,

________________________________________________________________________________________________________________________

[Name of attorney]
Form 25-22

Termination of Right of Possession Letter

[Date]

[Name and address of tenant]

Re: Lease dated [date] (the “Lease”), between [name] (“Landlord”) and [name] (“Tenant”), for [describe space or give suite number] at [address] (“the Premises”)

[Salutation]

By letter dated [date], you were notified that you were in default under the Lease. To date, you have not cured the default[s]. Therefore, Landlord has elected to terminate [your right to possess the Premises and to reenter and take possession of the Premises/the Lease].

Landlord demands that you immediately vacate the Premises. [Include if applicable: If you do not vacate the Premises before the eleventh day after the date this letter is received and Landlord files suit against you, Landlord may recover attorney’s fees.]

[Include if applicable: This demand does not constitute a termination or forfeiture of the Lease. Your obligation to pay rent under the Lease continues.]

Nothing in this letter waives any rights Landlord may have regarding [this/these] or other defaults.

Sincerely,

________________________________________________________________________________________________________________________

[Name of attorney]
Form 25-23

This notice is to be posted at the premises. It is for use with commercial leases only. See Tex. Prop. Code § 93.002. Do not use it with residential leases, which are governed by Tex. Prop. Code § 92.0081.

Lockout Notice Posting

[Date]

Landlord has terminated tenant’s right to possess this space and has changed the locks. Tenant may acquire a new key, after paying all past-due rent, by contacting [name] at [address/telephone number] during [hours available], which must be during tenant’s normal working hours.
Notice of Change of Locks Letter

Form 25-24

This form is to be used for commercial leases only. See Tex. Prop. Code § 93.002. Do not use it for residential leases, which are governed by Tex. Prop. Code § 92.0081.

Notice of Change of Locks Letter

[Date]

[Name and address of tenant]

Re: Lease dated [date] (the “Lease”), between [name] (“Landlord”) and [name] (“Tenant”), for [describe space or give suite number] at [address] (“the Premises”)

[Salutation]

You are in default under the Lease, and Landlord has changed the locks to the Premises. You may obtain a new key, after paying all past-due rent, during [[hours available, which must be during tenant’s normal working hours]/your regular business hours] by contacting [name] at [address/telephone number].

Sincerely,

[Name of attorney]
Tenant Improvements Rider to Lease or Work Letter

Terms and Definitions

General Description of Work: [describe work]

[Architect/Engineer] Preparing Plans: [name]

[Architect/Engineer]’s Address: [address]

Contractor: [name]

Contractor’s Address: [address]

Contractor’s Insurance

Death/bodily injury:

Property/Builder’s risk:

Agreements

A. Preparation of Plans. Within [number] days from the execution of this lease, [Landlord/Tenant] will retain the [architect/engineer] to prepare the Plans, specifications, and other material required for completing performance of the Work (the “Plans”). The Plans will be delivered immediately to [Tenant/Landlord], who has [number] days to approve the Plans or to indicate any objections to the Plans. If [Tenant/Landlord] has objections to the Plans, it will communicate them to [Landlord/Tenant] within that time. This process will be repeated until the Plans are approved by both Landlord and Tenant. The cost of preparation of the Plans will be borne as follows: [describe cost arrangement, e.g., Landlord will pay for the initial $[amount] of the cost and Tenant will pay all excess costs].
B. **Performance of Work.** [Landlord/Tenant] will be responsible for retaining Contractor to perform the Work. [Landlord/Tenant/Contractor] will obtain all required permits for the Work. After approval of the Plans, Contractor will be instructed to perform the Work in accordance with the approved Plans and all applicable laws. The cost of performance of the Work will be borne as follows: [**describe cost arrangement, e.g.,** Landlord will pay for the initial $[**amount**] of the cost and Tenant will pay all excess costs].

C. **Schedules**

1. The parties estimate that the Plans will be approved no later than [**date**]. If the Plans are not approved by that date, the Commencement Date will be extended by the number of days of delay. If the Plans are not approved by [**date**], either party may terminate this lease by notifying the other before approval of the Plans.

2. The parties estimate that it will take [**number**] days to complete the Work. If the Work takes longer to perform and the delay is Tenant’s fault, the Commencement Date will be as stated in the lease and Tenant must begin paying Rent on the Commencement Date notwithstanding that the Work is not finished. If the delay is Landlord’s fault, the Commencement Date will be extended by the number of days of delay. As provided in paragraph B., [Landlord/Tenant] is responsible for retaining Contractor; accordingly, any delay in performance of the Work that is Contractor’s fault will be attributable to [Landlord/Tenant].

D. **Changes in Work.** Any changes in the Plans or the Work after initial approval of the Plans will require approval of Landlord and Tenant. As part of such approval, the parties must agree on any required changes to the construction schedule and who will bear any increase in cost.

E. **Contractor’s Insurance.** Contractor must maintain insurance reasonably satisfactory to Landlord in the amounts specified in the terms and definitions.
[Name of landlord]

[Name of tenant]
Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards

Form 25-26

This disclosure is used to warn a tenant about potential risks associated with lead-based paint. The form is based on the notice requirements of 40 C.F.R. § 745.113 and the disclosure form suggested by the Department of Housing and Urban Development; the language should not be altered without a review of the applicable regulations. The heading and text of the notice are required by the regulations to be in bold-faced type.

Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards

[Lease]

Lessor’s Name and Address:

Lessee’s Name and Address:

Description of Property:

Lead Warning Statement

Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.
Lessor’s Disclosure

(a) Presence of lead-based paint and/or lead-based paint hazards (check (i) or (ii) below):

☐ (i) Known lead-based paint and/or lead-based paint hazards are present in the housing [explain, providing the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces].

☐ (ii) Lessor has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

(b) Records and reports available to Lessor (check (i) or (ii) below):

☐ (i) Lessor has provided Lessee with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing (list documents below).

________________________________________________________

☐ (ii) Lessor has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

Lessee’s Acknowledgment (initial)

____ (c) Lessee has received copies of all information listed above.

____ (d) Lessee has received the lead hazard information pamphlet described in 15 U.S.C. section 2686.
Agent’s Acknowledgment (initial)

___ (e) Agent has informed Lessor of Lessor’s obligations under 42 U.S.C. section 4852d and is aware of his/her responsibility to ensure compliance.

Certification of Accuracy

The following parties have reviewed the information above and certify, to the best of their knowledge, that the information they have provided is true and accurate.

_________________________________________ ____________________________  
Lessor  Date

_________________________________________ ____________________________  
Lessee  Date

_________________________________________ ____________________________  
Agent  Date
Form 25-27

This form is used to confirm a landlord’s knowledge of the presence or absence of asbestos in the property being leased, as required by 29 C.F.R. §§ 1910.1001 et seq., 1926.1101 et seq.

Asbestos Disclosure Notice

[Lease]

Date:

Landlord’s Name and Address:

Tenant’s Name and Address:

Description of Property:

THIS ASBESTOS DISCLOSURE NOTICE (“NOTICE”) IS A DISCLOSURE OF KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THAT MAY BE DESIRED. THIS NOTICE IS NOT A WARRANTY OF ANY KIND.

Landlord’s Disclosure

1. Presence of asbestos-containing or presumed asbestos-containing material (check one):

   □ Known asbestos-containing material is present in the Property (explain).

   □ The Property was constructed before 1981, and presumed asbestos-containing material is present in the Property (explain).
☐ The Property was constructed after 1980, and Landlord has no knowledge of asbestos-containing material in the Property.

2. Records and reports available to Tenant (check one):

☐ Landlord has provided Tenant with all available records and reports pertaining to asbestos-containing material in the Property (list documents below).

____________________________________________________________

☐ Landlord has no records or reports pertaining to asbestos-containing material in the Property.

Tenant’s Acknowledgment

Tenant has received copies of all information listed above. Tenant is aware of Tenant’s responsibility to ensure compliance with 15 U.S.C. sections 2641 through 2656 and 29 C.F.R. sections 1910.1001 et seq. and 1926.1101 et seq.

Landlord Date

Tenant Date
Form 25-28

Real Estate Commission Rider

1. **Commission.** Landlord agrees to pay to the real estate broker named below (Broker) a commission in the amount of [percent] percent of the Base Rent.

2. **Payment.** The commission will be paid out of each Base Rent payment if and when actually received by Landlord. If Tenant defaults and any rent due Landlord is collected by means of litigation or with the aid of an attorney, Broker will receive a commission out of Landlord’s net recovery in the percentage amount set forth above. Landlord’s net recovery is defined as the amount Landlord eventually collects from Tenant less attorney’s fees, court costs, out-of-pocket expenses, and costs expended to obtain a new tenant for the remainder of Tenant’s term (e.g., broker’s commissions and remodeling and refurbishing costs).

3. **Brokers.** Landlord represents that it has had no dealings with any real estate broker in connection with the negotiation of this lease except Broker and knows of no other real estate broker entitled to a commission in connection with this lease. Landlord agrees to pay all real estate commissions due in connection with this lease to Broker. Landlord agrees to indemnify and hold harmless Tenant from any liability or claim arising by, through, or on behalf of Landlord, whether meritorious or not, with respect to any real estate broker not named below. Tenant represents that it has had no dealings with any real estate broker in connection with the negotiations of this lease except Broker and knows of no other real estate broker entitled to a commission in connection with this lease. Tenant agrees to indemnify and hold harmless Landlord from any liability or claim arising by, through, or on behalf of Tenant, whether meritorious or not, with respect to any real estate broker not named below.

4. **Broker Not Party to Lease.** Broker acknowledges that Broker is a party to this lease only for purposes of this Commission Rider and that Landlord and Tenant may modify,
assign, or terminate this lease without notice to or the consent of Broker as long as Broker’s commission rights are not affected.

Date: ________________________________.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of landlord]

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of tenant]

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of broker]
Manufactured-Home Community Lease

Notice to Tenant: Chapter 94 of the Texas Property Code governs certain rights granted to a manufactured-home community tenant and obligations imposed on a manufactured-home community landlord by law.

Basic Information

Date:

Landlord:

Landlord’s Address:

Landlord’s Agent for Official Notices:

Address of Landlord’s Agent for Official Notices:

Property Manager:

Property Manager’s Address:

Emergency Contact Person:

Emergency Contact Person’s Telephone Number:

Tenant:

Tenant’s Primary Residential Address:

Tenant’s Manufactured Home

Manufacturer:
Model:

Serial Number:

Label/Seal Number:

Certificate of Title Number:

Size:

Lienholder:

Lienholder’s Address:

Premises

Manufactured Home Community Name:

Lot Number:

[Block Number:]

Plat Recording Information:

Lot Address:

Number and Location of Parking Spaces:

Monthly Rent:

Term (months):

Commencement Date:

Termination Date:
Security Deposit:

Permitted Use: Placement of Tenant’s Manufactured Home for use as a private residence

Occupants (other than Tenant):

Utilities to Be Provided by Landlord:

Identification of Addenda Relating to Submetering of Utility Services:

[Expiration Date of Temporary Zoning Permit:]

A. Definition

“Rent” means Monthly Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant’s Obligations

B.1. Tenant agrees to—

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition “AS IS,” the Premises being currently suitable for Tenant’s intended Use.

B.1.c. Obey all laws and rules of the Manufactured Home Community relating to Tenant’s use and occupancy of the Premises and any common areas.

B.1.d. Pay monthly, in advance, on the first day of the month, the Monthly Rent to Landlord at Landlord’s Address.

B.1.e. Pay, as additional Rent, all other amounts due under this lease.
B.1.f. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day of the month in which it is due.

B.1.g. Pay for all utility services used by Tenant and not provided by Landlord.

B.1.h. Allow Landlord to enter the Premises to perform Landlord’s obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.i. Repair any damage to the Premises caused by Tenant or Occupants.

B.1.j. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.k. Maintain insurance on Tenant’s manufactured home and personal property.

B.1.l. Move out of the Premises at the end of the Term.

B.1.m. Pay Rent by check, money order, or other traceable or negotiable instrument.

B.1.n. Give written notice to Landlord of any change in Tenant’s Primary Residential Address.

B.2. **Tenant agrees not to**—

B.2.a. Use the Premises other than for the placement of Tenant’s Manufactured Home as a residence to be occupied by the named Tenant and Occupants.

B.2.b. Create or permit a nuisance or interfere with any other tenant’s use of its Premises.

B.2.c. Alter the Premises.

B.2.d. Allow a lien to be placed on the Premises.
B.2.e. Assign this lease or sublease any portion of the Premises without Landlord’s written consent.

C. Landlord’s Obligations

Landlord agrees to—

C.1. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.2. Obey all laws relating to Landlord’s operation of the Manufactured Home Community.

C.3. Provide the utilities specified in the lease.

C.4. Use reasonable efforts to maintain and make repairs to the common areas, utility lines in the Manufactured Home Community except those maintained by a public utility or political subdivision, the roads within the Manufactured Home Community, and conditions on the Premises that would materially affect the physical health or safety of an ordinary tenant of the Manufactured Home Community and to maintain an individual mailbox for Tenant and services for garbage and solid waste removal. Landlord will not be required to repair a condition unless Tenant notifies Landlord of the condition and Tenant has paid all Rent then due. Landlord will not be required to repair conditions caused by Tenant or Occupants, unless caused by normal wear and tear, and Landlord will not be required to maintain or make any repairs to Tenant’s Manufactured Home placed on the Premises.

C.5. Return the Security Deposit to Tenant on or before the thirtieth day after the date Tenant surrenders the Premises, after subtracting from the Security Deposit all amounts applied to cure any breach of the lease by Tenant as provided below, provided that Tenant has given Landlord written notice of Tenant’s new address.
C.6. At least sixty days before the date the Term expires, give Tenant written notice to vacate the Premises or an offer of lease renewal specifying the proposed monthly rent and any change of lease terms together with a statement notifying Tenant that the failure of Tenant to reject the offer of lease renewal not later than the thirtieth day before the date the Term expires will result in the automatic renewal of this lease as modified by the changes specified in the offer of lease renewal.

C.7. At least 180 days before a change of the Manufactured Home Community’s land use, (a) give written notice of nonrenewal to Tenant and, if the addresses are provided to Landlord in writing, to the owner of the Manufactured Home, if different from Tenant, and any Lienholder; and (b) post a notice in a conspicuous place in the Manufactured Home Community, specifying the date that the land use will change.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Casualty/Condemnation. If the Premises or the Tenant’s Manufactured Home is damaged by fire or other casualty or the Premises are condemned, either Landlord or Tenant may terminate this lease by notifying the other. Any Rent prepaid by Tenant will be returned to Tenant on termination.

D.2. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to remedy a condition that materially affects the physical health or safety of an ordinary tenant within ten days after written notice, unless such condition results from Tenant’s actions.

D.3. Default by Landlord/Tenant’s Remedies. Tenant’s remedies for Landlord’s default are to sue for damages and, if Landlord does not remedy a condition (not resulting
from Tenant’s actions) that materially affects the physical health or safety of an ordinary tenant for thirty days after notice, terminate this lease.

D.4. **Grounds for Eviction of Tenant.** Landlord may begin eviction proceedings against Tenant if Tenant fails to remove Tenant’s Manufactured Home from the Premises and otherwise vacate the Premises, after Landlord terminates this lease for one of the following grounds:

D.4.a. **Violation of Lease Provisions or Community Rules.** Tenant’s failure to comply within ten days after written notice with any provision of this lease or any rule of the Manufactured Home Community established by Landlord.

D.4.b. **Abandonment.** Tenant’s vacating or abandoning of Tenant’s Manufactured Home or the Premises.

D.4.c. **Nonpayment of Rent.** Tenant’s failure to timely pay Rent in the aggregate amount equal to at least one Monthly Rent within ten days after written notice of the delinquent Rent.

D.5. **Landlord’s Remedy for Early Termination.** The maximum amount Landlord is entitled to recover as damages for Tenant’s early termination of this lease is the amount of Rent outstanding for the remainder of the Term. If the Premises is reoccupied before the twenty-first day after the date Tenant surrenders possession of the Premises, the maximum amount Landlord is entitled to recover as damages for Tenant’s early termination of this lease is the Monthly Rent for one month.

D.6. **Mitigation.** Landlord and Tenant have a duty to mitigate damages.

D.7. **Security Deposit.** If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.
D.8. Renewal of Lease. If Tenant fails to reject Landlord’s offer to renew this lease at least thirty days before the expiration of the Term, this lease will automatically renew under the modified terms offered by Landlord beginning on the first day after expiration of the Term.

D.9. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must relocate Tenant’s Manufactured Home and otherwise vacate the Premises on receipt of notice from Landlord. Unless this lease is renewed, no holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.10. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.11. Attorney’s Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and any other costs.

D.12. Venue. Venue is in the county in which the Premises are located.

D.13. Entire Agreement. This lease, its exhibits, riders, [and] any addenda relating to submetering of utility services [include if applicable: , and the Manufactured Home Community rules] are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. There are no representations, warranties, agreements, or promises pertaining to the Premises or the lease of the Premises by Landlord to Tenant, and Tenant is not relying on any statements or representations of any agent of Landlord, that are not in those documents.

D.14. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.
D.15. **Limitation of Warranties.** THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.16. **Notices.** Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.17. **Texas Property Code.** Landlord and Tenant each acknowledge that chapter 94 of the Texas Property Code, which deals with manufactured-home community tenancies, affords certain rights and imposes certain duties on them.

D.18. **Abandoned Property.** Landlord may retain, destroy, or dispose of any property abandoned on the Premises at the end of the Term.

If applicable, include additional clauses like those suggested in form 25-10 in this chapter and/or a list of exhibits and riders, including community rules, if any.

[Name of landlord]

[Name of tenant]
Manufactured-Home Community Disclosure Form 25-30

This disclosure is required by Tex. Prop. Code § 94.051. The notice to prospective tenant must be prominently printed in at least ten-point type. Tex. Prop. Code § 94.051.

Manufactured-Home Community Disclosure

Application Date:

Landlord:

Landlord’s Address:

Prospective Tenant:

Prospective Tenant’s Address:

Premises

Manufactured Home Community Name:

Lot Number:

[Block Number:]

Prospective Tenant is applying to lease the Premises. Prospective Tenant acknowledges that on the Application Date Landlord has given to Prospective Tenant a copy of the proposed lease [include if applicable: and a copy of the rules of the Manufactured Home Community].

Notice to Prospective Tenant

You have the legal right to an initial lease term of six months. If you prefer a different lease period, you and your landlord may negotiate a shorter or longer lease period. After the initial lease period expires, you and your landlord may negotiate a new lease term by mutual
agreement. Regardless of the term of the lease, the landlord must give you at least 60 days’ notice of a nonrenewal of the lease, except that if the manufactured home community’s land use will change, the landlord must give you at least 180 days’ notice. During the applicable period, you must continue to pay all rent and other amounts due under the lease agreement, including late charges, if any, after receiving notice of the nonrenewal.

[Name of landlord]

[Name of tenant]
Form 25-31

Modification of Lease

Date:

Lease

Date:

Landlord:

Tenant:

Premises

Approximate square feet:

Name of building:

Street address/suite:

City, county, state, zip:

Lease Commencement Date:

Lease Termination Date:

Security Deposit:

Landlord and Tenant agree to the following modifications: [list modifications.]

The Lease is ratified as modified.

________________________________________________________________________________________________________________________

[Name of landlord]
[Name of tenant]
Form 25-32

Termination of Lease

Date:

Lease

Date:

Landlord:

Tenant:

Premises

Approximate square feet:

Name of building:

Street address/suite:

City, county, state, zip:

Lease Commencement Date:

Lease Termination Date:

Effective Termination Date:

Security Deposit:

Consideration:

1. Landlord and Tenant ratify the Lease.
2. Landlord acknowledges receiving from Tenant the following consideration:

\[ \text{Amount} \].

3. The Lease is terminated as of the Effective Termination Date and Tenant agrees to surrender the Premises by that date in accordance with the terms of the Lease.

4. Tenant’s Security Deposit is forfeited to Landlord/Landlord will refund the Security Deposit subject to any charge permitted by the Lease.

[Name of landlord]

[Name of tenant]
Memorandum of Lease

Date:

Landlord:

Landlord’s Mailing Address:

Tenant:

Tenant’s Mailing Address:

Tenant’s Trade Name:

Date of Lease:

Premises: [Describe or attach legal description as described in lease.]

Term:

Additional Provisions: The Lease is incorporated by reference and is binding on Landlord and Tenant. If a conflict exists between any term of this Memorandum of Lease and the Lease, the Lease controls.

[Name of landlord]

[Name of tenant]

Include acknowledgments.
Form 25-34

Insurance Addendum to Lease
[Long Form]

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

A. Tenant agrees to—

1. Maintain the property and/or liability insurance policies required below (mark applicable boxes) and such other insurance coverages and/or higher policy limits as may be required by Lienholder during the Term and any period before or after the Term when Tenant is present on the Premises:

<table>
<thead>
<tr>
<th>Type of Insurance or Endorsement</th>
<th>Minimum Policy or Endorsement Limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Liability Insurance Policies Required of Tenant:</td>
<td></td>
</tr>
<tr>
<td>□ Commercial general liability</td>
<td>Each occurrence: $__________</td>
</tr>
<tr>
<td></td>
<td>General aggregate: $__________</td>
</tr>
<tr>
<td>Or</td>
<td></td>
</tr>
<tr>
<td>□ Business owner’s policy</td>
<td>Each occurrence: $__________</td>
</tr>
<tr>
<td></td>
<td>General aggregate: $__________</td>
</tr>
</tbody>
</table>
Required Endorsements to Tenant’s General Liability or Business Owner’s Policy:

☐ Designated location(s) general aggregate limit

☐ ____________________________________________________________________ $________

Include any other desired endorsements. See chapter 17 of this manual.

