

DRAFT MODEL OPTION CONTRACT FOR NEBRASKA REAL ESTATE

OPTION AGREEMENT

This Option Agreement ("Agreement") is made as of _____ *[date]* ("Execution Date") between *[name of optionor, including capacity, if appropriate]* ("Optionor") and *[name of optionee, including capacity, if appropriate]* ("Optionee").

Recitals

A. Optionor is the Optionor of certain real property situated in *[name of county]*, Nebraska, commonly known as *[describe real property by street address or similar identifier]*, and more particularly described in attached Exhibit A *[legal description]*, incorporated by reference ("Property").

B. Optionee desires to acquire the exclusive right to purchase the Property at an agreed price and under the specific terms in this Agreement.

NOW THEREFORE, for good and valuable consideration, the receipt and adequacy of which are acknowledged, the parties agree as follows:

Section 1. Option to Purchase

Optionor grants to Optionee an option to purchase the Property on the terms and conditions of this Agreement and in the Real Estate Purchase and Sale Agreement attached as Exhibit B and incorporated by reference ("Purchase Agreement").

Section 2. Consideration for Option

Concurrently with the execution of this Agreement, Optionee has paid to Optionor as consideration the sum of _____ *[amount]* for the option.

NOTE: The parties should make clear whether the consideration given in exchange for the option should be applied as a credit against the purchase price. Therefore, one of the following four alternative clauses should be employed.

Alternate One

No consideration shall be applied to or credited against the purchase price of the Property if the option granted under this Agreement is exercised.

Alternate Two

All consideration paid by Optionee shall be credited to the Purchase Price of the Property

if the option granted under this Agreement is exercised.

Alternate Three

If the option granted under this Agreement is exercised by Optionee, then Optionor shall credit _____ [amount] of the option consideration to the purchase price of the Property.

Alternate Four (Applies Only if Optionee Agrees to Cover Real Estate Taxes During Option's Term)

All consideration paid by Optionee other than payment of Real Property Taxes shall be credited to the Purchase Price of the Property; or

All consideration paid by Optionee including payment of Real Property Taxes shall be credited to the Purchase Price of the Property.

NOTE: Obviously, the Optionor may seek consideration in addition to a fixed sum, such as payment of real estate taxes accruing during the option's term. Here are additional provisions requiring the Optionee to cover such taxes accruing during the option's term:

Alternate One

As additional consideration for the Option granted by this Agreement, Optionee shall pay during the Option Term all Real Property Taxes on the Property prorated from the Execution Date until Optionor's receipt of the Exercise Notice in accordance with Section 5. On the date the Option is terminated or expires, Optionee shall be relieved of the obligation to pay Real Property Taxes accruing afterwards on the Property not then purchased and Optionee will receive a pro rata refund of any taxes previously paid by Optionee that are attributable to the period after the termination or expiration date.

Optionee shall pay to Optionor by cashier's or certified check or wire transfer the installments of Real Property Taxes due for the Property on the later of:

(A) ten (10) days following written demand from Optionor to Optionee, including a copy of the current tax bill, or

(B) ten (10) days before each installment of taxes becomes delinquent. Optionor shall, conditioned on Optionee's performance, pay in a timely manner the Real Property Taxes to the appropriate governmental agency. However, Optionee may pay the Real Property Taxes directly to the taxing authority and provide proof of payment by the date the installment of taxes becomes delinquent.

(C) the payment of all consideration for the Option, including Real Property Taxes, due under this Agreement is a condition precedent to the exercise by Optionee of the option created under this Agreement.

NOTE: The Optionor may wish to clarify that none of the consideration paid for the

Option is refundable, except as expressly stated in the Option. The Option as drafted makes no allowance for a refund. There is a draft clause in the Addendum that provides the Optionee with the right to proceed with the transaction or cancel and obtain a refund if the Optionor cannot deliver good title.

