NEW CONSTRUCTION FORMS GUIDE

The NC REALTORS® forms library has two standard form contracts that a buyer may use to purchase a new construction home: (1) Form 2-T with the New Construction Addendum attached; and (2) Form 800-T. This guide explains the important similarities and differences between these two options, and it provides helpful tips for navigating new construction transactions.

This guide does not address agent compensation. Agents should review their agency agreements to make sure that new construction compensation is adequately addressed. This review should include, but not be limited to, when the agent will be paid if the real property will close before construction is completed, and whether the basis for computing the agent's commission is the original contract price or the final price of the home and land together (including any changes agreed to during construction).

Side-by-Side Comparison of Important Terms in the New Construction Standard Form Contracts

	Form 2-T with New Construction Addendum	Form 800-T
Effective Date	Yes	Yes
Due Diligence Fee	Yes	No
Earnest Money Deposit (Initial and Additional)	Yes	Yes
Construction Fees	No	Yes
Building Deposit	Yes	No
Due Diligence Period	Yes	No
Pre-Construction Evaluation Period	No	Yes
Plans and Specifications Included in Contract	Yes	Yes
Additional Improvements Included in Contract	Yes	No
Substantial Completion Deadline	No	Yes
Buyer or Seller Conditions and Reports	No	Yes
Inspections and Punch List Items	Yes	Yes
60 Day Delay for Construction or Additional Improvements	Yes	Yes
Construction Warranty	Yes	Yes

1. **When to Use Each Form and General Guidance**. Form 2-T with the New Construction Addendum may be used once the drywall is complete. Prior to completion of the drywall, Form 800-T should be used to make sure the full scope of construction issues are addressed in the contract. *However, completion of the drywall is not always a firm transition point when deciding which form to use.*

   Even if the drywall is complete, there may be some scenarios where Form 800-T is a better fit than Form 2-T with the New Construction Addendum. In deciding which contract to use in these cases, agents should consider: (a) which form the buyer is more comfortable using; (b) the amount and detail of construction left; (c) what funds the builder might need from the buyer to complete construction and when those funds need to be paid; and (d) how long the remaining construction will take. Depending on the answers to these questions, agents can consult with their buyer and decide which form will best fit their needs.

   Regardless of which contract is used, agents are strongly encouraged to make sure the Plans and Specifications are completely and fully attached and described. If the New Construction Addendum with Form 2-T is being used, then any Additional Improvements should similarly be detailed with attachments.

   If a new construction home is fully complete, and the buyer and seller are using Form 2-T as their contract, strong consideration should be given to attaching the New Construction Addendum even if no Additional Improvements are going to be made. Aside from Additional Improvements, the New Construction Addendum has many features the parties will want to be clear on, such as punch list requests and the warranty. Form 2-T does not otherwise address these items when a new construction home is the subject of the transaction.

2. **Earnest Money Deposits**. The Initial Earnest Money Deposit and the Additional Earnest Money Deposit work the same in both contracts. This money is placed in escrow and may be refundable to the buyer or payable to the seller pursuant to the contract.

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3. **Due Diligence Fees, Construction Fees, and Building Deposits**. Generally speaking, all these payments are non-refundable except for specific exceptions that are outlined in the contract. Building Deposits and Construction Fees are similar in that they are paid by the buyer so that the seller or builder can complete improvements to the home. Form 800-T allows the buyer and seller to agree to a schedule of Construction Fees to be paid over time, while Form 2-T and the New Construction Addendum together state that the Building Deposit is a one-time payment made immediately after the expiration of the Due Diligence Period.

   The Due Diligence Fee in Form 2-T, if any, does not share the same characteristics. Instead, it is a fee paid by the buyer so that the buyer has the right to terminate during the Due Diligence Period. Form 800-T does not have an option for a Due Diligence Fee, because there is no Due Diligence Period.

4. **Due Diligence Period and Pre-Construction Evaluation Period**. The addition of the New Construction Addendum does not change how the Due Diligence Period operates in Form 2-T. The buyer's right to conduct inspections, and the buyer's right to terminate, operate the same. So long as the Due Diligence Fee is timely paid, the buyer can terminate for any reason or no reason during the Due Diligence Period. The Pre-Construction Evaluation Period operates very differently.

   Under Form 800-T, the Pre-Construction Evaluation Period is a period of time where termination may be available based on certain conditions. For example, the buyer may choose to make loan funding, insurance, or street investigation a condition of the contract. If the selected conditions are not met, then the buyer will have a right to terminate during the Pre-Construction Evaluation Period. Once this period ends, the buyer's right to terminate is limited, but it may be possible for other reasons, such as breach of contract by the seller.

   Form 800-T also permits the buyer and seller to agree that certain satisfactory reports during the Pre-Construction Evaluation Period must be obtained by the seller. These reports include, but are not limited to, environmental factors, utilities, septic, flood, and land use. If the seller does not obtain the agreed-to reports, then the parties may have a right to terminate.

   Form 800-T permits the seller and buyer to agree that the seller's performance is contingent on the seller's ability to obtain financing for the build. If selected, then the seller may terminate only during the Pre-Construction Evaluation Period if the seller cannot obtain financing.

5. **Inspections**. Both Form 800-T and Form 2-T with the New Construction Addendum allow the buyer to conduct inspections up until Closing to ensure that Plans and Specifications and Additional Improvements are being completed as required by the contract. Both contracts also permit the buyer to perform a radon inspection, and if the result of the radon test exceeds government guidelines, then the seller has an obligation to remediate.

   The buyer's right to conduct inspections is generally broad, but not without limits. For example, both contracts state that the seller must provide "reasonable access." The term "reasonable access" is not defined, but it does give the seller the right to deny access that is unreasonable. As another example, both Form 800-T and the New Construction Addendum state that the buyer can only conduct inspections at reasonable times, and the buyer must not perform inspections in a way that impedes the construction process. This framework gives the buyer wide latitude as to the type and number of inspections they can schedule, but it also gives the seller some discretion to limit the buyer's access if the buyer is too demanding.

6. **Warranties**. The warranty in both the New Construction Addendum and Form 800-T is in addition to the new construction warranty implied by North Carolina law. In 1974, the North Carolina Supreme Court recognized the existence of an implied warranty of workmanlike construction and no major structural defects subject to the following requirements: (1) the contract must be for the sale of a recently completed dwelling or a dwelling under construction; (2) the seller must be in the business of residential construction; and (3) the warranty is only for the benefit of the original buyer(s) of the dwelling. This implied warranty is limited to latent defects – defects that are not visible or apparent to a reasonable person upon inspection of a dwelling.

   Warranty claims are rarely issues to be handled by agents. Buyers should review any warranty terms, coverage, and process with an attorney prior to entering into a new construction purchase contract. Should a buyer raise a warranty claim against a seller or builder, as opposed to a punch list item, agents should recommend they seek legal counsel.

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