Additional Liability Insurance Policies Required of Tenant:

☐ Workers’ compensation Statutory limit

☐ Employer’s liability $________ each accident for bodily injury by accident/each employee for bodily injury by disease/bodily injury by disease for entire policy

☐ Business auto liability $________

☐ Excess liability $________

Or

☐ Umbrella liability (occurrence basis) $________

Property Insurance Policy Required of Tenant:

☐ Commercial property insurance written on a causes of loss—special form (formerly known as “all risks” form) 100 percent of replacement cost of (a) all items included in the definition of Tenant’s Rebuilding Obligations and (b) all of Tenant’s furniture, fixtures, equipment, and other business personal property located in the Premises

Or
2. Comply with the following additional insurance requirements:

   a. The commercial general liability (or business owner’s property policy) must be (i) written on an occurrence basis, (ii) endorsed to name of Landlord, Landlord’s property manager, if any, and Landlord’s Lienholder, if any, as “additional insureds,” (iii) include contractual liability under Coverage A sufficient to respond to a broad-form indemnity, (iv) if Tenant operates multiple locations, be endorsed with a Designated Location(s) General Aggregate Limit endorsement, and (v) be primary and noncontributory with Landlord’s liability insurance coverage.

   □ Business owner’s policy  100 percent of replacement cost of (a) all items included in the definition of Tenant’s Rebuilding Obligations and (b) all of Tenant’s furniture, fixtures, equipment, and other business personal property located in the Premises

   Required Endorsements to Tenant’s Causes of Loss—[Special Form/Business Owner’s] Policy:

   □ Business income and additional expense  Sufficient limits to address reasonably anticipated business interruption losses for a period of ____ months

   □ Equipment breakdown (formerly boiler and machinery)  $___________

   □ Flood  $___________

   □ Earth movement  $___________

   □ Increased limits of ordinance or law coverage to cover increased cost of construction  $___________

   □ Increased limits of debris removal  $___________

   □ Plate Glass  Sufficient limits to cover plate glass

   □ Increased limits for signs  Sufficient limits to cover exterior signage

   Include any other desired endorsements. See chapter 17.
b. The commercial property insurance policies must contain (i) optional coverage for agreed value to eliminate the coinsurance clause, (ii) optional coverage for replacement cost, (iii) a waiver of subrogation clause in favor of the party not carrying the commercial property insurance, and (iv) waivers of subrogation of claims against Landlord and Lienholder.

c. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

3. Obtain the approval of Landlord and Lienholder with respect to the following: the forms of Tenant’s insurance policies, endorsements and certificates, and other evidence of Tenant’s Insurance; the amounts of any deductibles or self-insured retentions amounts under Tenant’s Insurance; and the creditworthiness and ratings of the insurance companies issuing Tenant’s Insurance.

B. Landlord agrees to maintain the property and/or liability insurance policies required below (mark applicable boxes) during the Term:

<table>
<thead>
<tr>
<th>Type of Insurance</th>
<th>Minimum Policy Limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ Commercial general liability</td>
<td>Each occurrence: $_________________  General aggregate: $_________________</td>
</tr>
<tr>
<td>(occurrence basis)</td>
<td></td>
</tr>
<tr>
<td>☐ Commercial property insurance written on a causes of loss—special form</td>
<td>100 percent of replacement cost of the [Shopping Center/Building] exclusive of founda-</td>
</tr>
<tr>
<td></td>
<td>tion, footings, infrastructure, sitework, and the rebuilding requirements of all lessees</td>
</tr>
</tbody>
</table>
Form 25-35

Insurance Addendum to Lease
[Short Form]

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

A. Tenant agrees to—

1. Maintain the following coverages:

   a. Commercial property insurance written on a causes of loss—special form
      (formerly known as “all risks” form) covering Tenant’s personal property,
      fixtures, and leasehold improvements in the Premises, and naming Landlord
      as “Building Owner Loss Payable.”

   b. Business income and extra expense property insurance naming Landlord as
      an “additional insured” and covering income and ongoing expenses, including
      rent, for a period of at least twelve months.

   c. Commercial general liability insurance written on an occurrence basis,
      including contractual liability, covering Tenant’s operations within the
      Premises, naming Landlord, Landlord’s property manager, if any, and Land-
      lord’s Lienholder, if any, as “additional insured,” and having limits of not
      less than $1,000,000 each occurrence and $2,000,000 general aggregate.
d. Business auto liability insurance written on an occurrence basis and having a combined single limit of not less than $1,000,000.

e. Workers’ compensation insurance in the statutory amount and employer’s liability insurance having limits of not less than $500,000 each accident for bodily injury by accident, $500,000 each employee for bodily injury by disease, and $500,000 bodily injury by disease for entire policy. Both policies must have a waiver of subrogation in favor of Landlord.

2. Deliver certificates of insurance and copies of any additional insured and waiver of subrogation endorsements to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

B. Landlord agrees to maintain—

1. Commercial property insurance written on a causes of loss—special form covering the building in which the Premises is located.

2. Commercial general liability insurance written on an occurrence basis, including contractual liability, covering Landlord’s operations within the building in which the Premises is located and having limits not less than $2,000,000 each occurrence and $4,000,000 general aggregate.

C. Landlord and Tenant agree that—

1. The commercial property insurance policies maintained by them will contain (a) optional coverage for agreed value to eliminate the coinsurance clause, (b) optional coverage for replacement cost, (c) increased limits of ordinance or law coverage to cover increased cost of construction, (d) increased limits for debris removal coverage, and (e) a waiver of subrogation clause in favor of the party not carrying the commercial property insurance.
2. The commercial general liability insurance will be primary to the maintaining party and not contributory to any similar insurance carried by the other party and will contain a severability-of-interest clause.
## Chapter 26
### Miscellaneous Documents

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Form 26-1

This affidavit establishes in the real property records the death of an owner of real property and the status of the heirs of the decedent and is used if there is no will or administration in the probate court. This form is based on the one suggested by the statute. See Tex. Est. Code § 203.002.

Affidavit of Facts Concerning Identity of Heirs

Date:

Decedent:

Property:

[First] Spouse:

[Second Spouse:]

Affiant:

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. My name is [name of affiant], and I live at [address]. I am personally familiar with the family and marital history of [name of decedent], Decedent, and I have personal knowledge of the facts stated in this affidavit.

2. I knew Decedent from [date] until [date]. Decedent died on [date]. Decedent’s place of death was [place of death]. At the time of Decedent’s death, Decedent’s residence was [address].

3. Decedent’s marital history was as follows: [describe marital history and, if the decedent’s spouse is deceased, specify the date and place of the spouse’s death].
4. Decedent had the following children: [specify name, birth date, name of other parent, and current address of child or date of death of child and descendants of deceased child, as applicable, for each child].

5. Decedent did not have or adopt any other children and did not take any other children into Decedent’s home or raise any other children, except: [specify name[s] of child[ren] or state “none”].

6. Decedent’s mother was: [specify name, birth date, and current address or date of death of mother, as applicable].

7. Decedent’s father was: [specify name, birth date, and current address or date of death of father, as applicable].

8. Decedent had the following siblings: [specify name, birth date, and current address or date of death of each sibling and parents of each sibling and descendants of each deceased sibling, as applicable, or state “none”].

9. The following persons have knowledge regarding Decedent, the identities of Decedent’s children, if any, and parents or siblings, if any: [specify names of persons with knowledge or state “none”].

10. Decedent died without leaving a written will. [Modify statement if the decedent left a written will.]
11. There has been no administration of Decedent’s estate. [Modify statement if there has been administration of the decedent's estate.]

12. Decedent left no debts that are unpaid, except: [specify debts or state “none”].

13. There are no unpaid estate or inheritance taxes, except: [specify unpaid taxes or state “none”].

14. To the best of my knowledge, Decedent owned an interest in the following real property: [specify real property in which the decedent owned an interest or state “none”].

15. The following were the heirs of Decedent: [specify names of heirs].

16. [Include additional information as appropriate, such as size of the decedent’s estate.]

__________________________________________________________________________________________________________________________ ...

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on __________________ by [name of affiant].

__________________________________________________________________________________________________________________________ ...

Notary Public, State of Texas
Form 26-2

This affidavit resolves ambiguities or discrepancies, such as spelling variations, abbreviations, nicknames, initials, or the use of two or more different names to identify the same person, in the name and identity of the person referred to in the affidavit.

Affidavit of Identity

Date:

Affiant:

[Affiant’s Other Name(s):]

Affiant on oath swears that the following statement[s] [is/are] true and [is/are] within the personal knowledge of Affiant:

Select one of the following.

Affiant is sometimes known by Affiant’s Other Name[s]. Affiant and the person[s] indicated by Affiant’s Other Name[s] are the same person.

Or

Affiant is not the same person as the [name] named in [specify document].

Continue with the following.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on ________________ by [name of affiant].

Notary Public, State of Texas
Form 26-3

This affidavit recites marital history and identifies former or present spouses. The affidavit is used to indicate whether property should be classified as separate or community and also may be used to identify potential homestead problems or outstanding life estates in real property.

Affidavit of Marital Status

Date:

Affiant:

Property:

Date of Acquisition:

[Affiant’s Spouse:]

[Date of Marriage:]

[Affiant’s Former Spouse:]

[Date of Marriage:]

[Date of [Divorce/Death]:]

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

Affiant acquired title to the Property on the Date of Acquisition. Affiant was then unmarried and has remained unmarried continuously through the date of this affidavit.

Or
Affiant acquired title to the Property on the Date of Acquisition, and Affiant was then unmarried. Affiant subsequently married Affiant’s Spouse on the Date of Marriage, and they have remained married to each other continuously from then through the date of this affidavit.

Or

Affiant acquired title to the Property on the Date of Acquisition. Affiant was then married to Affiant’s Spouse, and they have remained married to each other continuously from then through the date of this affidavit.

Or

Affiant acquired title to the Property on the Date of Acquisition, and Affiant was then married to Affiant’s Former Spouse. They remained married to each other until they were divorced on the Date of Divorce, and Affiant acquired full title to the Property in the divorce. Affiant has not married again since the divorce.

Or

Affiant acquired title to the Property on the Date of Acquisition, and Affiant was then married to Affiant’s Former Spouse. They remained married to each other until they were divorced on the Date of Divorce, and Affiant acquired full title to the Property in the divorce. Affiant remained unmarried until marrying Affiant’s Spouse on the Date of Marriage, and they have remained married to each other continuously from then through the date of this affidavit.

Or

Affiant acquired title to the Property on the Date of Acquisition, and Affiant was then married to Affiant’s Former Spouse. They remained married to each other until Affiant’s Former Spouse died on the Date of Death, at which time Affiant acquired full title to the Property. Affiant has not married again since that time.
Affidavit of Marital Status

Affiant acquired title to the Property on the Date of Acquisition, and Affiant was then married to Affiant’s Former Spouse. They remained married to each other until Affiant’s Former Spouse died on the Date of Death, at which time Affiant acquired full title to the Property. Affiant remained unmarried until marrying Affiant’s Spouse on the Date of Marriage, and they have remained married to each other continuously from then through the date of this affidavit.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on ________________ by [name of affiant].

__________________________________________
Notary Public, State of Texas
An oil, gas, and mineral lease affects record title until the lease is properly released of record or it terminates according to its terms. One method of showing that a lease has terminated is to have a release executed by the lessee or the assignee of the lessee and filed in the real property records. If the lessee or assignee cannot be located, an affidavit of nonproduction is another means of demonstrating that a lease has expired. Provisions in oil, gas, and mineral leases typically specify events that terminate the lease. This affidavit evidences expiration of a lease because of nonproduction. It may be required by a purchaser before buying the property, by a lienholder making a loan with the property as collateral, or by a lessee. This affidavit can be modified if the termination is caused by other events specified in the lease.

Affidavit of Nonproduction

Date:

Oil and Gas Lease

Date:

Lessor:

Lessee:

Property:

Primary Term of the lease: [number] years

Owner:

[Buyer:]

[Lienholder:]

[Lessee:]

[Title Company:]
Owner on oath swears that the following statements are true and are within the personal knowledge of Owner:

Owner owns the Property. The Property was described in the Oil and Gas Lease.

Select one of the following.

No drilling operations were begun during the Primary Term. No oil, gas, or other mineral was produced from the Property during the Primary Term. No oil, gas, or other mineral is now being produced from the Property.

Or

Drilling operations were conducted during the Primary Term, but no oil, gas, or other mineral was produced from the Property during the Primary Term. No oil, gas, or other mineral is now being produced from the Property.

Or

Drilling operations were conducted during the Primary Term. Oil, gas, or another mineral was produced from the Property during the Primary Term, but no oil, gas, or other mineral is now being produced from the Property.

Continue with the following.

This affidavit is to establish of record that the Oil and Gas Lease has expired by its terms.

Include the following if applicable.

This affidavit is made for [Buyer to rely on in buying the Property/Lienholder to rely on in making a loan that is secured by a lien on the Property/Lessee to rely on in leasing the Property/Title Company to rely on in issuing title insurance with respect to the Property].
Affidavit of Nonproduction

Form 26-4

__________________________________________________________________________________________________________________________ ...

[Name of owner]

SUBSCRIBED AND SWORN TO before me on __________________ by [name of affiant].

__________________________________________________________________________________________________________________________ ...

Notary Public, State of Texas
Form 26-5

This certificate is to be used by a corporation, limited partnership, limited liability partnership, limited liability company, or foreign filing entity to register an assumed name in the county records and secretary of state’s records. See the Assumed Business or Professional Name Act, Tex. Bus. & Com. Code ch. 71, particularly Tex. Bus. & Com. Code §§ 71.101–.104, for requirements of execution and filing.

Assumed [Business/Professional] Name Certificate for Incorporated Business or Profession

Date:

Registrant:

Assumed Name:

[County/Counties]:

The time period during which the assumed name will be used may not exceed ten years. See Tex. Bus. & Com. Code § 71.052(3).

Period of Use:

Select one of the following.

1. Registrant [is conducting/will conduct] business under the Assumed Name.

Or

1. Registrant [is rendering/will render] professional service under the Assumed Name.

Continue with the following.

2. The name of Registrant as stated in its [certificate of formation/application for registration/[specify comparable document]] is [name of registrant].
3. The state, country, or other jurisdiction under the laws of which Registrant was [incorporated/organized/associated] is [jurisdiction]. The address of Registrant’s registered or similar office in that state, country, or jurisdiction is [address].

4. The period during which the Assumed Name will be used is the Period of Use.

5. Registrant is a [for-profit corporation/nonprofit corporation/professional corporation/professional association/limited partnership/limited liability partnership/limited liability company/foreign filing entity/[specify type of organization]].

6. The address of Registrant’s principal office is [address].

7. Business [is being/will be] conducted under the Assumed Name in the [county/counties].

8. Professional services [are being/will be] rendered under the Assumed Name in the [county/counties].

8. The attorney-in-fact executing this certificate for Registrant has been duly authorized in writing by [his/her] principal to execute and acknowledge this certificate.

[Name]

Include acknowledgment.
Assumed Name Certificate for Unincorporated Business or Profession

Date:

Registrant:

Assumed Name:

[County/Counties]:

The time period during which the assumed name will be used may not exceed ten years. See Tex. Bus. & Com. Code § 71.052(3).

Period of Use:

Select one of the following.

1. Registrant [is conducting/will conduct] business under the Assumed Name.

Or

1. Registrant [is rendering/will render] professional service under the Assumed Name.

Select one of the following.

2. Registrant is an individual whose full name and residence address are [name and address].
2. Registrant is a partnership named [name of partnership]. The partnership office address is [address]. The full names and addresses of each general partner are [names and addresses (residence for individuals, office for other entities)].

2. Registrant is a joint venture named [name of joint venture]. The joint venture office address is [address]. The full names and addresses of each joint venturer are [names and addresses (residence for individuals, office for other entities)].

2. Registrant is an estate named [name of estate]. The estate’s address is [address]. The full names and addresses of each representative of the estate are [names and addresses (residence for individuals, office for other entities)].

2. Registrant is a real estate investment trust named [name of trust]. The address of the trust is [address]. The full names and addresses of each trustee manager are [names and addresses (residence for individuals, office for other entities)].

2. Registrant is a company other than a real estate investment trust or a corporation. The name of the company is [name of company]. The state, country, or other jurisdiction under the laws of which it was organized or associated is [jurisdiction]. Its office address is [address].

3. The period during which the Assumed Name will be used is the Period of Use.
4. The [business/professional service] that [is/will be] [conducted/rendered] in the [county/counties] under the Assumed Name [is being/will be] [conducted/rendered] as a [proprietorship/sole practitioner/joint venture/partnership/real estate investment trust/joint-stock company/[other form of unincorporated business or professional association or legal entity other than a limited partnership, registered limited liability partnership, or limited liability company]].

Include the following if applicable.

5. The attorney[s]-in-fact executing this certificate for Registrant [has/have] been duly authorized in writing by [his/her/their] principal[s] to execute and acknowledge this certificate.

Include signature and acknowledgment for each registrant who is an individual. For all other registrants, include signatures and acknowledgments under oath.
Form 26-7

This form is used to establish the common boundary between two parcels by agreement if the location of the boundary has become obscured over time because of fence locations or discrepancies in survey calls.

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Boundary Line Agreement and Special Warranty Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Owner:

Owner’s Address:

Owner’s Property: That certain tract containing [number] acres, more or less, which is located in [county] County, Texas and is more fully described in Exhibit [exhibit number/letter] attached hereto and incorporated herein by reference for all purposes.

Adjoining Owner:

Adjoining Owner’s Address:

Adjoining Owner’s Property: That certain tract containing [number] acres, more or less, which is located in [county] County, Texas and is more fully described in Exhibit [exhibit number/letter] attached hereto and incorporated herein by reference for all purposes.

Based on [an examination of title/surveys] of Owner’s Property and Adjoining Owner’s Property, there appears to be a question as to the location of the common boundary line
between Owner’s Property and Adjoining Owner’s Property. Owner and Adjoining Owner
desire to settle the question by executing this agreement.

In consideration of settling the existing boundary line dispute and other good and valu-
able consideration, the receipt and sufficiency of which are hereby acknowledged, Owner and
Adjoining Owner hereby agree as follows:

1. Set forth in Exhibit [exhibit number/letter] attached hereto and incorporated herein
by reference for all purposes is a metes-and-bounds description of the line that Owner and
Adjoining Owner have agreed will henceforth constitute the common boundary line between
Owner’s Property and Adjoining Owner’s Property.

2. Owner and Adjoining Owner hereby grant, sell, and convey to each other their
respective interests, if any, in the real property lying on the opposite side of the agreed com-
mon boundary line from the remaining property that each of them owns, together with, all and
singular, the rights and appurtenances thereto in any way belonging, to have and to hold such
interests to the grantee and grantee’s heirs, successors, and assigns forever, and hereby agree
to warrant and forever defend the title to these interests in the grantee and the grantee’s
respective heirs, successors, and assigns against all claims arising by, through, or under the
grantor but not otherwise.

3. This agreement binds and inures to the benefit of Owner and Adjoining Owner
and their respective heirs, personal representatives, successors, and assigns.

[Name of owner]

[Name of adjoining owner]

Include acknowledgments and exhibits.
Form 26-8

All property acquired during marriage is presumed to be community property, except property acquired by gift, devise, or descent. During marriage, real property is presumed to be subject to the sole management, control, and disposition of the spouse in whose name the property is held. See Tex. Fam. Code §§ 3.102, 3.104. A spouse may evidence that certain property is subject to the sole management, control, and disposition of the other spouse by executing this form.

Certificate of Management, Control, and Disposition

Date:

Spouse A:

Spouse B:

[Purchaser:]  

[Lienholder:]  

Property:

[Spouse B/Spouse A] represents and warrants to [Purchaser/Lienholder/Purchaser and Lienholder] that [Spouse A/Spouse B] has the sole management, control, and disposition of the Property and that no divorce action is pending between the Spouses.

This instrument is executed for valuable consideration. [Purchaser/Lienholder/Purchaser and Lienholder], all subsequent transferees of the Property, all title insurance companies and agencies insuring title of the Property, and the world at large may rely on this instrument in dealing with [Spouse A/Spouse B] without [Spouse B/Spouse A]’s joinder.

[Name of spouse B/spouse A]
Include acknowledgment.
Form 26-9

This form certifies that a corporation has authorized an action. Most often this is done to confirm an individual officer’s authority to act on behalf of the corporation in connection with buying, selling, or mortgaging real property.

Certificate of Resolutions
[Corporation]

Date:

Corporation:

Date of Adoption: [date of meeting of board of directors or of written consent of directors]

The undersigned [secretary/assistant secretary] of the Corporation certifies the following facts:

1. The Corporation is organized and operating under the laws of [Texas/other state], is registered to do business in Texas, and is in good standing.

2. No proceeding for [termination of the certificate of formation/revocation of the registration] of the Corporation or for voluntary or involuntary termination of the Corporation is pending.

3. Neither the certificate of formation nor the bylaws of the Corporation limit the power of the board of directors to pass the resolutions [below/attached].

4. The undersigned is authorized to make and sign this certificate.

5. The undersigned keeps the records and minutes of the proceedings of the board of directors of the Corporation, and the resolutions [below/attached] are an accurate reproduction.
of the ones made in those proceedings. They have not been amended, modified, or rescinded and are now in full force and effect.

6. The resolutions [below/attached] were duly adopted on the Date of Adoption. The meeting of the board of directors was called and held in accordance with law and the bylaws of the Corporation, and a quorum was present.

Or

6. The resolutions [below/attached] were duly adopted on the Date of Adoption. A quorum was present at the meeting of the board of directors, and all directors had signed a waiver of notice of the meeting in accordance with law and the bylaws of the Corporation.

Or

6. The resolutions [below/attached] were duly adopted by unanimous written consent of all directors as of the Date of Adoption, and the unanimous consent conforms with law and the bylaws of the Corporation.

Continue with the following.

Include or attach full text of resolution(s). See, e.g., form 10-6 in this manual.

7. [Set forth below/Attached] is a list of the names, titles, and signatures of the individuals who are currently serving as officers of the Corporation.

[Name of [secretary/assistant secretary]]

Include corporate seal (if necessary) and corporate acknowledgment.