Alternate One

If, for any reason not provided for in this Option, the Purchaser does not exercise this Option, the consideration paid for this Option shall be retained by the Owner, and neither party shall have any further right or claim against the other party.

Section 3. Term

This Agreement shall be effective as of the date of this Agreement and shall expire at *[time]* on *[date]* ("Option Term").

NOTE: This provision establishes a date and time certain for the option to expire. Expiration of the option can of course be tethered to events and occurrences as well as a date certain, such as the death of the Optionee. If the parties select something other than a date certain as the option's expiration date, appropriate modifications may be required elsewhere in this draft Option. For example, if the Option expires upon the death of the Optionee, then Section 14 (Successors and Assigns provision) must be altered.

Section 4. Exercise

Provided Optionee is not in default under this Agreement, this option may be exercised by Optionee's delivering to Optionor before the expiration of the Option Term written notice of the exercise ("Exercise Notice"), which shall state that the option is exercised without condition or qualification. The Exercise Notice must be accompanied by:

- (a) two (2) copies of the Purchase Agreement executed by Optionee, with the first paragraph of the Purchase Agreement completed by insertion of the date on which the Exercise Notice is given, and
- (b) Optionee's check payable to Optionor in the amount of the earnest money required under the Purchase Agreement.

NOTE: The parties should provide substantial detail as to how Exercise Notice is be delivered, and to whom, to minimize the risk of dispute as to the timeliness or efficacy of the Optionee's exercise of the Option. These issues are addressed in Section 9.

Section 5. Execution of Purchase Agreement

On receipt by Optionor of the Exercise Notice, two (2) copies of the Purchase Agreement executed by Optionee, and the check in the amount of the earnest money required under the Purchase Agreement, Optionor shall promptly execute the Purchase Agreement and deliver an executed copy to Optionee. Optionor's failure to execute and deliver a copy of the Purchase Agreement in accordance with this Section shall not affect the validity of the Purchase Agreement. The Purchase Agreement shall be

immediately effective and binding on both Optionor and Optionee without further execution by the parties, on exercise of the option in accordance with Section 4 hereof.

NOTE: The parties may additionally wish to address the issue of possession and Optionee's right of inspection/entry, as follows:

Alternate One

Optionor shall deliver possession of the Property to Optionee upon receipt of the Exercise Notice.

Alternate Two

Without having the obligation to do so the Optionee, as well as its employees, agents and representatives, shall have the right, upon written or verbal notice to the Optionor, to enter the Property, from time to time while this Option is in effect, to survey, inspect, conduct soil borings and tests, or otherwise examine and/or test the property and the facilities located thereon. Testing may include cutting of trees on the site and, if so, then Optionee will pay the reasonable value of such trees, not to exceed the statutory value for wrongful cutting of same, should the Option not be exercised. Optionee assumes all liability for damages to the property and/or persons caused by activities by Optionee or its agents under this paragraph and this obligation shall survive any termination or rescinding of this agreement.

Alternate Three

The Optionee, as well as its employees, agents, or representatives, during the term of this Option shall have the right and privilege to enter upon the Property to make inspection thereof, to make surveys, verify the description of the Property attached hereto as Exhibit "A," and/or tests to determine the use to which said Property may be put, so long as the inspection, surveys, verifications, and/or tests do no damage to the Property or interfere with the ordinary transaction of business by the Optionor .

Section 6. Representations and Warranties

Optionor warrants that Optionor is the Optionor of the Property and has marketable and insurable fee simple title to the Property clear of restrictions, leases, liens, and other encumbrances, except as permitted in the Purchase Agreement. If this option is exercised by Optionee, Optionor will convey title to the Property by warranty deed. During the Option Term and until the Property is conveyed to Optionee, if this option is exercised, Optionor will not encumber the Property in any way nor grant any property or contract right relating to the Property without the prior written consent of Optionee.