Include the following if applicable.
The undersigned hereby certifies that [he/she] is the duly elected and qualified president of [name of corporation]; that [name] is the duly elected and qualified [secretary/assistant secretary] of [name of corporation]; that the signature above is [name]’s genuine signature; and that the foregoing certificate of resolutions is true and correct.

[Name of president]

Include acknowledgment.
Form 26-10

This form certifies that a general partnership has authorized an action. Most often this is done to confirm an individual partner’s authority to act on behalf of the partnership in connection with buying, selling, or mortgaging real property.

Certificate of Resolutions
[General Partnership]

Date:

Partnership:

Date of Adoption: [date of meeting of partners or of written consent of partners]

We, the partners of the Partnership, a general partnership, certify that we have custody of the records of the Partnership and that we are authorized to execute and deliver this certificate of resolutions on behalf of the Partnership. We further certify as follows:

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A meeting of the partners of the Partnership was called and held in accordance with law and the partnership agreement of the Partnership, and a quorum was present. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

Or

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A quorum was present at the meeting of the partners of the Partnership, and all partners had signed a waiver of notice of the meeting in accordance with law and the partnership agreement of the Partnership. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.
1. The resolutions [below/attached] were duly adopted by written consent of partners of the Partnership owning [all/the requisite percentage] of the ownership in the Partnership as of the Date of Adoption, and the written consent conforms with law and the partnership agreement of the Partnership. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

2. We further certify that the Partnership is duly formed and validly existing under the laws of the state of Texas; that no proceeding is pending for the winding up or termination of the Partnership; that there is no provision in the partnership agreement of the Partnership limiting the powers of the partners of the Partnership to adopt the resolutions referred to above and that the resolutions are in conformity with the requirements of the partnership agreement of the Partnership; that the undersigned are the keepers of the records and minutes of the proceedings of the Partnership; and that the following persons constitute all of the partners of the Partnership:

[Name of partner]

[Name of partner]

Include acknowledgments.
Form 26-11

This form certifies that a limited liability company has authorized an action. Most often this is done to confirm an individual member’s or manager’s authority to act on behalf of the limited liability company in connection with buying, selling, or mortgaging real property.

Certificate of Resolutions
[Limited Liability Company]

Date:

Company: [name of limited liability company]

Date of Adoption: [date of meeting or of written consent]

[I/We], the [members/managers/secretary/other authorized officer] of the Company, a Texas limited liability company, certify that [I/we] have custody of the records of the Company and that [I am/we are] authorized to execute and deliver this certificate of resolutions on behalf of the Company. [I/We] further certify as follows:

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A meeting of the [members/managers] of the Company was called and held in accordance with law and the company agreement of the Company, and a quorum was present. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

Or

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A quorum was present at the meeting of the [members/managers] of the Company, and all [members/managers] had signed a waiver of notice of the meeting in accordance with law and the company agreement of the Company. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.
1. The resolutions [below/attached] were duly adopted as of the Date of Adoption by written consent of the [members/managers] of the Company as required by law and the operating agreement of the Company. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

2. [I/We] further certify that the Company is duly organized and existing under the laws of the state of [Texas/[name of state], is registered to do business in Texas,] and is in good standing; that no proceeding is pending for the termination of the [certificate of formation/registration] of the Company or for the winding up or termination, voluntary or involuntary, of the Company; that there is no provision of the company agreement or certificate of formation of the Company limiting the powers of the members or managers of the Company to adopt the resolutions referred to above and that the resolutions are in conformity with the provisions of the company agreement and the certificate of formation of the Company; that the undersigned is the keeper of the records and minutes of the proceedings of the Company; and that the following persons constitute all of the [members/managers] of the Company:

[Name of member/manager]

[Name of member/manager]

Include signatures of members, managers, or secretary and acknowledgments.
Form 26-12

This form certifies that a limited partnership has authorized an action. Most often this is done to confirm the general partner’s authority to act on behalf of the limited partnership in connection with buying, selling, or mortgaging real property.

Certificate of Resolutions
[Limited Partnership]

Date:

Partnership: [name], a Texas limited partnership

Date of Adoption: [date of meeting of partners or of written consent]

I, the duly elected [secretary/[other authorized officer]] of [name of company] (the “Company”), a Texas [type of company], in its capacity as general partner of the Partnership, certify that I have custody of the [corporate/partnership] records of the Company and the partnership records of the Partnership and that I am authorized to execute and deliver this certificate of resolutions on behalf of the Company in its capacity as general partner of the Partnership. I further certify as follows:

1. Partners holding [all/the required percentage] of the partnership interests in the Partnership consented to the activities by the Partnership reflected in the resolutions [below/attached]. The resolutions were duly adopted on the Date of Adoption. A meeting of the partners of the Partnership was called and held in accordance with law and the partnership agreement of the Partnership, and a quorum was present. The consent has not been amended, modified, or rescinded and is now in full force and effect.

Or
1. Partners holding [all/the required percentage] of the partnership interests in the Partnership consented to the activities by the Partnership reflected in the resolutions [below/attached]. The resolutions were duly adopted on the Date of Adoption. A quorum was present at the meeting of the partners of the Partnership, and all partners had signed a waiver of notice of the meeting in accordance with law and the partnership agreement of the Partnership. The consent has not been amended, modified, or rescinded and is now in full force and effect.

Or

1. Partners holding [all/the required percentage] of the partnership interests in the Partnership have given written consent to the activities by the Partnership reflected in the resolutions [below/attached]. The resolutions were duly adopted by written consent of the partners of the Partnership as of the Date of Adoption in accordance with law and the partnership agreement of the Partnership. The consent has not been amended, modified, or rescinded and is now in full force and effect.

Continue with the following.

Include or attach full text of resolution(s). See, e.g., form 10-6 in this manual.

2. I further certify that the Company is duly organized and existing under the laws of the state of [Texas/[name of state], is registered to do business in Texas,] and is in good standing; that no proceeding is pending for the winding up or termination, voluntary or involuntary, of the Company or the Partnership; that there is no provision of the partnership agreement or certificate of formation of the Partnership limiting the powers of the partners of the Partnership to adopt the consent referred to above and that the consent is in conformity with the provisions of the agreement of limited partnership and certificate of formation; that the undersigned is the keeper of the records and minutes of the proceedings of the partners of the Partnership; and that the following persons constitute all of the partners of the Partnership:
The undersigned hereby certifies that [he/she] is the duly elected and qualified president of [name of company]; that [name] is the duly elected and qualified [secretary/[other officer]] of [name of company]; that the signature above is [name]’s genuine signature; and that the foregoing certificate of resolutions is true and correct.
Form 26-13

This form certifies that a nonprofit corporation has authorized an action. Most often this is done to confirm an individual officer’s authority to act on behalf of the nonprofit corporation in connection with buying, selling, or mortgaging real property.

Certificate of Resolutions
[Nonprofit Corporation]

Date:

Corporation:

Date of Adoption: [date of meeting or of written consent]

[I/We], the [members/directors/secretary/[other authorized officer]] of [name of corporation] (the “Corporation”), a Texas nonprofit corporation, certify that [I/we] have custody of the records of the Corporation and that [I am/we are] authorized to execute and deliver this certificate of resolutions on behalf of the Corporation. [I/We] further certify as follows:

Select one of the following.

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A meeting of the [members/directors] of the Corporation was called and held in accordance with law and the bylaws of the Corporation, and a quorum was present. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

Or

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A quorum was present at the meeting of the [members/directors] of the Corporation, and all [members/directors] had signed a waiver of notice of the meeting in accordance with law and the bylaws of the Corporation. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.
1. The resolutions [below/attached] were duly adopted as of the Date of Adoption by written consent of the [members/directors] of the Corporation as required by law and the bylaws of the Corporation. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

2. [I/We] further certify that the Corporation is duly organized and existing under the laws of the state of [Texas/[name of state], is qualified to do business in Texas,] and is in good standing; that no proceeding is pending for the termination of the Corporation’s [certificate of formation/registration] or for the winding up or termination, voluntary or involuntary, of the Corporation; that there is no provision of the bylaws or certificate of formation of the Corporation limiting the powers of the [members/directors] of the Corporation to adopt the resolutions referred to above and that the resolutions are in conformity with the provisions of the bylaws and the certificate of formation of the Corporation; that the undersigned is the keeper of the records and minutes of the proceedings of the Corporation; and that the following persons constitute all of the [members/directors] of the Corporation:

   [Name of member or director]

   [Name of member or director]

Include signatures of members, directors, or secretary and acknowledgments.

Include the following if applicable.
The undersigned hereby certifies that [he/she] is the duly elected and qualified president of [name of corporation]; that [name] is the duly elected and qualified [secretary/[other officer]] of [name of corporation]; that the signature above is [name]’s genuine signature; and that the foregoing certificate of resolutions is true and correct.

[Name of president]
Certificate of Resolutions [Unincorporated Association]

Date:

Unincorporated Association:

Date of Adoption: [date of meeting of members or of written consent]

I, the [title] of [name of association] (the “Association”), an unincorporated association, certify that I have custody of the records of the Association and that I am authorized to execute and deliver this certificate of resolutions on behalf of the Association. I further certify as follows:

Select one of the following.

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A meeting of the members of the Association was called and held in accordance with law and the governing documents of the Association, and a quorum was present. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

Or

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A quorum was present at the meeting of the members of the Association, and all members had signed a waiver of notice of the meeting in accordance with law and the governing documents of the Association. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.
1. The resolutions [below/attached] were duly adopted as of the Date of Adoption by written consent of the required percentage of the members of the Association, and the written consent conforms with law and the governing documents of the Association. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

Continue with the following.

Include or attach full text of resolution(s). See, e.g., form 10-6 in this manual.

2. I further certify that the Association is qualified to do business in Texas; that no proceeding is pending for the winding up or termination of the Association; that there is no provision in the governing documents of the Association limiting the powers of the members of the Association to adopt the resolutions referred to above and that the resolutions are in conformity with the requirements of the governing documents; that the undersigned is the keeper of the records and minutes of the proceedings of the Association; and that the following persons constitute all of the officers of the Association:

[Name of officer]
[Title]

[Name of officer]
[Title]

Include acknowledgment(s).

Include the following if applicable.

The undersigned hereby certifies that [he/she] is the duly elected and qualified president of [name of association]; that [name] is the duly elected and qualified [secretary/other...}
of [name of association]; that the signature above is [name]’s genuine signature; and that the foregoing certificate of resolutions is true and correct.

[Name of president]
Form 26-15

This form is used by a borrower or borrower’s counsel to instruct an escrow agent regarding the closing of a real estate transaction and disbursement of the documents evidencing and securing a loan secured by real estate.

Closing Instructions
[from Borrower]

[Date]

[Name of escrow officer]
[Name and address of escrow agent]

Re: $[amount] Loan (“Loan”) from
[name of lender] (“Lender”) to
[name of borrower] (“Borrower”)
Your GF Number:

[Salutation]

Set forth below are Borrower’s instructions for closing the above-referenced Loan from Lender to Borrower.

1. Enclosed with this letter or otherwise delivered to you are the following documents for your use in closing this Loan (collectively, the “Documents”):

   Select as applicable from the following examples.

   a. Promissory Note in the original principal amount of the Loan (the “Note”).

   b. Deed of Trust [include as applicable: , Security Agreement, Assignment of Rents and Leases, [and] Financing Statement] (the “Deed of Trust”).

   c. Financing Statement to be filed with the Texas secretary of state’s office (the “Financing Statement”).
d. Borrower’s Closing Certificate and Affidavit (the “Closing Certificate”).

e. Certificate of Resolutions (the “Resolution Certificate”).

f. Form of Opinion of Borrower’s Legal Counsel (the “Borrower’s Opinion”).

Include title(s) of other document(s) as applicable.

2. It is understood that you will prepare a settlement statement setting forth the proceeds of the Loan being disbursed and the purposes for which the proceeds are being applied (the “Settlement Statement”).

3. It is also understood that the Documents either have been executed and acknowledged, if required, in the manner contemplated in the Documents before their delivery to you or will be executed and acknowledged, if required, by the appropriate party before the closing of the Loan as contemplated in these instructions. Please confirm that all blanks in the Documents are completed before their execution.

Adapt paragraphs 4. and 5. to reflect only those documents used in the transaction.

4. When you have received from Lender the proceeds of the Loan to be disbursed as shown on the Settlement Statement, you are authorized to deliver to Lender the signed originals of each of the following: the Note, the Closing Certificate, the Resolution Certificate, [and] the Borrower’s Opinion [include if applicable: , and [title[s] of other document[s]]]. At that same time, please deliver to Lender two copies, certified by you to be true and correct, of each of the following signed documents: the Deed of Trust, the Financing Statement, [and] the Settlement Statement executed by Borrower [include if applicable: , and [title[s] of other document[s]]]; record the original Deed of Trust [include if applicable: and [title[s] of other document[s]]] in the real property records of [county] County, Texas; and file the Financing Statement with the Texas secretary of state’s office. At that same time, please deliver to
Lender such other documents and information by then delivered to you by or on behalf of Borrower as will be required by Lender’s instructions in conjunction with closing the Loan.

5. Before releasing, recording, or filing any of the Documents, you must be prepared to disburse the proceeds of the Loan to or on behalf of Borrower in the manner shown on the Settlement Statement immediately on the recording of the Deed of Trust [include if applicable: and [title[s] of other document[s]]] in the real property records of [county] County, Texas, and the filing of the Financing Statement with the Texas secretary of state’s office, and you must have determined that all requirements of Lender for disbursement of the funds have been satisfied or waived by Lender. The disbursement of the proceeds of the Loan as shown on the Settlement Statement must be accomplished promptly on the satisfaction of such conditions, with any balance of the proceeds of the Loan that are to be disbursed to Borrower to be disbursed by wire transfer or check in accordance with Borrower’s separate instructions.

6. We have enclosed our statement for services on behalf of Borrower, which you are instructed to collect and remit to us as part of the closing.

7. By disbursing the funds, you will certify to Borrower that you have complied with the requirements and conditions of this letter and that all matters disclosed in Schedule C of the Commitment for Title Insurance (the “Commitment”) have been or will be paid, satisfied, or otherwise resolved to the complete satisfaction of the title insurer before the issuance date of the loan policy of title insurance (the “Loan Policy”) and that no exceptions for any item on Schedule C of the Commitment will be contained in the Loan Policy.

8. If for any reason you cannot or will not comply with all of the requirements and conditions of this letter, please inform the undersigned immediately. The Title Company is not authorized to close the transaction on behalf of Borrower unless the Title Company complies with the requirements and conditions of this letter.
If you have any questions regarding any aspect of this transaction, please call us at your earliest opportunity.

Very truly yours,

______________________________
Legal Counsel for Borrower

By ________________________________
(Authorized signature)

Enc.
c: [name of borrower]
Form 26-16

This form is used by a lender or lender’s counsel to instruct an escrow agent regarding the closing of a real estate transaction and disbursement of a loan secured by real estate.

Closing Instructions
[from Lender]

<Date>

[Name of escrow officer]
[Name and address of escrow agent]

Re: $[amount] Loan ("Loan") from
[name of lender] ("Lender") to
[name of borrower] ("Borrower")

Your GF Number:

[Salutation]

Set forth below are Lender’s instructions for closing the above-referenced Loan to Borrower.

1. Enclosed with this letter or otherwise delivered to you are the following documents for your use in closing this Loan (collectively, the “Documents”):

   Select as applicable from the following examples.

a. Promissory Note in the original principal amount of the Loan (the “Note”).

b. Deed of Trust [include as applicable: , Security Agreement, Assignment of Rents and Leases, [and] Financing Statement] (the “Deed of Trust”).

c. Financing Statement to be filed with the Texas secretary of state’s office (the “Financing Statement”).
d. Borrower’s Closing Certificate and Affidavit (the “Closing Certificate”).

e. Certificate of Resolutions (the “Resolution Certificate”).

f. Form of Opinion of Borrower’s Legal Counsel (the “Borrower’s Opinion”).

2. It is understood that you will prepare a settlement statement setting forth the proceeds of the Loan being disbursed and the purposes for which the proceeds are being applied (the “Settlement Statement”).

3. Also enclosed is a copy of Lender’s closing instructions (the “Closing Instructions”), which are being supplemented by the information set forth in this letter.

4. Before you request any funds from Lender or otherwise advise that this transaction has closed, please deliver to Lender the signed originals of each of the following: the Note, the Closing Certificate, the Resolution Certificate, [and] the Borrower’s Opinion [include if applicable: , and [title[s] of other document[s]]]. At that same time, please deliver to Lender two copies, certified by you to be true and correct, of each of the following signed documents: the Deed of Trust, the Financing Statement, [and] the Settlement Statement executed by Borrower [include if applicable: and [title[s] of other document[s]]]. Also deliver to Lender with the foregoing documents a currently dated and effective title commitment or the Loan Policy described below, and the original hazard insurance policy described in the closing instructions.

5. Confirm that all blanks in the enclosed Documents are completed before their execution. Please be certain that the Deed of Trust [include if applicable: and [title[s] of other document[s]]] [is/are] immediately recorded in the real property records of [county] County,
Texas, the Financing Statement is immediately filed in the Texas secretary of state’s office, and [other instructions].

6. Before you disburse any funds received by you from Lender or otherwise advise Lender that this transaction has closed, please be certain that the title insurer is in a position to issue, and will issue, to Lender a loan policy of title insurance (the “Loan Policy”) in the form prescribed by the Texas State Board of Insurance, written by the same underwriter that issued the Commitment for Title Insurance (the “Commitment”) with an issuance date of [date] and an effective date of [date] under the above-referenced GF number. The Loan Policy must be issued in accordance with the Commitment, except as follows:

a. The Insured under the Loan Policy must read exactly as the Lender’s name is set forth in the Note, with the following additional phrase: “and its successors and/or assigns who are the lawful owner or owners of the evidence of debt identified herein and any subsequent owner or owners thereof”;

b. The effective date of the Loan Policy must be the date on which the Deed of Trust is filed of record;

c. The lien insured by the Loan Policy must be the first-priority lien arising under the Deed of Trust;

d. The real property described in the Loan Policy must be the same property described in the Deed of Trust and in the survey dated [date], prepared by [name];

e. Fee simple title to the real property described in the Deed of Trust must be shown by the Loan Policy to be vested in Borrower, and any easements benefiting the real property must be included in the description of the property insured by the Loan Policy;
f. Item 2 of Schedule B of the Loan Policy must be modified to read “shortages in area” only, provided, however, that if the final survey delivered to you reflects one or more encroachments or other matters, the Loan Policy may except to the encroachments and other matters reflected in the survey if the Loan Policy contains a T-19 endorsement as to those encroachments or other matters;

g. Item 3 of Schedule B of the Loan Policy must be modified to delete the words “and subsequent assessments, for prior years due to change in land usage or ownership,” and must except only to taxes, assessments, and stand-by fees for the year [year] and subsequent years, not yet due and payable;

h. The exceptions to title shown on Schedule B of the Loan Policy must include only the Permitted Exceptions set forth in the Deed of Trust (so that the following-listed items from Schedule B of the Commitment must be deleted: [list items]);

i. All matters described on Schedule C of the Commitment must be satisfied and resolved to your complete satisfaction so that none of these matters will appear as exceptions in the Loan Policy;

j. There should be no exception in the Loan Policy for any lack of right of access to and from the Property;

k. The Arbitration Clause in the Conditions and Stipulations section of the Loan Policy should be deleted pursuant to Procedural Rule P-36;

l. There should be no exception in the Loan Policy for parties in possession (except for tenants as lessees only under unrecorded leases with no right of purchase or right of first refusal);
m. There should be no exception in the Loan Policy for visible or apparent easements on the Property; and

n. The following endorsements to the Loan Policy should be provided: [list any applicable endorsements].

7. By disbursing Loan funds, you will certify to Lender that all matters disclosed in Schedule C of the Commitment have been or will be paid, satisfied, or otherwise resolved to the complete satisfaction of the title insurer before the issuance date of the Loan Policy, that no exceptions for any item on Schedule C of the Commitment will be contained in the Loan Policy, and that you have complied with the requirements and conditions of the letter.

8. We have also enclosed our statement for services on behalf of Lender, which you are instructed to collect and remit to us as part of the closing.

9. If for any reason you cannot or will not comply with all of the requirements and conditions of this letter, please inform the undersigned immediately. The Title Company is not authorized to close the transaction on behalf of Lender unless the Title Company complies with the requirements and conditions of this letter.

If you have any questions regarding any aspect of this transaction or the instructions set forth herein, please call us at your earliest opportunity.

Very truly yours,

________________________________________________________________________________________________________________________

Legal Counsel for Lender

By ______________________________

(Authorized signature)

Enc.
c: [name of lender]
Form 26-17

This form is used by a purchaser’s counsel to instruct an escrow agent regarding the closing of a real estate transaction.

Closing Instructions
[from Purchaser]

[Date]

[Name of escrow officer]
[Name and address of escrow agent]

Re: Purchase of real property (“Property”) from
[ [name of seller] (“Seller”) by
[ [name of purchaser] (“Purchaser”)]

Your GF Number:

[Salutation]

We represent the Purchaser in connection with the purchase of the above-referenced Property. Set forth below are Purchaser’s instructions for closing this transaction.

1. Enclosed with this letter [is/are] the Settlement Statement (the “Settlement Statement”) [include if applicable: and [title[s] of other document[s]]] for your use in closing the purchase.

2. Also being delivered to you in conjunction with this letter are funds in the amount of $[amount] (the “Funds”), representing the net amount that is payable at closing by Purchaser with respect to the purchase price for the Property.

3. Also enclosed are copies of the form of [general/special] warranty deed (the “Deed”) and [title[s] of other document[s]], to be executed by Seller. The original of each of these documents is to be executed by Seller and delivered to your offices.
4. Determine that all of the foregoing documents are fully and properly executed and acknowledged when appropriate. Confirm that all blanks in the enclosed documents are completed before their execution.

5. Before you disburse any of the Funds or otherwise advise that this transaction has closed, deliver to Purchaser one copy, certified by you to be true and correct, of the signed originals of the Deed and [title[s] of other document[s]]. These documents are to be in the forms enclosed. Also deliver to Purchaser with the foregoing documents a currently dated and effective title commitment or the Owner Policy described below.

6. Be certain that the Deed and [title[s] of other document[s]] are immediately recorded in the real property records of [county] County, Texas, in the order set forth in this paragraph.

7. Before you disburse any of the Funds or otherwise advise Purchaser that this transaction has closed, be certain that the title insurer is in a position to issue, and will issue, to Purchaser an owner policy of title insurance (the “Owner Policy”) in the form prescribed by the Texas State Board of Insurance, written by the same underwriter that issued the Commitment for Title Insurance (the “Commitment”) with an issuance date of [date] and an effective date of [date] under the above-referenced GF number. The Owner Policy must be issued in accordance with the Commitment, except as follows:

   a. The Insured under the Owner Policy must read exactly as the Purchaser’s name is set forth in the Deed;

   b. The effective date of the Owner Policy must be the date on which the Deed is filed of record;
c. The real property described in the Owner Policy must be the same property described in the Deed and in the survey of the Property dated [date], prepared by [name];

d. Fee simple title to the real property described in the Deed must be shown by the Owner Policy to be vested in Purchaser, and any easements benefiting the real property must be included in the description of the property insured by the Owner Policy;

e. Item 2 of Schedule B of the Owner Policy must be modified to read “shortages in area” only, provided, however, that if the final survey delivered to you reflects one or more encroachments or other matters, the Owner Policy may except to the encroachments and other matters reflected in the survey if the Owner Policy contains a T-19.1 endorsement as to those encroachments or other matters;

f. Item 3 of Schedule B of the Owner Policy must be modified to except only to taxes, assessments, and stand-by fees for the year [year] and subsequent years, not yet due and payable, and subsequent assessments for prior years due to change in land usage or ownership;

g. The exceptions to title shown on Schedule B of the Owner Policy must include only the Permitted Exceptions set forth in the Deed (so that the following-listed items from Schedule B of the Commitment must be deleted: [list items]);

h. All matters described on Schedule C of the Commitment must be satisfied and resolved to your complete satisfaction so that none of these matters will appear as exceptions in the Owner Policy;
i. There should be no exception in the Owner Policy for any lack of right of access to and from the Property;

j. The Arbitration Clause in the Conditions and Stipulations section of the Owner Policy should be deleted pursuant to Procedural Rule P-36;

k. There should be no exception in the Owner Policy for parties in possession (except for tenants as lessees only under unrecorded leases with no right of purchase or right of first refusal);

l. The Owner Policy will not contain any exceptions for visible or apparent easements on the Property; and

m. The following endorsements to the Owner Policy should be provided: [list any applicable endorsements].

8. By disbursing the Funds, you certify to Purchaser that you have complied with the requirements and conditions of this letter and all matters disclosed in Schedule C of the Commitment have been or will be paid, satisfied, or otherwise resolved to the complete satisfaction of the title insurer before the issuance date of the Owner Policy and that no exceptions for any item on Schedule C of the Commitment will be contained in the Owner Policy.

9. If for any reason you cannot or will not comply with all of the requirements and conditions of this letter, inform the undersigned immediately. The Title Company is not authorized to close the transaction on behalf of Purchaser unless the Title Company complies with the requirements and conditions of this letter.

    If you have any questions regarding any aspect of this transaction or the instructions set forth herein, please call us at your earliest opportunity.
Very truly yours,

__________________________________________________________
Legal Counsel for Purchaser

By _______________________________________
(Authorized signature)

Enc.

c: [name of purchaser]
Form 26-18

This form is used by a seller’s counsel to instruct an escrow agent regarding closing the sale of a parcel of real estate.

Closing Instructions [from Seller]

[Date]

[Name of escrow officer]
[Name and address of escrow agent]

Re: Sale of real property (“Property”) by 
[name of seller] (“Seller”) to 
[name of purchaser] (“Purchaser”)

Your GF Number:

[Salutation]

We represent the Seller in connection with the sale (the “Sale”) of the above-referenced Property. Set forth below are Seller’s instructions for closing this transaction.

1. Enclosed with this letter are the following documents, which have been executed by Seller, for your use in closing the Sale:


   b. Settlement Statement (the “Settlement Statement”), executed on behalf of Seller.

   Include title(s) of other document(s) as applicable.

2. Do not deliver the Deed to Purchaser, or otherwise advise Seller that this transaction has closed, until Purchaser has executed the enclosed Settlement Statement and you are in
a position to disburse to Seller the amount reflected on the Settlement Statement as “Cash to Seller.”

3. Following the closing, return to Seller a fully executed copy of the Settlement Statement and copies of the other closing documents. When available, provide Seller a copy of the Deed that reflects the applicable recording information.

4. By delivering the Deed to Purchaser and disbursing the funds to Seller, you certify to Seller that you have complied with these instructions and the conditions set forth in this letter. If for any reason you cannot comply strictly with these instructions, then immediately return to Seller the Deed and the other items deposited by Seller in connection with this transaction. Comply before [date].

If you have any questions regarding any aspect of this transaction, please call us at your earliest opportunity.

Very truly yours,

________________________________________
Legal Counsel for Seller

By ________________________________
(Authorized signature)

Enc.
c: [name of seller]
A purchaser of realty from a foreign individual or entity in the United States must withhold 10 percent of the sales price and forward it to the Internal Revenue Service within twenty days of the date of transfer. A purchaser should assume a seller is foreign unless the purchaser obtains an affidavit to the contrary. See 26 U.S.C. § 1445; 26 C.F.R. § 1.1445–2(b)(2)(iv). This form is used if the seller is not an individual. If the seller is an individual, see form 26-20 in this chapter. No particular form is required; the following language is taken from 26 C.F.R. § 1.1445–2(b)(2)(iv).

Declaration of Nonforeign Status—Entity

Date:

Transferor:

Transferor’s Office Address:

Transferor’s U.S. Taxpayer Identification Number:

Transferee:

Property:

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. For U.S. tax purposes, including purposes of section 1445, the owner of a disregarded entity that has legal title to a U.S. real property interest under local law will be the transferor of the property and not the disregarded entity. To inform Transferee that withholding of tax is not required on the disposition of a U.S. real property interest by Transferor, I certify on behalf of Transferor that the contents of this declaration are true.

Transferor is the owner of the Property described above.
Transferor is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations).

Transferor is not a disregarded entity as defined in Treasury Regulation § 1.1445–2(b)(2)(iii).

Transferor understands that this certification may be disclosed to the Internal Revenue Service by Transferee and that any false statement contained in this declaration could be punished by fine, imprisonment, or both.

UNDER PENALTIES OF PERJURY I DECLARE THAT I HAVE EXAMINED THIS DECLARATION AND TO THE BEST OF MY KNOWLEDGE AND BELIEF IT IS TRUE, CORRECT, AND COMPLETE, AND I FURTHER DECLARE THAT I HAVE AUTHORITY TO SIGN THIS DOCUMENT ON BEHALF OF TRANSFEROR.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

By: 
Title: 

Name of Entity: 

Include acknowledgment if the declaration is to be recorded.
Declaration of Nonforeign Status—Individual

Form 26-20

A purchaser of realty from a foreign individual or entity in the United States must withhold 10 percent of the sales price and forward it to the Internal Revenue Service within twenty days of the date of transfer. A purchaser should assume a seller is foreign unless the purchaser obtains an affidavit to the contrary. See 26 U.S.C. § 1445; 26 C.F.R. § 1.1445–2(b)(2)(iv). This form is used if the seller is an individual. If the seller is not an individual, see form 26-19 in this chapter. No particular form is required; the following language is taken from 26 C.F.R. § 1.1445–2(b)(2)(iv).

Declaration of Nonforeign Status—Individual

Date:

Transferor:

Transferor’s Home Address:

Transferor’s Social Security Number:

Transferee:

Property:

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. To inform Transferee that withholding of tax is not required on my disposition of a U.S. real property interest, I affirm that the contents of this declaration are true.

I am not a nonresident alien for purposes of U.S. income taxation.

I understand that this certification may be disclosed to the Internal Revenue Service by Transferee and that any false statement I have made here could be punished by fine, imprisonment, or both.
UNDER PENALTIES OF PERJURY I DECLARE THAT I HAVE EXAMINED THIS DECLARATION AND TO THE BEST OF MY KNOWLEDGE AND BELIEF IT IS TRUE, CORRECT, AND COMPLETE.

[Name of transferor]

Include acknowledgment if the declaration is to be recorded.
Form 26-21

If a person may claim a homestead and has not done so, Tex. Prop. Code § 41.005 provides that the property on which the person receives a homestead exemption under Tex. Tax Code § 11.43 is generally considered to have been designated as the person’s homestead. Tex. Prop. Code § 41.005(e). Section 41.005 also allows a person to voluntarily designate a homestead. A person may find it necessary to designate a homestead in aid of enforcement of a judgment debt. See Tex. Prop. Code § 41.022. This form may be used for either of these purposes. If a homestead claimant’s homestead has changed, the voluntary filing of a designation of homestead may facilitate changing the tax exemption to the new homestead.

A rural homestead may not exceed two hundred acres if it is the homestead of a family or one hundred acres if it is the homestead of a single adult. Tex. Prop. Code § 41.002(b). An urban homestead may not exceed ten acres. Tex. Prop. Code § 41.002(a). Tex. Prop. Code § 41.002 sets forth criteria by which a homestead is categorized as rural or urban. See also the discussion on rural and urban homesteads at section 11.9:8 in this manual.

If a rural homestead includes property in more than one survey, state the number of acres in each survey. See Tex. Prop. Code § 41.005(c). See also section 3.7 concerning property description. If the rural homestead exceeds ten acres, the optional clause stating that the homestead is not considered urban will assist the taxing authorities in determining that the acreage in excess of ten is entitled to the exemption.

Designation of Homestead

Date:

Claimant:

Current Record Title Holder of Property:

Property:

Pursuant to section [41.005/41.022] of the Texas Property Code, Claimant designates the Property as Claimant’s homestead.

Include the following if applicable.

The Property contains [number] acres, more or less, with [number] acres in the [name] Survey and [number] acres in the [name] Survey.
The Property [is/is not] considered to be urban under the provisions of section 41.002(c) of the Texas Property Code.

And/Or

Continue with the following.

[Name]

[Name]

Include acknowledgments.
Easement Agreement for Access

Form 26-22

This form is used to grant an easement across one tract of land for ingress to and egress from another tract of land.

Easement Agreement for Access

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

[Grantor’s Lienholder:]

[Grantor’s Lienholder’s Mailing Address:]

Dominant Estate Property: [describe by metes and bounds or plat reference the real property benefited by the easement], and portions thereof.

Easement Property: [Describe by metes and bounds the location of the easement and include a drawing of the easement as an exhibit, if available.]

Easement Purpose: For providing free and uninterrupted pedestrian and vehicular ingress to and egress from the Dominant Estate Property, to and from [describe public thoroughfare].
Consideration: Good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Grantor.

Reservations from Conveyance: [Describe here or in an attached exhibit any reservations from the conveyance in this instrument.]

Exceptions to Warranty: [Describe here or in an attached exhibit any exceptions to the warranties in this instrument.]

Grant of Easement: Grantor, for the Consideration and subject to the Reservations from Conveyance and Exceptions to Warranty, grants, sells, and conveys to Grantee and Grantee’s heirs, successors, and assigns an easement over, on, and across the Easement Property for the Easement Purpose and for the benefit of the Dominant Estate Property, together with all and singular the rights and appurtenances thereto in any way belonging (collectively, the “Easement”), to have and to hold the Easement to Grantee and Grantee’s heirs, successors, and assigns forever. Grantor binds Grantor and Grantor’s heirs, successors, and assigns to warrant and forever defend the title to the Easement in Grantee and Grantee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the Easement or any part thereof, except as to the Reservations from Conveyance and Exceptions to Warranty [include if applicable: , to the extent that such claim arises by, through, or under Grantor but not otherwise].

Terms and Conditions: The following terms and conditions apply to the Easement granted by this agreement:

1. *Character of Easement.* The Easement is appurtenant to and runs with all or any portion of the Dominant Estate Property, whether or not the Easement is referenced or described in any conveyance of all or such portion of the Dominant Estate Property. The Easement is nonexclusive and irrevocable. The Easement is for the benefit of Grantee and
Grantee’s heirs, successors, and assigns who at any time own the Dominant Estate Property or any interest in the Dominant Estate Property (as applicable, the “Holder”).

2. *Duration of Easement.* [The duration of the Easement is perpetual./The duration of the Easement is for [number] years beginning [date].]

3. *Reservation of Rights.* Grantor reserves for Grantor and Grantor’s heirs, successors, and assigns the right to continue to use and enjoy the surface of the Easement Property for all purposes that do not interfere with or interrupt the use or enjoyment of the Easement by Holder for the Easement Purposes. Grantor reserves for Grantor and Grantor’s heirs, successors, and assigns the right to use all or part of the Easement in conjunction with Holder and the right to convey to others the right to use all or part of the Easement in conjunction with Holder, as long as such further conveyance is subject to the terms of this agreement and the other users agree to bear a proportionate part of the costs of improving and maintaining the Easement.

4. *Secondary Easement.* Holder has the right (the “Secondary Easement”) to use as much of the surface of the property that is adjacent to the Easement Property (“Adjacent Property”) as may be reasonably necessary to install and maintain a road reasonably suited for the Easement Purpose within the Easement Property. However, Holder must promptly restore the Adjacent Property to its previous physical condition if changed by use of the rights granted by this Secondary Easement.

5. *Improvement and Maintenance of Easement Property.* Improvement and maintenance of the Easement Property will be at the sole expense of Holder. Holder has the right to eliminate any encroachments into the Easement Property. Holder must maintain the Easement Property in a neat and clean condition. Holder has the right to construct, install, maintain, replace, and remove a road with all culverts, bridges, drainage ditches, sewer facilities, and similar or related utilities and facilities under or across any portion of the Easement Property.
(collectively, the “Road Improvements”). All matters concerning the configuration, construction, installation, maintenance, replacement, and removal of the Road Improvements are at Holder’s sole discretion, subject to performance of Holder’s obligations under this agreement. Holder has the right to remove or relocate any fences within the Easement Property or along or near its boundary lines if reasonably necessary to construct, install, maintain, replace, or remove the Road Improvements or for the road to continue onto other lands or easements owned by Holder and adjacent to the Easement Property, subject to replacement of the fences to their original condition on the completion of the work. On written request by Holder, the owners of the Easement Property will execute or join in the execution of easements for sewer, drainage, or utility facilities under or across the Easement Property.

6. **Equitable Rights of Enforcement.** This Easement may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the parties to or those benefited by this agreement; provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

7. **Attorney’s Fees.** If [either/any] party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and other costs.

8. **Binding Effect.** This agreement binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.
9. **Choice of Law.** This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Easement Property is located.

10. **Counterparts.** This agreement may be executed in multiple counterparts. All counterparts taken together constitute this agreement.

11. **Waiver of Default.** A default is not waived if the nondefaulting party fails to declare default immediately or delays in taking any action with respect to the default. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

12. **Further Assurances.** Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

13. **Indemnity.** Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney’s fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying party. The obligations of the parties under this provision will survive termination of this agreement.

14. **Survival.** The obligations of the parties in this agreement that cannot be or were not performed before termination of this agreement survive termination of this agreement.

15. **Entire Agreement.** This agreement and any exhibits are the entire agreement of the parties concerning the Easement Property and the grant of the Easement by Grantor to Grantee. There are no representations, agreements, warranties, or promises, and neither party is relying on any statements or representations of the other party or any agent of the other party, that are not in this agreement and any exhibits.
16. **Legal Construction.** If any provision in this agreement is unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof; and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. This agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

17. **Notices.** Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

Include acknowledgments.

Include the following if applicable.

**Consent and Subordination by Lienholder**

Lienholder, as the holder of [a] lien[s] on the Easement Property, consents to the above grant of an Easement, including the terms and conditions of the grant, and Lienholder subordi-
nates its lien[s] to the rights and interests of Holder, so that a foreclosure of the lien[s] will not extinguish the rights and interests of Holder.

[Name of lienholder]

Include acknowledgment.
Form 26-23

This form is used if the parties are granting reciprocal rights of access across their respective properties.

Easement Agreement for Reciprocal Access

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

First Party:

First Party’s Mailing Address:

Second Party:

Second Party’s Mailing Address:

[First Party’s Lienholder:]

[First Party’s Lienholder’s Mailing Address:]

[Second Party’s Lienholder:]

[Second Party’s Lienholder’s Mailing Address:]

First Party’s Property: [Describe by metes and bounds or plat reference the real property owned by the first party.]

Second Party’s Property: [Describe by metes and bounds or plat reference the real property owned by the second party.]
Easement Purpose: For providing free and uninterrupted pedestrian and vehicular ingress to, egress from, and access across and between First Party’s Property and Second Party’s Property and portions thereof.

Consideration: Good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties.

Reservations from Conveyance of First Party’s Property: [Describe here or in an attached exhibit any reservations from the conveyance of the first party’s property in this instrument.]

Exceptions to Warranty of First Party’s Property: [Describe here or in an attached exhibit any exceptions to the warranties of the first party’s property in this instrument.]

Reservations from Conveyance of Second Party’s Property: [Describe here or in an attached exhibit any reservations from the conveyance of the second party’s property in this instrument.]

Exceptions to Warranty of Second Party’s Property: [Describe here or in an attached exhibit any exceptions to the warranties of the second party’s property in this instrument.]

Grants of Easements:

First Party, for the Consideration and subject to the Reservations from Conveyance of First Party’s Property and Exceptions to Warranty of First Party’s Property, grants, sells, and conveys to Second Party and Second Party’s heirs, successors, and assigns an easement to, over, and across First Party’s Property for the Easement Purpose and for the benefit of all or any portion of Second Party’s Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold the easement, rights, and appurtenances to Second Party and Second Party’s heirs, successors, and assigns forever. First Party binds First Party and First Party’s heirs, successors, and assigns to warrant and forever defend
the title to the easement, rights, and appurtenances in Second Party and Second Party’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the easement, rights, or appurtenances, or any part thereof, except as to the Reservations from Conveyance of First Party’s Property and Exceptions to Warranty of First Party’s Property [include if applicable: , to the extent that such claim arises by, through, or under First Party but not otherwise].

Second Party, for the Consideration and subject to the Reservations from Conveyance of Second Party’s Property and Exceptions to Warranty of Second Party’s Property, grants, sells, and conveys to First Party and First Party’s heirs, successors, and assigns an easement to, over, and across Second Party’s Property for the Easement Purpose and for the benefit of all or any portion of First Party’s Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold the easement, rights, and appurtenances to First Party and First Party’s heirs, successors, and assigns forever. Second Party binds Second Party and Second Party’s heirs, successors, and assigns to warrant and forever defend the title to the easement, rights, and appurtenances in First Party and First Party’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the easement, rights, or appurtenances, or any part thereof, except as to the Reservations from Conveyance of Second Party’s Property and Exceptions to Warranty of Second Party’s Property [include if applicable: , to the extent that such claim arises by, through, or under Second Party but not otherwise].

The easements, rights, and appurtenances hereby granted by and between First Party and Second Party are referred to herein as the “Easements.” First Party’s Property and Second Party’s Property are sometimes referred to herein collectively as the “Properties.” First Party and Second Party are sometimes referred to herein individually as a “Party” and collectively as the “Parties.”
Terms and Conditions: The following terms and conditions apply to the Easements granted by this agreement:

1. **Character of Easements.** The Easements are appurtenant to and run with the Properties, and portions thereof, whether or not the Easements are referenced or described in any conveyance of the Properties, or any portion thereof. The Easements are for the benefit of the Parties and the heirs, successors, and assigns of the Parties who at any time own the Properties or any interest therein (as applicable, the “Holders”).

2. **Duration of Easements.** [The duration of the Easements is perpetual./The duration of the Easements is for [number] years beginning [date].]

3. **Nonexclusiveness of Easements.** The Easements are nonexclusive, and each of the Parties reserves for itself and its heirs, successors, and assigns the right to use all or part of the Easements in conjunction with any other Holder and the right to convey to others the right to use all or part of the Easements in conjunction with the Holders, as long as such further conveyance is subject to the terms of this agreement.

4. **Use and Location of Easements.** The Parties and other Holders will be entitled to exercise direct access to and between the Properties without interference except as set forth in this agreement and to use all access areas, driveways, and parking lots located on any portion of the Properties in exercising the Easements. A Holder may erect curbs or other barriers to traffic between the Properties owned by that Holder and adjacent portions of the Properties, including but not limited to differences in grade levels, only to the extent that such curbs or other barriers will not unreasonably interfere with or restrict direct access to and between the Properties by the Holders of other portions of the Properties and their employees, customers, and other invitees. A Holder may erect buildings and other improvements on the portion of the Properties owned by that Holder only to the extent that the buildings and other improvements will not unreasonably interfere with the use of and access to the access areas, driveways, and
parking lots on such portion of the Properties by the other Holders and their employees, customers, and other invitees. A Holder’s employees, customers, and other invitees will not be entitled to park on the other Holder’s Properties but will be permitted to walk or drive across and otherwise traverse the Properties to obtain ingress to or egress from the other Properties.

5. *Maintenance of Easement Property.* All access ways, driveways, and parking lots located on the Properties must be maintained at a level of appearance and utility consistent with the highest industry standards then prevailing for similarly used properties in the market in which the Properties are located. Each Holder will be solely responsible for the costs of maintaining the access ways, driveways, and parking lots located on that Holder’s Properties. If a Holder does not perform the required maintenance then any other Holder, after giving the nonperforming Holder thirty days’ written notice, will have the right to perform the maintenance and receive reimbursement from the nonperforming Holder. Reimbursement will be payable on demand and include the costs of the maintenance, plus interest at the highest rate permitted by law (or if no maximum rate is prescribed by law, at the rate of 18 percent per year).

6. *Rights Reserved.* Each Party reserves for that Party and that Party’s heirs, successors, and assigns the right to continue to use and enjoy the surface of the Properties for all purposes that do not unreasonably interfere with or interrupt the use or enjoyment of the Easements.