NOTE: From the Optionee's perspective, it is vital to specify how the Optionor will convey title. Otherwise, the Optionor may convey title in any effective form, including a quitclaim deed. There are additional proposed clauses set out in the Addendum that address title examination, closing procedures and condition of the Property at the time the Option is exercised. These clauses address in particular the Optionee's remedies and choices if the

Optionor ultimately cannot convey good title.

Section 7. Time of Essence

Time is of the essence for this Option Agreement. If the option is not exercised in the manner provided in Section 4 hereof before the expiration of the Option Term, Optionee shall have no interest in the Property and the option may not be revived by any subsequent payment or further action by Optionee.

NOTE: This provision benefits the Optionor. The Optionee may want greater flexibility by including a provision that which permits unilateral extension of the option:

Alternate One

This option may be extended for an additional ____ months by the Optionee, by giving written notice to the Optionor prior to expiration of original Option Term of Optionee's desire to extend and payment of \$_____, by _____ (*specify method of payment, such as certified check or wire transfer*).

Section 8. Quitclaim Deed

If this Agreement is terminated, Optionee agrees, if requested by Optionor, to execute, acknowledge, and deliver a quitclaim deed to Optionor within ten (10) days after termination and to execute, acknowledge, and deliver any other documents required by any title company to remove the cloud of this option from the Property.

Section 9. Notices

All notices, demands, requests, exercises, and other communications under this Agreement by either party shall be in writing and:

(a) sent by United States Certified Mail, return receipt requested, in which case notice shall be deemed delivered three (3) business days after deposit, postage prepaid in the United States mail, or

(b) sent by a nationally recognized overnight courier, in which case notice shall be deemed delivered one (1) business day after deposit with that courier, or

(c) sent by telecopy or similar means if a copy of the notice is also sent by United States Certified Mail; in which case notice shall be deemed delivered on transmittal by telecopier or other similar means, provided that a transmission report is generated that reflects the accurate transmission of the notices, as follows:

[Provide names, addresses, and fax numbers of parties on whom notice is to be served, including names and addresses of counsel for the parties.]

These addresses may be changed by written notice to the other party, provided that no notice of a change of address shall be effective until actual receipt of that notice. Copies of notices are for informational purposes only, and a failure to give or receive copies of any notice shall not be deemed a failure to give notice.

Section 10. Transfer

Optionee may not assign or transfer this Agreement and the rights under it without Optionor's prior written consent.

Section 11. Litigation Costs

If any legal action or any other proceeding, including arbitration or action for declaratory relief, is brought for the enforcement of this Agreement or because of an alleged dispute, breach, default, or misrepresentation in connection with this Agreement, the prevailing party shall be entitled to recover reasonable attorney fees and other costs, in addition to any other relief to which the party may be entitled. "Prevailing party" shall include without limitation:

- (a) a party who dismisses an action in exchange for sums allegedly due;
- (b) the party who receives performance from the other party of an alleged breach of covenant or a desired remedy where that is substantially equal to the relief sought in an action; or
- (c) the party determined to be the prevailing party by a court of law.

Section 12. Memorandum of Option

Immediately following the execution of this Agreement by Optionor, the Memorandum of Option Agreement attached to this Agreement as Exhibit C shall be recorded by Optionor with the official records of *[name of county]*, Nebraska.

Section 13. Survival

The terms of this Agreement shall survive the close of escrow of the Property unless there is a contradiction between the Real Estate Purchase and Sale Agreement and this Agreement, in which event the Real Estate Purchase and Sale Agreement shall control.

Section 14. Successors and Assigns

This Agreement shall bind and inure to the benefit of the respective heirs, personal representatives, successors, and assignees of the parties to this Agreement.

Section 15. Waivers

No waiver of any breach of any covenant or provision in this Agreement shall be deemed a waiver of any other covenant or provision in this Agreement, and no waiver shall be valid unless in writing and executed by the waiving party.

Section 16. Construction

Section headings are solely for the convenience of the parties and are not a part of and shall not be used to interpret this Agreement. The singular form shall include the plural and vice versa. This Agreement shall not be construed as if it had been prepared by one of the parties, but rather as if both parties have prepared it. Unless otherwise indicated, all references to sections are to this Agreement.