7. *Equitable Rights of Enforcement.* These Easements may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the Parties to or those benefited by this agreement; provided, however, that the act of obtaining an injunction
or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

8. **Attorney’s Fees.** If [either/any] Party retains an attorney to enforce this agreement, the Party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and other costs.

9. **Binding Effect.** This agreement binds, benefits, and may be enforced by the Parties and their respective heirs, successors, and permitted assigns.

10. **Choice of Law.** This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any other jurisdiction. Venue is in the county or counties in which the Properties are located.

11. **Counterparts.** This agreement may be executed in multiple counterparts. All counterparts taken together constitute this agreement.

12. **Waiver of Default.** A default is not waived if the nondefaulting Party fails to declare default immediately or delays in taking any action with respect to the default. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

13. **Further Assurances.** Each signatory Party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

14. **Indemnity.** Each Party agrees to indemnify, defend, and hold harmless the other Party from any loss, attorney’s fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying Party. The obligations of the Parties under this provision will survive termination of this agreement.
15. **Survival.** The obligations of the Parties in this agreement that cannot be or were not performed before termination of this agreement survive termination of this agreement.

16. **Entire Agreement.** This agreement and any exhibits are the entire agreement of the Parties concerning their respective Properties and the reciprocal Easements granted by the Parties. There are no representations, agreements, warranties, or promises, and neither Party is relying on any statements or representations of the other Party or any agent of the other Party, that are not in this agreement and its exhibits.

17. **Legal Construction.** If any provision in this agreement is unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the Parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. This agreement will not be construed more or less favorably between the Parties by reason of authorship or origin of language.

18. **Notices.** Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

__________________________

[Name of first party]

__________________________

[Name of second party]
Consent and Subordination by Lienholders

Lienholders, as the holders of liens on the Properties, consent to the above grants of Easements, including the terms and conditions of the grants, and Lienholders subordinate their liens to the rights and interests of Holders, so that a foreclosure of the liens will not extinguish the rights and interests of Holders.

[Name of lienholder]

[Name of lienholder]

Include acknowledgments.
Easement Agreement for Utilities

Form 26-24

This form is used to grant an easement for the installation and maintenance of utility facilities.

Easement Agreement for Utilities

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

[Grantor’s Lienholder:]

[Grantor’s Lienholder’s Mailing Address:]

Dominant Estate Property: [Describe by metes and bounds or plat reference the real property being benefited by the easement.]

Easement Property: [Describe by metes and bounds the location of the easement and include a drawing of the easement as an exhibit, if available.]

Easement Purpose: For the installation, construction, operation, maintenance, replacement, repair, upgrade, and removal of [specify] and related facilities (collectively, the “Facilities”).
Consideration: Good and valuable consideration, the receipt and sufficiency of which are acknowledged by Grantor.

Reservations from Conveyance: [Describe here or in an attached exhibit any reservations from the conveyance in this instrument.]

Exceptions to Warranty: [Describe here or in an attached exhibit any exceptions to the warranties in this instrument.]

Grant of Easement: Grantor, for the Consideration and subject to the Reservations from Conveyance and Exceptions to Warranty, grants, sells, and conveys to Grantee and Grantee’s heirs, successors, and assigns an easement over, on, and across the Easement Property for the Easement Purpose, together with all and singular the rights and appurtenances thereto in any way belonging (collectively, the “Easement”), to have and to hold the Easement to Grantee and Grantee’s heirs, successors, and assigns forever. Grantor binds Grantor and Grantor’s heirs, successors, and assigns to warrant and forever defend the title to the Easement in Grantee and Grantee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the Easement or any part of the Easement, except as to the Reservations from Conveyance and Exceptions to Warranty [include if applicable: , to the extent that such claim arises by, through, or under Grantor but not otherwise].

Terms and Conditions: The following terms and conditions apply to the Easement granted by this agreement:

1. **Character of Easement.** The Easement is appurtenant to, runs with, and inures to the benefit of all or any portion of the Dominant Estate Property, whether or not the Easement is referenced or described in any conveyance of all or such portion of the Dominant Estate Property. The Easement is nonexclusive and irrevocable. The Easement is for the benefit of
Grantee and Grantee’s heirs, successors, and assigns who at any time own any interest in the Dominant Estate Property (as applicable, the “Holder”).

2. **Duration of Easement.** [The duration of the Easement is perpetual./The duration of the Easement is for [number] years beginning [date].]

3. **Reservation of Rights.** Holder’s right to use the Easement Property is nonexclusive, and Grantor reserves for Grantor and Grantor’s heirs, successors, and assigns the right to use all or part of the Easement Property in conjunction with Holder as long as such use by Grantor and Grantor’s heirs, successors, and assigns does not interfere with the use of the Easement Property by Holder for the Easement Purpose, and the right to convey to others the right to use all or part of the Easement Property in conjunction with Holder, as long as such further conveyance is subject to the terms of this agreement.

4. **Secondary Easement.** Holder has the right (the “Secondary Easement”) to use as much of the surface of the property that is adjacent to the Easement Property (“Adjacent Property”) as may be reasonably necessary to install and maintain the Facilities within the Easement Property that are reasonably suited for the Easement Purpose. However, Holder must promptly restore the Adjacent Property to its previous physical condition if changed by use of the rights granted by this Secondary Easement.

5. **Improvement and Maintenance of Easement Property.** Improvement and maintenance of the Easement Property and the Facilities will be at the sole expense of Holder. Holder has the right to eliminate any encroachments into the Easement Property. Holder must maintain the Easement Property in a neat and clean condition. Holder has the right to construct, install, maintain, replace, and remove the Facilities under or across any portion of the Easement Property. All matters concerning the Facilities and their configuration, construction, installation, maintenance, replacement, and removal are at Holder’s sole discretion, subject to performance of Holder’s obligations under this agreement. Holder has the right to remove or
relocate any fences within the Easement Property or along or near its boundary lines if reasonably necessary to construct, install, maintain, replace, or remove the Facilities, subject to replacement of the fences to their original condition on the completion of the work.

6. **Equitable Rights of Enforcement.** This Easement may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the parties to or those benefited by this agreement; provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

7. **Attorney’s Fees.** If [either/any] party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and other costs.

8. **Binding Effect.** This agreement binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

9. **Choice of Law.** This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Easement Property is located.

10. **Counterparts.** This agreement may be executed in multiple counterparts. All counterparts taken together constitute this agreement.

11. **Waiver of Default.** A default is not waived if the nondefaulting party fails to declare default immediately or delays in taking any action with respect to the default. Pursuit
of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

12. **Further Assurances.** Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

13. **Indemnity.** Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney’s fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying party. The obligations of the parties under this provision will survive termination of this agreement.

14. **Survival.** The obligations of the parties in this agreement that cannot be or were not performed before termination of this agreement survive termination of this agreement.

15. **Entire Agreement.** This agreement and any exhibits are the entire agreement of the parties concerning the Easement Property and the grant of the Easement by Grantor to Grantee. There are no representations, agreements, warranties, or promises, and neither party is relying on any statements or representations of the other party or any agent of the other party, that are not expressly set forth in this agreement and any exhibits.

16. **Legal Construction.** If any provision in this agreement is unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. This agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.
17. Notices. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

[Name of grantor]

[Name of grantee]

Include acknowledgments.

Include the following if applicable.

Consent and Subordination by Lienholder

Lienholder, as the holder of [a] lien[s] on the Easement Property, consents to the above grant of an Easement, including the terms and conditions of the grant, and Lienholder subordinates its lien[s] to the rights and interests of Holder, so that a foreclosure of the lien[s] will not extinguish the rights and interests of Holder.

[Name of lienholder]

Include acknowledgment.
Form 26-25

This form is used to convey the sole privilege of making the uses of the grantor’s land that are authorized in the form. Neither the grantor nor any other person except the grantee is entitled to make such uses. Examples are for uses of the land covered by the easement for a sign, billboard, cell tower, or wind turbine.

Easement in Gross Agreement

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

[Grantor’s Lienholder:]

[Grantor’s Lienholder’s Mailing Address:]

Grantor’s Property: All of the property described in Exhibit A, attached hereto and incorporated herein.

Easement Property: All of the property within Grantor’s Property as described in Exhibit B, attached hereto and incorporated herein, and as much of the remainder of Grantor’s Property as may be reasonably necessary for ingress and egress by Grantee, its employees, agents, and contractors to and from the Easement Property, to construct, install, operate,
maintain, inspect, repair, and replace the Facilities, ONLY to the extent that the Easement Property is not accessible by using existing rights-of-way, streets, roads, driveways, and parking areas to the maximum extent reasonably possible.

Easement Purpose: For the installation, construction, operation, maintenance, replacement, repair, upgrade, and removal of [specify, e.g., a tower, billboard, sign, wind turbine] and related equipment (collectively, the “Facilities”).

Consideration: Good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Grantor.

Reservations from Conveyance: [Describe here or in an attached exhibit any reservations from the conveyance in this instrument.]

Exceptions to Warranty: [Describe here or in an attached exhibit any exceptions to the warranties in this instrument.]

Grant of Easement: Grantor, for the Consideration and subject to the Reservations from Conveyance and Exceptions to Warranty, grants, sells, and conveys to Grantee and Grantee’s heirs, successors, and assigns an easement over, on, and across the Easement Property for the Easement Purpose, together with all and singular the rights and appurtenances thereto in any way belonging (collectively, the “Easement”), to have and to hold the Easement to Grantee and Grantee’s heirs, successors, and assigns forever. Grantor binds Grantor and Grantor’s heirs, successors, and assigns to warrant and forever defend the title to the Easement in Grantee and Grantee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the Easement or any part thereof, except as to the Reservations from Conveyance and Exceptions to Warranty [include if applicable: , to the extent that such claim arises by, through, or under Grantor but not otherwise/, without express or implied warranty. All warranties that might arise
Easement in Gross Agreement

by common law and the warranties in Section 5.023 of the Texas Property Code (or its successor) are excluded].

Terms and Conditions: The following terms and conditions apply to the Easement granted by this agreement:

1. **Character of Easement.** The Easement and related rights granted by Grantor in this agreement to Grantee are an [exclusive/nonexclusive] and irrevocable easement in gross for the benefit of Grantee and its successors and assigns, as owner of the rights created by the Easement in gross, and is exclusive and irrevocable (as applicable, the “Holder”). The Easement and related rights granted by Grantor in this agreement are binding on Grantor; on the Grantor’s heirs, legal representatives, successors, and assigns; and on all future owners of the Easement Property. This Easement and other rights granted by Grantor in this agreement are independent of any lands or estates of interest in lands; there is no other real property benefitting from the Easement granted in this agreement.

2. **Assignment.** Grantee may assign, sublease, license, transfer, or convey its interest in this agreement or any part of its interest in the Easement without Grantor’s consent, provided that the assignee or transferee shall be subject to all of the obligations, covenants, and conditions applicable to Grantee.

3. **Duration of Easement.** [The duration of the Easement is perpetual./The duration of the Easement is for [number] years beginning [date].]

4. **Improvement and Maintenance of Easement Property.** Improvement and maintenance of the Easement Property and the Facilities will be at the sole expense of Holder. Holder has the right to eliminate any encroachments into the Easement Property that interfere with the Easement Purpose. Holder must maintain the Easement Property in a neat and clean condition. Holder has the right to construct, install, maintain, replace, and remove the Facilities on, under, or across any portion of the Easement Property. All matters concerning the
Facilities and their configuration, construction, installation, maintenance, replacement, and removal are at Holder’s sole discretion, subject to performance of Holder’s obligations under this agreement. Holder has the right to remove or relocate any fences within the Easement Property or along or near its boundary lines if reasonably necessary to construct, install, maintain, replace, or remove the Facilities, subject to replacement of the fences to their original condition on the completion of the work.

5. **Equitable Rights of Enforcement.** This Easement may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the parties to or those benefited by this agreement; provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

6. **Attorney’s Fees.** If [either/any] party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and other costs.

7. **Binding Effect.** This agreement binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

8. **Choice of Law.** This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Easement Property is located.

9. **Counterparts.** This agreement may be executed in multiple counterparts. All counterparts taken together constitute this agreement.
10. **Waiver of Default.** A default is not waived if the nondefaulting party fails to declare default immediately or delays in taking any action with respect to the default. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

11. **Further Assurances.** Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

12. **Indemnity.** Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney’s fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying party. The obligations of the parties under this provision will survive termination of this agreement.

13. **Survival.** The obligations of the parties in this agreement that cannot be or were not performed before termination of this agreement survive termination of this agreement.

14. **Entire Agreement.** This agreement and any exhibits are the entire agreement of the parties concerning the Easement Property and the grant of the Easement by Grantor to Grantee. There are no representations, agreements, warranties, or promises, and neither party is relying on any statements or representations of the other party or any agent of the other party, that are not expressly set forth in this agreement and any exhibits.

15. **Legal Construction.** If any provision in this agreement is unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or femi-
nine gender, and vice versa. This agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

16. **Notices.** Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

Include acknowledgments.

Include the following if applicable.

**Consent and Subordination by Lienholder**

Lienholder, as the holder of [a] lien[s] on the Easement Property, consents to the above grant of an Easement, including the terms and conditions of the grant, and Lienholder subordinates its lien[s] to the rights and interests of Holder, so that a foreclosure of the lien[s] will not extinguish the rights and interests of Holder.

Include acknowledgment.
Exhibit A

Description of Grantor’s Property

Describe by metes and bounds or plat reference the real property within which the easement is located.
Exhibit B

Description of Easement Property

Describe by metes and bounds the location of the easement and include a drawing of the easement as an exhibit, if available.
Escrow Agreement

Date:

Escrow Agent:

Depositing Party:

Performing Party:

1. Escrow Agent, Depositing Party, and Performing Party are entering into this agreement.

2. Depositing Party is depositing in escrow with Escrow Agent the following: [describe deposits].

3. The purpose of this agreement is [describe purpose].

4. Escrow Agent is to hold the [funds/documents/funds and documents] in escrow in anticipation of performance by the Performing Party of the following acts: [describe contingencies].

5. If Performing Party completes the contingencies referred to in paragraph 4. of this agreement during the time specified in this agreement, Escrow Agent is instructed to dispose of the [funds/documents/funds and documents] in the following manner: [describe disposition, e.g., record them with the [county] county clerk].
6. The contingencies required of Performing Party must be fully performed within [number] days from the date of this agreement. If all contingencies are not fully performed within that time, Escrow Agent will dispose of the [funds/documents/funds and documents] in the following manner: [describe disposition, e.g., return them to Depositing Party].

7. Escrow Agent agrees to hold the [funds/documents/funds and documents] in accordance with the provisions of this agreement.

8. Escrow Agent will receive a fee of $[amount] for performance of the services called for under this agreement. Payment of the fee will be made equally by Depositing Party and Performing Party.

9. Depositing Party and Performing Party agree that Escrow Agent will have no responsibility under this agreement except for the safekeeping and handling of the [funds/documents/funds and documents] deposited with Escrow Agent by Depositing Party. Escrow Agent will not be liable for any act or thing done by it relating to this agreement, except for the negligence or willful misconduct of Escrow Agent. If conflicting demands are made on Escrow Agent by Depositing Party and Performing Party, Escrow Agent may withhold its performance under the terms of this agreement until the conflicting demands are withdrawn or the rights of the parties making the demands are settled by a court of competent jurisdiction.

10. Escrow Agent may resign as Escrow Agent by giving [number] days’ written notice to Depositing Party and Performing Party of its resignation. Escrow Agent will then deliver the [funds/documents/funds and documents] it is holding under the terms of this agreement in accordance with the joint written instructions given it by Depositing Party and Performing Party. If no instructions are given to Escrow Agent within the stated time period, Escrow Agent is authorized to deposit all the [funds/documents/funds and documents] into the registry of a court of competent jurisdiction.
11. Depositing Party and Performing Party may remove Escrow Agent, with or without cause, and appoint a substitute escrow agent by giving joint written notice to Escrow Agent. Escrow Agent will deliver the [funds/documents/funds and documents] as directed in the notice within ten days after the date of notice.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of depositing party]

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of performing party]

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of escrow agent]
Form 26-27

This form is used to release a judgment lien by affidavit pursuant to Tex. Prop. Code § 52.0012.

Homestead Affidavit as Release of Judgment Lien

Date:

Affiant:

Affiant’s Address:

Judgment Debtor:

Judgment Creditor:

Judgment

Date:

Cause number:

Style of case:

Court:

Abstract of Judgment/Judgment Lien Recording Information:

Property: [description of homestead property]

Before me, the undersigned authority, on this day personally appeared Affiant, who being first duly sworn, on oath stated:

1. I own the Property.
2. This Affidavit is made for the purpose of effecting a release of the Judgment Lien on the Property.

3. The Property includes as its purpose use for a home for Affiant and is the homestead of Affiant, as defined in Texas Property Code section 41.002. The Property does not exceed—

   a. ten acres of land, if used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, or

   b. two hundred acres for a family or 100 acres for a single, adult person not otherwise entitled to a homestead, if used for the purposes of a rural home.

4. Attached to this Affidavit is evidence that—

   a. Affiant sent a letter and a copy of this Affidavit, without attachments and before execution of the Affidavit, notifying Judgment Creditor in the Judgment Lien of this Affidavit and Affiant’s intent to file for record this Affidavit, and

   b. the letter and this Affidavit were sent by registered or certified mail, return receipt requested, thirty or more days before this Affidavit was filed to (i) Judgment Creditor’s last known address, (ii) the address appearing in Judgment Creditor’s pleadings in the action in which the Judgment was rendered or another court record, if that address is different from Judgment Creditor’s last known address, (iii) the address of Judgment Creditor’s last known attorney as shown in those pleadings or another court record, and (iv) the address of Judgment Creditor’s last known attorney as shown in the records of the State Bar of Texas, if that address is different from the address of the attorney as shown in those pleadings or another court record.
5. This Affidavit serves as a release of the Judgment Lien as to the Property in accordance with Texas Property Code section 52.0012.

__________________________________________________________________________________________________________________________ ...

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _________________ by [name of affiant].

__________________________________________________________________________________________________________________________ ...

Notary Public, State of Texas
Form 26-28

Tex. Prop. Code § 12.007 authorizes the filing of a lis pendens with the county clerk in each county in which the property is located to give notice that a proceeding is pending.

Lis Pendens

Date:

Party Filing Lis Pendens:

[Party’s Address/Party’s Attorney’s Address]:

Other Party to Proceeding:

[Other Party’s Address/Other Party’s Attorney’s Address:]

Proceeding

Court:

Cause number:

Style of case:

Type of proceeding:

Property:

Notice is given that the Proceeding is pending and that the Party Filing Lis Pendens is affirmatively seeking title to, the establishment of an interest in, or enforcement of an encumbrance against the Property.

Repeat as needed.
Tex. Prop. Code § 12.007(b) requires the lis pendens be signed by the party or the party's attorney.

[Name of party or party’s attorney]

Include acknowledgment.
Form 26-29

This form is used to create an agency relationship between a seller and a broker if the seller appoints the broker as the seller’s sole and exclusive agent to sell the property for the price and on the terms specified in the agreement but retains the right to sell the property directly without using the agent.

Listing Agreement
[Exclusive Agency]

Date:

Seller:

Seller’s Mailing Address, Telephone Number, and E-mail Address:

Broker:

Broker’s Mailing Address, Telephone Number, and E-mail Address:

Property:

Commencement Date:

Termination Date:

Listing Price:

Broker’s Fee:

Agreement

In consideration of services to be performed by Broker, Seller appoints Broker as Seller’s sole and exclusive agent to sell the Property for the price and on the terms described in this agreement, it being understood and agreed that Seller reserves the right to sell,
exchange, or otherwise dispose of the Property to a buyer procured by Seller without the assistance of Broker.

A. Agreement and Term. This agreement will commence on the Commencement Date and will continue for a term that will expire at 11:59 P.M. local time on the Termination Date. However, if there is a pending contract in effect on the Termination Date between Seller and a buyer procured by Broker and that transaction has not been closed and funded, this agreement will continue in effect beyond the Termination Date solely with respect to that contract until the earlier of the closing and funding of the transaction described in the contract or the termination of the contract in a manner permitted in the contract. The term of this agreement is also subject to extension and early termination as provided in this agreement.

B. Listing Price and Terms. Seller agrees to sell the Property for the Listing Price or any other price that Seller may accept. Unless otherwise agreed by Seller, the Property will be sold for cash, and Seller will not provide any financing with respect to the sale. Seller will pay the typical transaction and closing costs borne by or charged to sellers of real property in Texas.

C. Exclusive Agency Relationship. Unless otherwise specified by written agreement between Seller and Broker, it is understood and agreed that Broker will act solely as Seller’s agent in connection with the sale of the Property and that Broker is not authorized to act as an intermediary between Seller and any buyer of the Property.

D. Broker’s Fee. Seller will pay Broker the Broker’s Fee in cash if the Broker’s Fee is earned and payable in accordance with the following provisions:

Select one of the following.

D.1. The Broker’s Fee will be earned and payable when the sale or exchange of the Property to a buyer procured by Broker, individually or in cooperation with another broker,
under a contract executed by Seller is finally closed and funded, whether this occurs during the term of this agreement or after the termination of this agreement.

D.1. The Broker’s Fee will be earned if Broker, during the term of this agreement, individually or in cooperation with another broker, procures a buyer who enters into a contract with Seller to buy the Property. The Broker’s Fee, once earned with respect to a particular sale or exchange of the Property, will be payable, either during the term of this agreement or after the termination of this agreement, on either of the following events: (a) the closing and funding of the sale or exchange of the Property or (b) Seller’s wrongful refusal to close the sale or exchange of the Property.

D.2. Unless otherwise provided in this agreement, the Broker’s Fee will be determined on the basis of the sale price (the “Sale Price”) specified in the contract between Seller and the buyer. If the disposition of the Property is consummated as an exchange of the Property for other property, the Sale Price of the Property will be deemed to be the Listing Price unless otherwise specified by Broker and Seller in writing.

D.3. If a buyer procured by Broker with whom Seller has entered into a contract for the sale of the Property during the term of this agreement breaches that contract and Seller receives the buyer’s earnest money or a portion thereof as liquidated damages, Seller will pay Broker the lesser of one-half of the amount of the liquidated damages or the Broker’s Fee.

D.4. If litigation, mediation, or arbitration is instituted with respect to a contract between Seller and a buyer procured by Broker for the sale of the Property that is executed during the term of this agreement, and Seller collects all or a portion of the Sale Price or damages by judgment, compromise, settlement, or otherwise, Seller will pay Broker the lesser of (a) one-half of the amount collected after deduction of attorney’s fees and other expenses of
collection or (b) the Broker’s Fee (determined after reducing the Sale Price by the amount of attorney’s fees or other expenses of collection).

**D.5.** Seller will not owe Broker the Broker’s Fee if a sale of the Property does not close or fund as a result of (a) Seller’s failure to deliver a title policy to a buyer, caused by Seller’s inability to cure the buyer’s title objections due to matters beyond Seller’s reasonable control; (b) Seller’s loss of ownership due to foreclosure, conveyance in lieu of foreclosure, or other legal proceeding; or (c) Seller’s failure to restore the Property following any casualty or condemnation to its previous condition by the closing date set forth in a contract for the sale of the Property.

**D.6.** Seller authorizes any escrow or closing agent authorized to close a transaction for the sale or other disposition of the Property contemplated in this agreement to collect and disburse to Broker the Broker’s Fee due under this agreement if the buyer was procured by Broker. Seller authorizes Broker to instruct any closing or escrow agent to collect and disburse the Broker’s Fee due under this agreement if the buyer was procured by Broker.

**D.7.** Seller will not owe Broker the Broker’s Fee in connection with any transaction in which the buyer or other party to the transaction was procured by Seller without the assistance or participation of Broker.

**E. Protection Period.** Subject to the conditions set forth in paragraph D. above, if, within ninety days after the termination of this agreement (the “Protection Period”), Seller enters into a contract to sell the Property to one of Broker’s Registered Buyers (as hereinafter defined) or sells, exchanges, or otherwise transfers an interest in the Property to one of Broker’s Registered Buyers, Seller will pay Broker the Broker’s Fee. For purposes of this agreement, the Broker’s Registered Buyers will consist only of those persons whose attention has been called to the Property by Broker during the term of this agreement, or with whom Broker has negotiated the sale, exchange, or other transfer of the Property during the term of this
agreement, and whose names and addresses have been provided in writing by Broker to Seller within five days after the termination of this agreement. It is specifically understood and agreed, however, that the foregoing provisions regarding the Protection Period will not be applicable with respect to any sale, exchange, or other transfer of the Property that occurs after the termination of this agreement while the Property is listed exclusively with another broker.

F. Broker’s Duties and Authorities. During the term of this agreement, Broker will be authorized and required to take the following actions:

F.1. Broker will make reasonable efforts and act diligently to sell the Property in accordance with the terms of this agreement. Seller authorizes Broker and Broker’s associates, at Broker’s sole cost and expense, to (a) advertise the Property by the means and methods Broker reasonably determines to be appropriate for the Property based on then-current market practices for properties substantially similar to the Property; (b) place a “For Sale” sign on the Property in compliance with any state and local laws, rules, ordinances, restrictions, or covenants; (c) remove from the Property all other signs offering the Property for sale or lease; (d) furnish comparative marketing and sale information about other properties to prospective buyers; (e) disseminate information about the Property to other brokers and their associates through a multiple-listing service or such other means as Broker reasonably determines to be appropriate; (f) enter the Property, and accompany other brokers and their associates who wish to enter the Property, at reasonable times and, if the Property is then occupied, on reasonable advance notice, to show the Property to prospective buyers; (g) authorize property inspectors, appraisers, and repair personnel to enter the Property at reasonable times and, if the Property is then occupied, on reasonable notice, for pertinent purposes; (h) obtain information from any holder of any note secured by a lien on the Property concerning the note or lien; and (i) on a final and closed sale of the Property, disclose the Sale Price and terms to the local tax appraisal district and, if applicable, multiple-listing service.
F.2. Broker is not authorized to (a) execute any document in the name of or on behalf of Seller with respect to the Property, (b) authorize any repairs to the Property without Seller’s prior written consent, (c) authorize the expenditure of any funds on behalf of Seller without Seller’s prior written consent, (d) negotiate any earnest money deposit or other instrument in connection with the Property, or (e) use a “lock-box” for keys to the Property.

F.3. Broker will not be obligated to market the Property after Seller has entered into a binding contract unless the contract provides otherwise. If Broker is obligated to submit subsequent or backup offers, Seller will specifically provide in the contract for the sale of the Property with a buyer that Seller may continue to market the Property so that Broker may receive subsequent or backup offers, which will be submitted to Seller as received for consideration by Seller when the prior contract is terminated or renegotiated. If Seller enters into a contract to sell the Property that does not provide for the submission of backup offers, and Broker subsequently receives a subsequent or backup offer to purchase the Property, Broker will inform Seller and submit the subsequent or backup offer to Seller when the prior contract is terminated or renegotiated.

F.4. Broker will not be responsible in any manner for personal injury to Seller resulting from acts of third parties or loss of or damage to personal or real property due to vandalism, theft, freezing water pipes, or other causes, except the negligence or misconduct of Broker. If the Property becomes vacant during the term of this agreement, Seller will notify Seller’s casualty insurance company and request that the insurance coverage regarding the Property be modified to include a “vacancy clause” to cover the Property. Broker will not be responsible for the security of the Property or for inspecting the Property on any periodic basis unless otherwise agreed in writing by Seller and Broker.

G. **Broker’s Representations and Covenants.** Broker represents and warrants to, and covenants with, Seller as follows:
G.1. Broker is duly licensed as a real estate broker authorized to provide real estate brokerage services in accordance with this agreement by the Texas Real Estate Commission (the “Commission”) under the Texas Real Estate License Act (the “Act”), as amended, and will maintain that license in full force and effect at all times during the term of this agreement. All associates employed by Broker to assist with marketing and selling the Property, and all other brokers with whom Broker cooperates in connection with marketing and selling the Property, will be duly licensed by the Commission as real estate brokers or agents in accordance with the Act when any such services are rendered.

G.2. All activities by Broker and Broker’s associates hereunder will be conducted in strict compliance with the Act, the rules and regulations of the Commission, and all other provisions of applicable law, including, without limitation, all fair housing laws.

H. Seller’s Representations and Covenants. Seller represents and warrants to, and covenants with, Broker as follows:

H.1. Seller represents that (a) Seller has fee simple title to the Property, peaceable possession of the Property and all improvements and fixtures on the Property unless rented, and the legal capacity to convey the Property; (b) Seller is not now a party to a listing agreement with another broker for the sale, exchange, or lease of the Property; (c) no person or entity has any right to purchase, lease, or acquire the Property by virtue of a contract, option, right of first refusal, or other agreement; (d) there are no delinquencies or defaults under any deed of trust, mortgage, or other encumbrance on the Property; (e) the Property is not subject to the jurisdiction of any court whose permission or consent is required for the execution of this agreement or the sale, exchange, or other disposition of the Property; and (f) all information regarding the Property that has been provided by Seller to Broker, or that may be provided by Seller to Broker after the execution of this agreement, has been or will be, to the best of Seller’s knowledge, true, correct, and complete in all material respects.
H.2. Seller will cooperate fully and in good faith with Broker to facilitate the showing and marketing of the Property at Broker’s sole cost and expense; not enter into any listing agreement with another broker for the sale, exchange, or lease of the Property to become effective during the term of this agreement; and provide Broker with copies of all leases or rental agreements pertaining to the Property, if any, and advise Broker of any tenants moving into or out of the Property.

H.3. Seller will provide Broker and all prospective buyers of the Property with disclosure notices regarding the condition of the Property, if and to the extent required by law. Seller authorizes Broker to deliver such disclosure notices to prospective buyers of the Property at or before the time a contract is executed for the sale, exchange, or other disposition of the Property. Seller agrees to complete all such disclosure notices based on Seller’s best knowledge and belief and in a manner that discloses all material defects or facts concerning the Property that are actually known to Seller. Seller agrees to indemnify, defend, and hold Broker and Broker’s associates harmless from any damages, costs, attorney’s fees, or expenses arising from Seller’s knowingly giving to Broker or Broker’s associates or any buyer of the Property information regarding the Property that is actually known to Seller to be incorrect in any material respect or from Seller’s failure to disclose to Broker or Broker’s associates or any buyer of the Property any material information regarding the Property that is actually known to Seller.

H.4. Seller will furnish to a buyer of the Property (a) an owner policy of title insurance at Seller’s expense for the basic premium cost of such policy (without regard to any modifications or endorsements) in the amount of the Sale Price and dated at or after the closing of the sale of the Property; (b) a [general/special] warranty deed conveying title to the Property subject only to liens securing payment of a debt created or assumed as part of the Sale Price, taxes for the current year, restrictive covenants and utility easements common to any platted subdivision in which the Property is located, and other reservations or exceptions
that will not materially impair or interfere with the buyer’s anticipated use of the Property or that are otherwise acceptable to the buyer; (c) property tax statements showing no delinquent taxes; and (d) copies of restrictive covenants and documents evidencing exceptions to any title commitment other than the standard printed title exceptions.

H.5. Seller will indemnify, defend, and hold Broker harmless from any damages, costs, attorney’s fees, or expenses arising from acts of third parties or loss of or damage to personal or real property due to vandalism, theft, freezing of water pipes, or any other causes, except the negligence or misconduct of Broker.

H.6. Seller will furnish to the escrow or closing agent closing any sale or other disposition of the Property contemplated by this agreement such information regarding Seller and the transaction as the agent will require to report the transaction to the Internal Revenue Service in accordance with applicable law.

H.7. Unless otherwise specified by written notice from Seller to Broker, Seller represents that Seller is not a nonresident alien, foreign corporation, foreign partnership, foreign trust, foreign estate, or other foreign person, requiring a buyer of the Property to withhold a portion of the Sale Price under section 1445 of the Internal Revenue Code of 1986, as amended. At or before the sale or other disposition of the Property, Seller will provide Broker and any buyer of the Property any affidavits and other information reasonably required to confirm the representations concerning the nonforeign status of Seller.

I. Termination for Cause. Either party is entitled to terminate this agreement before the Termination Date if the other party fails to perform its obligations under the agreement and the failure to perform is not cured to the reasonable satisfaction of the party giving written notice of such failure within thirty days after receipt of the notice. Except for a termination due to Broker’s failure to be licensed under the Act, any such termination will not be effective
with respect to any contract for the sale, exchange, or other disposition of the Property previ-
ously executed by Seller and a buyer that is then pending closing.

J. Attorney’s Fees. If [either/any] party retains an attorney to enforce this agreement,
the party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and
other costs.

K. Binding Effect. This agreement binds, benefits, and may be enforced by the succes-
sors in interest to the parties.

L. Choice of Law. This agreement will be construed under the laws of the state of
Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or
counties in which the Property is located.

M. Counterparts. This agreement may be executed in any number of counterparts with
the same effect as if all signatory parties had signed the same document. All counterparts will
be construed together and will constitute one and the same instrument.

N. Waiver of Default. It is not a waiver of or consent to default if the nondefaulting
party fails to declare immediately a default or delays in taking any action. Pursuit of any rem-
edies set forth in this agreement does not preclude pursuit of other remedies in this agreement
or provided by law.

O. Further Assurances. Each signatory party agrees to execute and deliver any addi-
tional documents and instruments and to perform any additional acts necessary or appropriate
to perform the terms, provisions, and conditions of this agreement and all transactions con-
templated by this agreement.

P. Indemnity. Each party agrees to indemnify, defend, and hold harmless the other
party from any loss, attorney’s fees, expenses, or claims attributable to breach or default of
any provision of this agreement by the indemnifying party.
Q. Entire Agreement. This agreement is the entire agreement of the parties. There are no representations, agreements, warranties, or promises, and neither party is relying on any statements or representations of any agent of the other party, that are not in this agreement.

R. Legal Construction. If any provision in this agreement is for any reason unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. Article and section headings in this agreement are for reference only and are not intended to restrict or define the text of any section. The agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

S. Notices. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

T. Recitals. Any recitals in this agreement are represented by the parties to be accurate, and constitute a part of the substantive agreement.

U. Time. Time is of the essence. Unless otherwise specified, all references to “days” mean calendar days. Business days exclude Saturdays, Sundays, and legal public holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or legal public holiday, the date for performance will be the next following regular business day.
V. **Broker’s Lien.** BROKER HAS THE RIGHT TO CLAIM A LIEN UNDER THE PROVISIONS OF TEXAS PROPERTY CODE CHAPTER 62.

Include the following if applicable.

[Name of seller]

[Name of broker]
Form 26-30

This form is used to create an agency relationship between a seller and a broker if the seller appoints the broker as the seller’s sole and exclusive agent and grants the broker an irrevocable and exclusive right to sell the property for the price and on the terms specified in the agreement.

Listing Agreement
[Exclusive Right to Sell]

Date:

Seller:

Seller’s Mailing Address, Telephone Number, and E-mail Address:

Broker:

Broker’s Mailing Address, Telephone Number, and E-mail Address:

Property:

Commencement Date:

Termination Date:

Listing Price:

Broker’s Fee:

Agreement

In consideration of services to be performed by Broker, Seller appoints Broker as Seller’s sole and exclusive agent and grants to Broker the irrevocable and exclusive right to sell the Property for the price and on the terms described in this agreement.
A. Agreement and Term. This agreement will commence on the Commencement Date and will continue for a term that will expire at 11:59 P.M. local time on the Termination Date. However, if there is a pending contract in effect on the Termination Date between Seller and a buyer and that transaction has not been closed and funded, this agreement will continue in effect beyond the Termination Date solely with respect to that contract until the earlier of the closing and funding of the transaction described in the contract or the termination of the contract in a manner permitted in the contract. The term of this agreement is also subject to extension and early termination as provided in this agreement.

B. Listing Price and Terms. Seller agrees to sell the Property for the Listing Price or any other price that Seller may accept. Unless otherwise agreed by Seller, the Property will be sold for cash, and Seller will not provide any financing with respect to the sale. Seller will pay the typical transaction and closing costs borne by or charged to sellers of real property in Texas.

C. Exclusive Agency Relationship. Unless otherwise specified by written agreement between Seller and Broker, it is understood and agreed that Broker will act solely as Seller’s agent in connection with the sale of the Property and that Broker is not authorized to act as an intermediary between Seller and any buyer of the Property.

D. Broker’s Fee. Seller will pay Broker the Broker’s Fee in cash if the Broker’s Fee is earned and payable in accordance with the following provisions:

Select one of the following.

D.1. The Broker’s Fee will be earned and payable when the sale or exchange of the Property under a contract executed by Seller is finally closed and funded, whether this occurs during the term of this agreement or after the termination of this agreement.

Or
D.1. The Broker’s Fee will be earned if Broker, during the term of this agreement, individually or in cooperation with another broker, procures a buyer who enters into a contract with Seller to buy the Property. The Broker’s Fee, once earned with respect to a particular sale or exchange of the Property, will be payable, either during the term of this agreement or after the termination of this agreement, on either of the following events: (a) the closing and funding of the sale or exchange of the Property or (b) Seller’s wrongful refusal to close the sale or exchange of the Property.

D.2. Unless otherwise provided in this agreement, the Broker’s Fee will be determined on the basis of the sale price (the “Sale Price”) specified in the contract between Seller and the buyer. If the disposition of the Property is consummated as an exchange of the Property for other property, the Sale Price of the Property will be deemed to be the Listing Price unless otherwise specified by Broker and Seller in writing.

D.3. If Seller breaches this agreement, or leases, rents, or otherwise transfers the Property without Broker’s prior written consent, the Broker’s Fee will be earned and payable at the time of the transaction and the Sale Price will be deemed to be the Listing Price for purposes of calculating the Broker’s Fee.

D.4. If a buyer with whom Seller has entered into a contract for the sale of the Property during the term of this agreement breaches that contract and Seller receives the buyer’s earnest money or a portion thereof as liquidated damages, Seller will pay Broker the lesser of one-half of the amount of the liquidated damages or the Broker’s Fee.

D.5. If litigation, mediation, or arbitration is instituted with respect to a contract between Seller and a buyer for the sale of the Property that is executed during the term of this agreement, and Seller collects all or a portion of the Sale Price or damages by judgment, compromise, settlement, or otherwise, Seller will pay Broker the lesser of (a) one-half of the
amount collected after deduction of attorney’s fees and other expenses of collection or (b) the Broker’s Fee (determined after reducing the Sale Price by the amount of attorney’s fees or other expenses of collection).

D.6. Seller will not owe Broker the Broker’s Fee if a sale of the Property does not close or fund as a result of (a) Seller’s failure to deliver a title policy to a buyer, caused by Seller’s inability to cure the buyer’s title objections due to matters beyond Seller’s reasonable control; (b) Seller’s loss of ownership due to foreclosure, conveyance in lieu of foreclosure, or other legal proceeding; or (c) Seller’s failure to restore the Property following any casualty or condemnation to its previous condition by the closing date set forth in a contract for the sale of the Property.

D.7. Seller authorizes any escrow or closing agent authorized to close a transaction for the sale or other disposition of the Property contemplated in this agreement to collect and disburse to Broker the Broker’s Fee due under this agreement. Seller authorizes Broker to instruct any closing or escrow agent to collect and disburse the Broker’s Fee due under this agreement.

E. Protection Period. Subject to the conditions set forth in paragraph D. above, if, within ninety days after the termination of this agreement (the “Protection Period”), Seller enters into a contract to sell the Property to one of Broker’s Registered Buyers (as hereinafter defined) or sells, exchanges, or otherwise transfers an interest in the Property to one of Broker’s Registered Buyers, Seller will pay Broker the Broker’s Fee. For purposes of this agreement, the Broker’s Registered Buyers will consist only of those persons whose attention has been called to the Property by Broker, any other broker, or Seller during the term of this agreement, or with whom Broker, any other broker, or Seller has negotiated the sale, exchange, or other transfer of the Property during the term of this agreement, and whose names and addresses have been provided in writing by Broker to Seller within five days after the termination of this agreement. It is specifically understood and agreed, however, that the
foregoing provisions regarding the Protection Period will not be applicable with respect to any
sale, exchange, or other transfer of the Property that occurs after the termination of this agree-
ment while the Property is listed exclusively with another broker.

F. Broker’s Duties and Authorities. During the term of this agreement, Broker will be
authorized and required to take the following actions:

F.1. Broker will make reasonable efforts and act diligently to sell the Property in
accordance with the terms of this agreement. Seller Authorizes Broker and Broker’s associ-
ates, at Broker’s sole cost and expense, to (a) advertise the Property by the means and meth-
ods Broker reasonably determines to be appropriate for the Property based on then-current
market practices for properties substantially similar to the Property; (b) place a “For Sale”
sign on the Property in compliance with any state and local laws, rules, ordinances, restric-
tions, or covenants; (c) remove from the Property all other signs offering the Property for sale
or lease; (d) furnish comparative marketing and sale information about other properties to pro-
spective buyers; (e) disseminate information about the Property to other brokers and their
associates through a multiple-listing service or such other means as Broker reasonably deter-
mines to be appropriate; (f) enter the Property, and accompany other brokers and their associ-
ates who wish to enter the Property, at reasonable times and, if the Property is then occupied,
on reasonable advance notice, to show the Property to prospective buyers; (g) authorize prop-
erty inspectors, appraisers, and repair personnel to enter the Property at reasonable times and,
if the Property is then occupied, on reasonable notice, for pertinent purposes; (h) obtain infor-
mation from any holder of any note secured by a lien on the Property concerning the note or
lien; and (i) on a final and closed sale of the Property, disclose the Sale Price and terms to the
local tax appraisal district and, if applicable, multiple-listing service.

F.2. Broker is not authorized to (a) execute any document in the name of or on
behalf of Seller with respect to the Property, (b) authorize any repairs to the Property without
Seller’s prior written consent, (c) authorize the expenditure of any funds on behalf of Seller
without Seller’s prior written consent, (d) negotiate any earnest money deposit or other instrument in connection with the Property, or (e) use a “lock-box” for keys to the Property.

**F.3.** Broker will not be obligated to market the Property after Seller has entered into a binding contract unless the contract provides otherwise. If Broker is obligated to submit subsequent or backup offers, Seller will specifically provide in the contract for the sale of the Property with a buyer that Seller may continue to market the Property so that Broker may receive subsequent or backup offers, which will be submitted to Seller as received for consideration by Seller when the prior contract is terminated or renegotiated. If Seller enters into a contract to sell the Property that does not provide for the submission of backup offers, and Broker subsequently receives a subsequent or backup offer to purchase the Property, Broker will inform Seller and submit the subsequent or backup offer to Seller when the prior contract is terminated or renegotiated.

**F.4.** Broker will not be responsible in any manner for personal injury to Seller resulting from acts of third parties or loss of or damage to personal or real property due to vandalism, theft, freezing water pipes, or other causes, except the negligence or misconduct of Broker. If the Property becomes vacant during the term of this agreement, Seller will notify Seller’s casualty insurance company and request that the insurance coverage regarding the Property be modified to include a “vacancy clause” to cover the Property. Broker will not be responsible for the security of the Property or for inspecting the Property on any periodic basis unless otherwise agreed in writing by Seller and Broker.

**G. Broker’s Representations and Covenants.** Broker represents and warrants to, and covenants with, Seller as follows:

**G.1.** Broker is duly licensed as a real estate broker authorized to provide real estate brokerage services in accordance with this agreement by the Texas Real Estate Commission (the “Commission”) under the Texas Real Estate License Act (the “Act”), as amended, and
will maintain that license in full force and effect at all times during the term of this agreement. All associates employed by Broker to assist with marketing and selling the Property, and all other brokers with whom Broker cooperates in connection with marketing and selling the Property, will be duly licensed by the Commission as real estate brokers or agents in accordance with the Act when any such services are rendered.

G.2. All activities by Broker and Broker’s associates hereunder will be conducted in strict compliance with the Act, the rules and regulations of the Commission, and all other provisions of applicable law, including, without limitation, all fair housing laws.

H. Seller’s Representations and Covenants. Seller represents and warrants to, and covenants with, Broker as follows:

H.1. Seller represents that (a) Seller has fee simple title to the Property, peaceable possession of the Property and all improvements and fixtures on the Property unless rented, and the legal capacity to convey the Property; (b) Seller is not now a party to a listing agreement with another broker for the sale, exchange, or lease of the Property; (c) no person or entity has any right to purchase, lease, or acquire the Property by virtue of a contract, option, right of first refusal, or other agreement; (d) there are no delinquencies or defaults under any deed of trust, mortgage, or other encumbrance on the Property; (e) the Property is not subject to the jurisdiction of any court whose permission or consent is required for the execution of this agreement or the sale, exchange, or other disposition of the Property; and (f) all information regarding the Property that has been provided by Seller to Broker, or that may be provided by Seller to Broker after the execution of this agreement, has been or will be, to the best of Seller’s knowledge, true, correct, and complete in all material respects.

H.2. Seller will (a) cooperate fully and in good faith with Broker to facilitate the showing and marketing of the Property at Broker’s sole cost and expense; (b) not negotiate with any prospective buyer who may contact Seller directly, but refer all prospective buyers to
Broker; (c) not enter into any listing agreement with another broker for the sale, exchange, or lease of the Property to become effective during the term of this agreement; and (d) provide Broker with copies of all leases or rental agreements pertaining to the Property, if any, and advise Broker of any tenants moving into or out of the Property.

H.3. Seller will provide Broker and all prospective buyers of the Property with disclosure notices regarding the condition of the Property, if and to the extent required by law. Seller authorizes Broker to deliver such disclosure notices to prospective buyers of the Property at or before the time a contract is executed for the sale, exchange, or other disposition of the Property. Seller agrees to complete all such disclosure notices based on Seller’s best knowledge and belief and in a manner that discloses all material defects or facts concerning the Property that are actually known to Seller. Seller agrees to indemnify, defend, and hold Broker and Broker’s associates harmless from any damages, costs, attorney’s fees, or expenses arising from Seller’s knowingly giving to Broker or Broker’s associates or any buyer of the Property information regarding the Property that is actually known to Seller to be incorrect in any material respect or from Seller’s failure to disclose to Broker or Broker’s associates or any buyer of the Property any material information regarding the Property that is actually known to Seller.

H.4. Seller will furnish to a buyer of the Property (a) an owner policy of title insurance at Seller’s expense for the basic premium cost of such policy (without regard to any modifications or endorsements) in the amount of the Sale Price and dated at or after the closing of the sale of the Property; (b) a [general/special] warranty deed conveying title to the Property subject only to liens securing payment of a debt created or assumed as part of the Sale Price, taxes for the current year, restrictive covenants and utility easements common to any platted subdivision in which the Property is located, and other reservations or exceptions that will not materially impair or interfere with the buyer’s anticipated use of the Property or that are otherwise acceptable to the buyer; (c) property tax statements showing no delinquent
Listing Agreement [Exclusive Right to Sell] Form 26-30

taxes; and (d) copies of restrictive covenants and documents evidencing exceptions to any title commitment other than the standard printed title exceptions.

**H.5.** Seller will indemnify, defend, and hold Broker harmless from any damages, costs, attorney’s fees, or expenses arising from acts of third parties or loss of or damage to personal or real property due to vandalism, theft, freezing of water pipes, or any other causes, except the negligence or misconduct of Broker.

**H.6.** Seller will furnish to the escrow or closing agent closing any sale or other disposition of the Property contemplated by this agreement such information regarding Seller and the transaction as such agent will require to report the transaction to the Internal Revenue Service in accordance with applicable law.

**H.7.** Unless otherwise specified by written notice from Seller to Broker, Seller represents that Seller is not a nonresident alien, foreign corporation, foreign partnership, foreign trust, foreign estate, or other foreign person, requiring a buyer of the Property to withhold a portion of the Sale Price under section 1445 of the Internal Revenue Code of 1986, as amended. At or before the sale or other disposition of the Property, Seller will provide Broker and any buyer of the Property any affidavits and other information reasonably required to confirm the representations concerning the nonforeign status of Seller.

**I. Termination for Cause.** Either party is entitled to terminate this agreement before the Termination Date if the other party fails to perform its obligations under the agreement and the failure to perform is not cured to the reasonable satisfaction of the party giving written notice of such failure within thirty days after receipt of the notice. Except for a termination due to Broker’s failure to be licensed under the Act, any such termination will not be effective with respect to any contract for the sale, exchange, or other disposition of the Property previously executed by Seller and a buyer that is then pending closing.
J. Attorney’s Fees. If [either/any] party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and other costs.

K. Binding Effect. This agreement binds, benefits, and may be enforced by the successors in interest to the parties.

L. Choice of Law. This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Property is located.

M. Counterparts. This agreement may be executed in any number of counterparts with the same effect as if all signatory parties had signed the same document. All counterparts will be construed together and will constitute one and the same instrument.

N. Waiver of Default. It is not a waiver of or consent to default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

O. Further Assurances. Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

P. Indemnity. Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney’s fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying party.
Q. Entire Agreement. This agreement is the entire agreement of the parties. There are no representations, agreements, warranties, or promises, and neither party is relying on any statements or representations of any agent of the other party, that are not in this agreement.

R. Legal Construction. If any provision in this agreement is for any reason unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. Article and section headings in this agreement are for reference only and are not intended to restrict or define the text of any section. The agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

S. Notices. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

T. Recitals. Any recitals in this agreement are represented by the parties to be accurate, and constitute a part of the substantive agreement.

U. Time. Time is of the essence. Unless otherwise specified, all references to “days” mean calendar days. Business days exclude Saturdays, Sundays, and legal public holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or legal public holiday, the date for performance will be the next following regular business day.
V. Broker’s Lien. BROKER HAS THE RIGHT TO CLAIM A LIEN UNDER THE PROVISIONS OF TEXAS PROPERTY CODE CHAPTER 62.
Form 26-31

This form is used to create an agency relationship between a seller and a broker if the seller appoints the broker as the seller’s nonexclusive agent to sell the property for the price and on the terms specified in the agreement but retains the right to sell the property without using the agent, by selling it either directly or through another agent.

Listing Agreement
[Open Listing]

Date:

Seller:

Seller’s Mailing Address, Telephone Number, and E-mail Address:

Broker:

Broker’s Mailing Address, Telephone Number, and E-mail Address:

Property:

Commencement Date:

Termination Date:

Listing Price:

Broker’s Fee:

Agreement

In consideration of services to be performed by Broker, Seller appoints Broker as Seller’s nonexclusive agent to sell the Property for the price and on the terms described in this agreement, it being understood and agreed that Seller reserves the right to sell, exchange, or
otherwise dispose of the Property to a buyer procured by Seller directly or through another broker without the assistance of Broker.

A. Agreement and Term. This agreement will commence on the Commencement Date and will continue for a term that will expire at 11:59 P.M. local time on the Termination Date. However, if there is a pending contract in effect on the Termination Date between Seller and a buyer procured by Broker and that transaction has not been closed and funded, this agreement will continue in effect beyond the Termination Date solely with respect to that contract until the earlier of the closing and funding of the transaction described in the contract or the termination of the contract in a manner permitted in the contract. The term of this agreement is also subject to extension and early termination as provided in this agreement.

B. Listing Price and Terms. Seller agrees to sell the Property for the Listing Price or any other price that Seller may accept. Unless otherwise agreed by Seller, the Property will be sold for cash, and Seller will not provide any financing with respect to the sale. Seller will pay the typical transaction and closing costs borne by or charged to sellers of real property in Texas.

C. Exclusive Agency Relationship. Unless otherwise specified by written agreement between Seller and Broker, it is understood and agreed that Broker will act solely as Seller’s agent in connection with the sale of the Property and that Broker is not authorized to act as an intermediary between Seller and any buyer of the Property.

D. Broker’s Fee. Seller will pay Broker the Broker’s Fee in cash if the Broker’s Fee is earned and payable in accordance with the following provisions:

Select one of the following.

D.1. The Broker’s Fee will be earned and payable when the sale or exchange of the Property to a buyer procured by Broker, individually or in cooperation with another broker,
under a contract executed by Seller is finally closed and funded, whether this occurs during the term of this agreement or after the termination of this agreement.

**D.1.** The Broker’s Fee will be earned if Broker, during the term of this agreement, individually or in cooperation with another broker, procures a buyer who enters into a contract with Seller to buy the Property. The Broker’s Fee, once earned with respect to a particular sale or exchange of the Property, will be payable, either during the term of this agreement or after the termination of this agreement, on either of the following events: (a) the closing and funding of the sale or exchange of the Property or (b) Seller’s wrongful refusal to close the sale or to close the exchange of the Property.

**D.2.** Unless otherwise provided in this agreement, the Broker’s Fee will be determined on the basis of the sale price (the “Sale Price”) specified in the contract between Seller and the buyer. If the disposition of the Property is consummated as an exchange of the Property for other property, the Sale Price of the Property will be deemed to be the Listing Price unless otherwise specified by Broker and Seller in writing.

**D.3.** If a buyer procured by Broker with whom Seller has entered into a contract for the sale of the Property during the term of this agreement breaches that contract and Seller receives the buyer’s earnest money or a portion thereof as liquidated damages, Seller will pay Broker the lesser of one-half of the amount of the liquidated damages or the Broker’s Fee.

**D.4.** If litigation, mediation, or arbitration is instituted with respect to a contract between Seller and a buyer procured by Broker for the sale of the Property that is executed during the term of this agreement, and Seller collects all or a portion of the Sale Price or damages by judgment, compromise, settlement, or otherwise, Seller will pay Broker the lesser of (a) one-half of the amount collected after deduction of attorney’s fees and other expenses of
collection or (b) the Broker’s Fee (determined after reducing the Sale Price by the amount of 
attorney’s fees or other expenses of collection).

D.5. Seller will not owe Broker the Broker’s Fee if a sale of the Property does not 
close or fund [include if applicable: as a result of (a) Seller’s failure to deliver a title policy to 
a buyer, caused by Seller’s inability to cure the buyer’s title objections due to matters beyond 
Seller’s reasonable control; (b) Seller’s loss of ownership due to foreclosure, conveyance in 
lieu of foreclosure, or other legal proceeding; or (c) Seller’s failure to restore the Property fol-
lowing any casualty or condemnation to its previous condition by the closing date set forth in 
a contract for the sale of the Property].

D.6. Seller authorizes any escrow or closing agent authorized to close a transaction 
for the sale or other disposition of the Property contemplated in this agreement to collect and 
disburse to Broker the Broker’s Fee due under this agreement if the buyer was procured by 
Broker. Seller authorizes Broker to instruct any closing or escrow agent to collect and dis-
burse the Broker’s Fee due under this agreement if the buyer was procured by Broker.

D.7. Seller will not owe Broker the Broker’s Fee in connection with any transaction 
in which the buyer or other party to the transaction was procured by Seller directly or through 
the services of another broker without the assistance or participation of Broker.

E. Protection Period. Subject to the conditions set forth in paragraph D. above, if, 
within ninety days after the termination of this agreement (the “Protection Period”), Seller 
enters into a contract to sell the Property to one of Broker’s Registered Buyers (as hereinafter 
defined) or sells, exchanges, or otherwise transfers an interest in the Property to one of Bro-
ker’s Registered Buyers, Seller will pay Broker the Broker’s Fee. For purposes of this agree-
ment, the Broker’s Registered Buyers will consist only of those persons whose attention has 
been called to the Property by Broker during the term of this agreement, or with whom Broker 
has negotiated the sale, exchange, or other transfer of the Property during the term of this
agreement, and whose names and addresses have been provided in writing by Broker to Seller within five days after the termination of this agreement. It is specifically understood and agreed, however, that the foregoing provisions regarding the Protection Period will not be applicable with respect to any sale, exchange, or other transfer of the Property that occurs after the termination of this agreement while the Property is listed exclusively with another broker.

F. Broker’s Duties and Authorities. During the term of this agreement, Broker will be authorized and required to take the following actions:

F.1. Broker will make reasonable efforts and act diligently to sell the Property in accordance with the terms of this agreement. Seller authorizes Broker and Broker’s associates, at Broker’s sole cost and expense, to (a) advertise the Property by the means and methods Broker reasonably determines to be appropriate for the Property based on then-current market practices for properties substantially similar to the Property; (b) furnish comparative marketing and sale information about other properties to prospective buyers; (c) disseminate information about the Property to other brokers and their associates through a multiple-listing service or such other means as Broker reasonably determines to be appropriate; (d) enter the Property, and accompany other brokers and their associates who wish to enter the Property, at reasonable times and, if the Property is then occupied, on reasonable advance notice, to show the Property to prospective buyers; (e) authorize property inspectors, appraisers, and repair personnel to enter the Property at reasonable times and, if the Property is then occupied, on reasonable notice, for pertinent purposes; (f) obtain information from any holder of any note secured by a lien on the Property concerning the note or lien; and (g) on a final and closed sale of the Property to a buyer procured by Broker, disclose the Sale Price and terms to the local tax appraisal district and, if applicable, multiple-listing service.

F.2. Broker is not authorized to (a) execute any document in the name of or on behalf of Seller with respect to the Property, (b) authorize any repairs to the Property without
Seller’s prior written consent, (c) authorize the expenditure of any funds on behalf of Seller without Seller’s prior written consent, (d) negotiate any earnest money deposit or other instrument in connection with the Property, (e) use a “lock-box” for keys to the Property, or (f) place any “For Sale” signs on the Property or remove other signs offering the Property for sale or lease without Seller’s prior written consent.

**F.3.** Broker will not be obligated to market the Property after Seller has entered into a binding contract unless the contract provides otherwise. If Broker is obligated to submit subsequent or backup offers, Seller will specifically provide in the contract for the sale of the Property with a buyer that Seller may continue to market the Property so that Broker may receive subsequent or backup offers, which will be submitted to Seller as received for consideration by Seller when the prior contract is terminated or renegotiated. If Seller enters into a contract to sell the Property that does not provide for the submission of backup offers, and Broker subsequently receives a subsequent or backup offer to purchase the Property, Broker will inform Seller and submit the subsequent or backup offer to Seller when the prior contract is terminated or renegotiated.

**F.4.** Broker will not be responsible in any manner for personal injury to Seller resulting from acts of third parties or loss of or damage to personal or real property due to vandalism, theft, freezing water pipes, or other causes, except the negligence or misconduct of Broker. If the Property becomes vacant during the term of this agreement, Seller will notify Seller’s casualty insurance company and request that the insurance coverage regarding the Property be modified to include a “vacancy clause” to cover the Property. Broker will not be responsible for the security of the Property or for inspecting the Property on any periodic basis unless otherwise agreed in writing by Seller and Broker.

**G. Broker’s Representations and Covenants.** Broker represents and warrants to, and covenants with, Seller as follows:
G.1.  Broker is duly licensed as a real estate broker authorized to provide real estate brokerage services in accordance with this agreement by the Texas Real Estate Commission (the “Commission”) under the Texas Real Estate License Act (the “Act”), as amended, and will maintain that license in full force and effect at all times during the term of this agreement. All associates employed by Broker to assist with marketing and selling the Property, and all other brokers with whom Broker cooperates in connection with marketing and selling the Property, will be duly licensed by the Commission as real estate brokers or agents in accordance with the Act when any such services are rendered.

G.2.  All activities by Broker and Broker’s associates hereunder will be conducted in strict compliance with the Act, the rules and regulations of the Commission, and all other provisions of applicable law, including, without limitation, all fair housing laws.

H.  Seller’s Representations and Covenants.  Seller represents and warrants to, and covenants with, Broker as follows:

H.1.  Seller represents that (a) Seller has fee simple title to the Property, peaceable possession of the Property and all improvements and fixtures on the Property unless rented, and the legal capacity to convey the Property; (b) no person or entity has any right to purchase, lease, or acquire the Property by virtue of a contract, option, right of first refusal, or other agreement; (c) there are no delinquencies or defaults under any deed of trust, mortgage, or other encumbrance on the Property; (d) the Property is not subject to the jurisdiction of any court whose permission or consent is required for the execution of this agreement or the sale, exchange, or other disposition of the Property; and (e) all information regarding the Property that has been provided by Seller to Broker, or that may be provided by Seller to Broker after the execution of this agreement, has been or will be, to the best of Seller’s knowledge, true, correct, and complete in all material respects.
H.2. Seller will cooperate fully and in good faith with Broker to facilitate the showing and marketing of the Property at Broker’s sole cost and expense and will provide Broker with copies of all leases or rental agreements pertaining to the Property, if any, and advise Broker of any tenants moving into or out of the Property.

H.3. Seller will provide Broker and all prospective buyers of the Property with disclosure notices regarding the condition of the Property, if and to the extent required by law. Seller authorizes Broker to deliver such disclosure notices to prospective buyers of the Property at or before the time a contract is executed for the sale, exchange, or other disposition of the Property. Seller agrees to complete all such disclosure notices based on Seller’s best knowledge and belief and in a manner that discloses all material defects or facts concerning the Property that are actually known to Seller. Seller agrees to indemnify, defend, and hold Broker and Broker’s associates harmless from any damages, costs, attorney’s fees, or expenses arising from Seller’s knowingly giving to Broker or Broker’s associates or any buyer of the Property information regarding the Property that is actually known to Seller to be incorrect in any material respect or from Seller’s failure to disclose to Broker or Broker’s associates or any buyer of the Property any material information regarding the Property that is actually known to Seller.

H.4. Seller will furnish to a buyer of the Property (a) an owner policy of title insurance at Seller’s expense for the basic premium cost of such policy (without regard to any modifications or endorsements) in the amount of the Sale Price and dated at or after the closing of the sale of the Property; (b) a [general/special] warranty deed conveying title to the Property subject only to liens securing payment of a debt created or assumed as part of the Sale Price, taxes for the current year, restrictive covenants and utility easements common to any platted subdivision in which the Property is located, and other reservations or exceptions that will not materially impair or interfere with the buyer’s anticipated use of the Property or that are otherwise acceptable to the buyer; (c) property tax statements showing no delinquent
taxes; and (d) copies of restrictive covenants and documents evidencing exceptions to any title commitment other than the standard printed title exceptions.

H.5. Seller will indemnify, defend, and hold Broker harmless from any damages, costs, attorney’s fees, or expenses arising from acts of third parties or loss of or damage to personal or real property due to vandalism, theft, freezing of water pipes, or any other causes, except the negligence or misconduct of Broker.

H.6. Seller will furnish to the escrow or closing agent closing any sale or other disposition of the Property contemplated by this agreement such information regarding Seller and the transaction as the agent will require to report the transaction to the Internal Revenue Service in accordance with applicable law.

H.7. Unless otherwise specified by written notice from Seller to Broker, Seller represents that Seller is not a nonresident alien, foreign corporation, foreign partnership, foreign trust, foreign estate, or other foreign person, requiring a buyer of the Property to withhold a portion of the Sale Price under section 1445 of the Internal Revenue Code of 1986, as amended. At or before the sale or other disposition of the Property, Seller will provide Broker and any buyer of the Property any affidavits and other information reasonably required to confirm the representations concerning the nonforeign status of Seller.

I. Termination for Cause. Either party is entitled to terminate this agreement before the Termination Date if the other party fails to perform its obligations under the agreement and the failure to perform is not cured to the reasonable satisfaction of the party giving written notice of such failure within thirty days after receipt of the notice. Except for a termination due to Broker’s failure to be licensed under the Act, any such termination will not be effective with respect to any contract for the sale, exchange, or other disposition of the Property previously executed by Seller and a buyer that is then pending closing.
J. **Attorney’s Fees.** If [either/any] party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney’s fees and court and other costs.

K. **Binding Effect.** This agreement binds, benefits, and may be enforced by the successors in interest to the parties.

L. **Choice of Law.** This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Property is located.

M. **Counterparts.** This agreement may be executed in any number of counterparts with the same effect as if all signatory parties had signed the same document. All counterparts will be construed together and will constitute one and the same instrument.

N. **Waiver of Default.** It is not a waiver of or consent to default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

O. **Further Assurances.** Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

P. **Indemnity.** Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney’s fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying party.
Q. **Entire Agreement.** This agreement is the entire agreement of the parties. There are no representations, agreements, warranties, or promises, and neither party is relying on any statements or representations of any agent of the other party, that are not in this agreement.

R. **Legal Construction.** If any provision in this agreement is for any reason unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. Article and section headings in this agreement are for reference only and are not intended to restrict or define the text of any section. The agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

S. **Notices.** Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

T. **Recitals.** Any recitals in this agreement are represented by the parties to be accurate, and constitute a part of the substantive agreement.

U. **Time.** Time is of the essence. Unless otherwise specified, all references to “days” mean calendar days. Business days exclude Saturdays, Sundays, and legal public holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or legal public holiday, the date for performance will be the next following regular business day.
V. **Broker’s Lien.** BROKER HAS THE RIGHT TO CLAIM A LIEN UNDER THE PROVISIONS OF TEXAS PROPERTY CODE CHAPTER 62.

Include the following if applicable.

Continue with the following.

[Name of seller]

[Name of broker]
Partial Release of Judgment Lien

Form 26-32

This form is used to effect a partial release of specified property from a judgment lien.

Partial Release of Judgment Lien

Date:

Judgment Debtor:

Judgment Creditor:

Judgment

Date:

Cause number:

Style of case:

Court:

Abstract of Judgment Recording Information:

Judgment Creditor acknowledges satisfaction of the Judgment in part and releases to Judgment Debtor any and all liens existing by reason of the Judgment and the filing of the abstract of judgment only against the following described property: [describe property].

The liens existing by reason of the Judgment and the filing of the abstract of judgment continue in full force and effect as to all properties not expressly released by this instrument.

[Name of judgment creditor]
Include acknowledgment.
Form 26-33

This form is used to evidence a buyer’s acceptance of property subject to a disclaimer of warranties by the seller.

Property Condition Disclaimer

Date:

Seller:

Seller’s Address:

Buyer:

Buyer’s Address:

Transaction: The purchase of the Property by Buyer from Seller.

Buyer’s Reliance Items: [List items of information regarding the property that the seller has provided to the buyer.]

Property:

[Contract:]

[Closing Documents:]

Consideration: The same consideration exchanged in the Transaction; in addition, Buyer’s stipulation that Seller has sold the Property at the purchase price in this Transaction on the basis that this disclaimer is a material part of the Transaction, and Seller would have required additional consideration had this disclaimer not been a part of the Transaction.

For the Consideration stated, Buyer agrees and represents to Seller as follows:
1. **Inspections.** Buyer has been entitled to inspect every aspect of the Property to Buyer’s satisfaction, and Buyer has actually inspected to Buyer’s satisfaction each aspect of the Property considered to be a substantial or material factor by Buyer in making the decision to complete the Transaction.

2. **Importance of Disclaimer.** BUYER IS TAKING THE PROPERTY IN AN ARM’S-LENGTH AGREEMENT BETWEEN THE PARTIES. THE CONSIDERATION WAS BARGAINED ON THE BASIS OF AN “AS IS, WHERE IS” TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS OR EXPRESS OR IMPLIED WARRANTIES [include if applicable: ], EXCEPT FOR THE WARRANTY OF TITLE STATED IN THE [DEED/CLOSING DOCUMENTS] [AND SELLER’S REPRESENTATIONS AND WARRANTIES TO BUYER SET FORTH IN THE SALES CONTRACT]]. This disclaimer is not an incidental or boilerplate provision. Buyer and Seller have relatively equal bargaining positions.

3. **Level of Buyer’s Knowledge.** Buyer understands that Buyer has the right to employ professionals to advise Buyer on every aspect of the Property, and Buyer has agreed not to rely on Seller for such information.

4. **Absence of Seller Representations.** Other than for the Buyer’s Reliance Items, which Seller has furnished to Buyer and on which Buyer is relying, Buyer is not relying on any of Seller’s representations, statements, or assertions concerning the Property. Buyer is not relying on Seller to provide any information about the Property that Buyer has not independently verified. Other than the Buyer’s Reliance Items, Buyer is relying solely on Buyer’s independent verifications, rather than Seller’s information, assertions, statements, or representations. Other than the Buyer’s Reliance Items, any information, assertions, statements, or representations made by Seller or Seller’s representatives have been recognized as puffing or opinion. Further, if such information, assertions, statements, or representations were or are incorrect, their insignificance to Buyer would not be affected, and they would not constitute misrepresentations of material fact.
5. **Waiver of Warranties.** BUYER IS NOT RELYING ON ANY REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES OTHER THAN THOSE EXPRESSLY CONTAINED IN THIS DISCLOSURE [include as applicable: THE CONTRACT, THE CLOSING DOCUMENTS, AND [describe other documents]]. BUYER IS NOT RELYING ON ANY INFORMATION REGARDING THE PROPERTY PROVIDED BY ANY PERSON, OTHER THAN BUYER’S OWN INSPECTION AND THE REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS DISCLOSURE, THE CONTRACT, AND THE CLOSING DOCUMENTS.

6. **Dangerous Conditions.** Buyer has thoroughly inspected the Property to determine the existence of any conditions posing unreasonable risk of harm. To the extent such conditions have been discovered, Buyer will prevent persons from being subject to the risks of such conditions and Buyer will exercise reasonable care to reduce or eliminate the risks.

7. **Consequences of Disclaimer.** Buyer understands that, by executing this disclaimer, Buyer has agreed to make Buyer’s own appraisal of the bargain and to accept the risk that Buyer may be wrong. Furthermore, Buyer agrees not to hold Seller liable if the Property turns out to be worth less than the price paid or if the Property turns out to have patent or latent defects that Buyer has not discovered before closing. Instead, Buyer would be the sole cause of any loss occasioned by the foregoing, because Buyer is relying on surveys, elevation analyses, appraisals, inspections, and other analyses conducted only by Buyer’s representatives, in determining the condition, suitability, and value of the Property, or because Buyer has been free to conduct such analyses but has chosen not to do so.

8. **Permits.** Buyer is solely responsible for determining what, if any, permits, licenses, certificates, and the like (collectively, the “Permits”) are necessary for Buyer’s intended uses of the Property. Buyer is solely responsible for taking all necessary steps to obtain any such Permits that Buyer deems necessary for Buyer’s intended uses of the Property.
9. **No Reliance of Buyer on Seller’s Disclosure Notice.** Buyer has not relied on any of the information contained in the [select one of the following: Seller’s Disclosure Notice (TAR)/Seller’s Disclosure of Property Condition (TREC Residential)/Commercial Property Condition Statement (TAR Commercial)], if one has been provided in connection with the transaction.

10. **Survival.** Buyer’s agreements with and representations to Seller made in this disclaimer will survive closing.

11. **Construction.** When the context requires, singular nouns and pronouns include the plural.

__________________________________________________________________________________________________________________________________________________________

[Name of buyer]

Include acknowledgment.
Release of Judgment Lien

Form 26-34

This form is used to effect a complete release of a recorded judgment lien.

Release of Judgment Lien

Date:

Judgment Debtor:

Judgment Creditor:

Judgment

Date:

Cause number:

Style of case:

Court:

Abstract of Judgment Recording Information:

Judgment Creditor acknowledges satisfaction of the Judgment and releases to Judgment Debtor any and all liens existing by reason of the Judgment and the filing of the abstract of judgment.

[Name of judgment creditor]

Include acknowledgment.
Revocation of Power of Attorney

Date:

Principal:

Principal’s Mailing Address:

Agent (Attorney-in-fact):

Agent’s Mailing Address:

Power of Attorney

Date:

[Recording Information:]

[Expiration Date:]

Property:

Principal revokes the Power of Attorney and all power and authority given to the Agent (Attorney-in-fact) in the Power of Attorney.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

[Name of principal]
STATE OF TEXAS )
COUNTY OF )

This instrument was acknowledged before me on [date] by [name].

[SEAL] [Title of officer]
My commission expires: [date]
Special Durable Power of Attorney for Real Estate Transactions

Date:

Principal:

Principal’s Mailing Address:

Agent:

Agent’s Mailing Address:

Effective Date:

[Expiration Date:]

Property:

Powers Given with Respect to the Property:

The following are suggested powers for the sale of real estate.
1. Enter into real estate listing agreements offering the Property for sale at any price on any terms and with any commission agreement.

2. Contract to sell the Property for any price on any terms.

3. Convey the Property.

4. Execute and deliver any legal instruments relating to the sale and conveyance of the Property, including but not limited to general and special warranty deeds binding Principal with vendor’s liens retained or disclaimed as applicable or transferred to a third-party lender, affidavits (for example, federal tax statements), notices, disclosures, waivers, and designations.

5. Accept notes, deeds of trust, and other legal instruments.

6. Approve closing statements authorizing deductions from the sale price.

7. Receive Principal’s net sales proceeds by check payable to Principal.

8. Indemnify and hold harmless any third party who accepts and acts under this Power of Attorney.

9. Do everything and sign everything necessary or appropriate to sell the Property and accomplish the powers set out.

The following are suggested powers for the purchase of real estate.

1. Contract to purchase the Property for any price on any terms.

2. Execute, deliver, and accept any legal instruments relating to the purchase of the Property and to any borrowing for the purchase, including but not limited to deeds, notes, deeds of trust, guaranties, and closing statements.
3. Approve closing statements authorizing payment of prorations and expenses.

4. Pay Principal’s net purchase price from funds provided by Principal.

5. Indemnify and hold harmless any third party who accepts and acts under this power of attorney.

6. Do everything and sign everything necessary or appropriate to purchase the Property and accomplish the powers set out.

Principal appoints Agent to act for Principal in accordance with the powers given with respect to the Property, and Principal ratifies all acts done under this appointment. Agent’s authority will begin on the Effective Date and end [on the Expiration Date unless revoked sooner/only if revoked] by Principal’s signing an instrument revoking this power of attorney and filing it for record in the real property records of [county] County, Texas. A signed and filed revocation instrument will be effective, without limitation or exception, including but not limited to being effective against a third party relying on this power of attorney without receipt of actual notice of the revocation, on the date and time of filing.

This is a durable power of attorney under chapter 751 of the Texas Estates Code, which is not affected by subsequent disability or incapacity of Principal and will not lapse because of a passage of time [include if applicable: , but it will expire on the Expiration Date].

If applicable, the following paragraph is a suggested indemnity clause.

Principal binds Principal and Principal’s heirs and personal representatives to indemnify and hold Agent harmless from all claims, demands, losses, damages, actions, and expenses that Agent may sustain or incur in connection with carrying out the authority granted to Agent in this power of attorney.
THE ATTORNEY-IN-FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

[Name of principal]

Include acknowledgment.
Affidavit of Attorney-in-Fact

Date:

Principal:

Principal’s Mailing Address:

Effective Date of Power of Attorney:

Affiant: [name of attorney-in-fact]

Affiant’s Mailing Address:

Affiant on oath swears that the following statements are true and within the personal knowledge of Affiant:

1. Affiant is the attorney-in-fact for Principal, having been appointed in the Power of Attorney.

2. The power of attorney has not been terminated by revocation, by Principal’s death, by Principal’s divorce or the annulment of the marriage of Principal if the attorney-in-fact is Principal’s spouse, or by the qualification of a guardian of the estate of Principal.

[Name of attorney-in-fact]

SWORN TO AND SUBSCRIBED before me on ____________________________
by [name of attorney-in-fact].

Notary Public, State of Texas
STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of attorney-in-fact].

________________________________________
Notary Public, State of Texas
Form 26-37

This form is provided by section 752.051 of the Texas Estates Code. It has broad, sweeping, and detailed powers and can be used for real estate transactions as well as a wide variety of other transactions.

Statutory Durable Power of Attorney

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, SUBTITLE P, TITLE 2, ESTATES CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO. IF YOU WANT YOUR AGENT TO HAVE THE AUTHORITY TO SIGN HOME EQUITY LOAN DOCUMENTS ON YOUR BEHALF, THIS POWER OF ATTORNEY MUST BE SIGNED BY YOU AT THE OFFICE OF THE LENDER, AN ATTORNEY AT LAW, OR A TITLE COMPANY.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent’s authority will continue until:

(1) you die or revoke the power of attorney;

(2) your agent resigns, is removed by court order, or is unable to act for you; or

(3) a guardian is appointed for your estate.

I, _________________________________ (insert your name and address), appoint _________________________________ (insert the name and address of the person appointed) as my agent to act for me in any lawful way with respect to all of the fol-
lowing powers that I have initialed below. (YOU MAY APPOINT CO-AGENTS. UNLESS YOU PROVIDE OTHERWISE, CO-AGENTS MAY ACT INDEPENDENTLY.)

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (O) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS LISTED IN (A) THROUGH (N).

TO GRANT A POWER, YOU MUST INITIAL THE LINE IN FRONT OF THE POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF THE POWER. YOU MAY, BUT DO NOT NEED TO, CROSS OUT EACH POWER WITHHELD.

_____ (A) Real property transactions;

_____ (B) Tangible personal property transactions;

_____ (C) Stock and bond transactions;

_____ (D) Commodity and option transactions;

_____ (E) Banking and other financial institution transactions;

_____ (F) Business operating transactions;

_____ (G) Insurance and annuity transactions;

_____ (H) Estate, trust, and other beneficiary transactions;

_____ (I) Claims and litigation;

_____ (J) Personal and family maintenance;
____ (K) Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;

____ (L) Retirement plan transactions;

____ (M) Tax matters;

____ (N) Digital assets and the content of an electronic communication;

____ (O) ALL OF THE POWERS LISTED IN (A) THROUGH (N). YOU DO NOT HAVE TO INITIAL THE LINE IN FRONT OF ANY OTHER POWER IF YOU INITIAL LINE (O).

SPECIAL INSTRUCTIONS:

Special instructions applicable to agent compensation (initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to compensation that is reasonable under the circumstances):

____ My agent is entitled to reimbursement of reasonable expenses incurred on my behalf and to compensation that is reasonable under the circumstances.

____ My agent is entitled to reimbursement of reasonable expenses incurred on my behalf but shall receive no compensation for serving as my agent.

Special instructions applicable to co-agents (if you have appointed co-agents to act, initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to act independently):

____ Each of my co-agents may act independently for me.

____ My co-agents may act for me only if the co-agents act jointly.
My co-agents may act for me only if a majority of the co-agents act jointly.

Special instructions applicable to gifts (initial in front of the following sentence to have it apply):

I grant my agent the power to apply my property to make gifts outright to or for the benefit of a person, including by the exercise of a presently exercisable general power of appointment held by me, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent. If you DO NOT want to grant your agent one or more of the following powers, you may also CROSS OUT a power you DO NOT want to grant.)

Create, amend, revoke, or terminate an inter vivos trust

Make a gift, subject to the limitations of Section 751.032 of the Durable Power of Attorney Act (Section 751.032, Estates Code) and any special instructions in this power of attorney

Create or change rights of survivorship

Create or change a beneficiary designation
____ Authorize another person to exercise the authority granted under this power of attorney.

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________
__________________________________________________________________________________________________________________________ ... __________________________________________________________________________________________________________________________

UNLESS YOU DIRECT OTHERWISE BELOW, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT TERMINATES.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

(A) This power of attorney is not affected by my subsequent disability or incapacity.
(B) This power of attorney becomes effective upon my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

If Alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician’s medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. Termination of this durable power of attorney is not effective as to a third party until the third party has actual knowledge of the termination. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney. The meaning and effect of this durable power of attorney is determined by Texas law.

If any agent named by me dies, becomes incapacitated, resigns, or refuses to act, or is removed by court order, or if my marriage to an agent named by me is dissolved by a court decree of divorce or annulment or is declared void by a court (unless I provided in this document that the dissolution or declaration does not terminate the agent’s authority to act under this power of attorney), I name the following (each to act alone and successively, in the order named) as successor(s) to that agent:
Signed this ______ day of __________________, ____________.

________________________________________
(your signature)

State of ____________________

County of ____________________

This document was acknowledged before me on ________________ (date) by

________________________________________
(name of principal).

________________________________________
(signature of notarial office)
(Seal, if any, of notary)

________________________________________
(printed name of notary)

My commission expires: ________
IMPORTANT INFORMATION FOR AGENT

Agent’s Duties

When you accept the authority granted under this power of attorney, you establish a “fiduciary” relationship with the principal. This is a special legal relationship that imposes on you legal duties that continue until you resign or the power of attorney is terminated, suspended, or revoked by the principal or by operation of law. A fiduciary duty generally includes the duty to:

1. act in good faith;
2. do nothing beyond the authority granted in this power of attorney;
3. act loyally for the principal’s benefit;
4. avoid conflicts that would impair your ability to act in the principal’s best interest; and
5. disclose your identity as an agent when you act for the principal by writing or printing the name of the principal and signing your own name as “agent” in the following manner:

(Principal’s Name) by (Your Signature) as Agent

In addition, the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code) requires you to:

1. maintain records of each action taken or decision made on behalf of the principal;
2. maintain all records until delivered to the principal, released by the principal, or discharged by a court; and
(3) if requested by the principal, provide an accounting to the principal that, unless otherwise directed by the principal or otherwise provided in the Special Instructions, must include:

(A) the property belonging to the principal that has come to your knowledge or into your possession;

(B) each action taken or decision made by you as agent;

(C) a complete account of receipts, disbursements, and other actions of you as agent that includes the source and nature of each receipt, disbursement, or action, with receipts of principal and income shown separately;

(D) a listing of all property over which you have exercised control that includes an adequate description of each asset and the asset’s current value, if known to you;

(E) the cash balance on hand and the name and location of the depository at which the cash balance is kept;

(F) each known liability;

(G) any other information and facts known to you as necessary for a full and definite understanding of the exact condition of the property belonging to the principal; and

(H) all documentation regarding the principal’s property.

Termination of Agent’s Authority

You must stop acting on behalf of the principal if you learn of any event that terminates or suspends this power of attorney or your authority under this power of attorney. An event
that terminates this power of attorney or your authority to act under this power of attorney includes:

(1) the principal’s death;

(2) the principal’s revocation of this power of attorney or your authority;

(3) the occurrence of a termination event stated in this power of attorney;

(4) if you are married to the principal, the dissolution of your marriage by a court decree of divorce or annulment or declaration that your marriage is void, unless otherwise provided in this power of attorney;

(5) the appointment and qualification of a permanent guardian of the principal’s estate unless a court order provides otherwise; or

(6) if ordered by a court, your removal as agent (attorney in fact) under this power of attorney. An event that suspends this power of attorney or your authority to act under this power of attorney is the appointment and qualification of a temporary guardian unless a court order provides otherwise.

Liability of Agent

The authority granted to you under this power of attorney is specified in the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code). If you violate the Durable Power of Attorney Act or act beyond the authority granted, you may be liable for any damages caused by the violation or subject to prosecution for misapplication of property by a fiduciary under Chapter 32 of the Texas Penal Code.

THE AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.
Certification of Durable Power of Attorney by Agent

I, ______________________________ (agent), certify under penalty of perjury that:

1. I am the agent named in the power of attorney validly executed by _______________ (principal) (“principal”) on __________ (date), and the power of attorney is now in full force and effect.

2. The principal is not deceased and is presently domiciled in _______________ (city and state/territory or foreign country).

3. To the best of my knowledge after diligent search and inquiry:
   a. The power of attorney has not been revoked by the principal or suspended or terminated by the occurrence of any event, whether or not referenced in the power of attorney;
   b. At the time the power of attorney was executed, the principal was mentally competent to transact legal matters and was not acting under the undue influence of any other person;
   c. A permanent guardian of the estate of the principal has not qualified to serve in that capacity;
   d. My powers under the power of attorney have not been suspended by a court in a temporary guardianship or other proceeding;
e. If I am (or was) the principal’s spouse, my marriage to the principal has not been dissolved by court decree of divorce or annulment or declared void by a court, or the power of attorney provides specifically that my appointment as the agent for the principal does not terminate if my marriage to the principal has been dissolved by court decree of divorce or annulment or declared void by a court;

f. No proceeding has been commenced for a temporary or permanent guardianship of the person or estate, or both, of the principal; and

g. The exercise of my authority is not prohibited by another agreement or instrument.

4. If under its terms the power of attorney becomes effective on the disability or incapacity of the principal or at a future time or on the occurrence of a contingency, the principal now has a disability or is incapacitated or the specified future time or contingency has occurred.

5. I am acting within the scope of my authority under the power of attorney, and my authority has not been altered or terminated.

6. If applicable, I am the successor to ____________________ (predecessor agent), who has resigned, died, or become incapacitated, is not qualified to serve or has declined to serve as agent, or is otherwise unable to act. There are no unsatisfied conditions remaining under the power of attorney that preclude my acting as successor agent.

7. I agree not to:

a. Exercise any powers granted by the power of attorney if I attain knowledge that the power of attorney has been revoked, suspended, or terminated; or
b. Exercise any specific powers that have been revoked, suspended, or terminated.

8. A true and correct copy of the power of attorney is attached to this document.

9. If used in connection with an extension of credit under Section 50(a)(6), Article XVI, Texas Constitution, the power of attorney was executed in the office of the lender, the office of a title company, or the law office of ____________________.

Date: ____________________

__________________________________________________________________________________________________________________________ ...

__________________________________________________________________________________________________________________________

________________________

(signature of agent)
Appendix

Third-Party Legal Opinion Letters

Lenders often require a borrower’s counsel to issue a legal opinion letter to the lender on certain aspects of a loan transaction, including, among other matters, an opinion regarding the borrower’s legal status and the enforceability of the lender’s loan documents. Historically, the initial form of the legal opinion letter is presented to the borrower’s counsel by the lender or its counsel. Although several national, state, and local private attorney organizations and bar association groups have published suggested standard third-party legal opinion letter formats for use in rendering a third-party legal opinion letter, neither a single opinion format nor a single standard for interpreting the opinions included in an opinion letter has been universally accepted by lenders, borrowers, or their respective legal counsel. Information and guidance on the preparation and use of third-party legal opinion letters may be obtained from sources listed in the selected bibliography in this appendix. Additional information can be obtained from the Legal Opinion Resource Center at [https://www.americanbar.org/groups/business_law/migrated/tribar.html](https://www.americanbar.org/groups/business_law/migrated/tribar.html).

Several of the articles listed in the bibliography discuss the Texas Supreme Court case of *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999), which held that attorneys (as well as other professionals) could be liable in Texas for the tort of negligent misrepresentation, as defined by the *Restatement (Second) of Torts* § 552 (1977). Even as the supreme court reaffirmed the availability in Texas of the defense of a lack of privity in legal malpractice cases, it noted several times that section 552 does not require privity to impose liability for negligent misrepresentation or implicate the policy concerns behind the privity rule. *See McCamish, 991 S.W.2d at 792–93, 795.*

As the supreme court pointed out in *McCamish*, an attorney can be liable to a nonclient for negligent misrepresentation based on the issuance of an opinion letter; however, section 552 limits liability to situations in which (1) the attorney who provides the false information is aware of the nonclient and intends that the nonclient rely on the false information and (2) the nonclient justifiably relies on the false information. *See McCamish, 991 S.W.2d at 793–94.* Furthermore, the supreme court expressly recognized that “[a] lawyer may also avoid or minimize the risk of liability to a nonclient by setting forth (1) limitations as to whom the representation is directed and who should rely on it, or (2) disclaimers as to the scope and accuracy of the factual investigation or assumptions forming the basis of the representation or the representation itself.” *See McCamish, 991 S.W.2d at 794.* The foregoing quote explains a good deal of the scope of reliance disclaimers in current third-party opinion letter practice.
Selected Bibliography

Reports


Articles and CLE Materials


Statutes and Rules Cited

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