Section 17. Further Assurances

Whenever requested by the other party, each party shall execute, acknowledge, and deliver all further conveyances, agreements, confirmations, satisfactions, releases, powers of attorney, instruments of further assurance, approvals, consents, and all further instruments and documents as may be necessary, expedient, or proper to complete any conveyances, transfers, sales, and agreements covered by this Agreement, and to do all other acts and to execute, acknowledge, and deliver all requested documents to carry out the intent and purpose of this Agreement.

Section 18. Third-Party Rights

Nothing in this Agreement, express or implied, is intended to confer on any person, other than the parties to this Agreement and their respective successors and assigns, any rights or remedies under or by reason of this Agreement.

Section 19. Integration

This Agreement contains the entire agreement between the parties, and expressly supersedes all previous or contemporaneous agreements, understandings, representations, or statements between the parties respecting the option for the Property.

Section 20. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which taken together shall constitute one and the same instrument.

Section 21. Amendment

This Agreement may not be amended or altered except by a written instrument executed by Optionor and Optionee.

Section 22. Partial Invalidity

Any provision of this Agreement that is unenforceable or invalid or the inclusion of which would adversely affect the validity, legality, or enforceability of this Agreement shall be of no effect, but all the remaining provisions of this Agreement shall remain in full force.

Section 23. Exhibits

All attached exhibits are incorporated in this Agreement by this reference.

Section 24. Authority of Parties

All persons executing this Agreement on behalf of any party to this Agreement warrant that they have the authority to execute this Agreement on behalf of that party.

Section 25. Governing Law

The validity, meaning, and effect of this Agreement shall be determined in accordance with Nebraska law.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

OPTIONOR:

[Name of optionor, including capacity if appropriate]

By: _____
Name _____
:
Its: _____

By: _____
Name _____
:
Its: _____

OPTIONEE:

[Name of optionee, including capacity if appropriate]

By: _____
Name _____
:
Its: _____

By: _____
Name _____
:
Its: _____

[Attach exhibits and schedules]

The undersigned acknowledges that the undersigned has no right, title, or interest, whether present or future, in Property. The undersigned further acknowledges and agrees that the undersigned has read this Agreement and had its effect explained satisfactorily by counsel chosen by the undersigned, and consents to this execution and performance of this Agreement by Optionor.

_____ *[Name of spouse]*

ADDENDUM

The parties may want to specify contractual processes and procedures in detail to avoid potential disputes. Set out below are a number of provisions which address issues likely to arise in the course of real estate transactions, and how to handle them.

Title Examination; Time of Closing. The Optionee shall have *[number of days]* days after the date of exercise of this Option within which to have the title to the property examined by his attorney. If such examination shows (a) the title to said Property to be free and clear of all liens, outstanding oil, gas, and mineral interests, defects, objections, and encumbrances, except (i) the usual easements for roads, railroads, power lines, gas lines, utilities, (ii) items to be cleared at or before closing, and (iii) loans agreed herein to be assumed by Optionee; and (b) the title to be good and marketable, then this transaction shall be closed within a reasonable time but no later than *[number of days]* days after exercise of this Option. If the evidence of title shall not meet the requirements above specified, the Optionee shall so notify the Optionor in writing within *[number of days]* days after the date of the exercise of this Option specifying the defects and objections to title, and the Optionor shall have a reasonable period of time, not to exceed *[number of days]* days after receipt of that notice, to cure the defects, and will, in good faith, exercise due diligence to do so. Upon curing said defects, the transaction will be closed within a reasonable time not to exceed *[number of days]* days after Optionee's attorney agrees that defects in title are cured and title is good and marketable. If the defects are not cured within the above-required time, the Optionee shall have the right to either: (a) take any and all necessary action to cure said defects at the expense of the Optionee; (b) accept title of Optionor, notwithstanding said defects, and to close this transaction in accordance with its terms and conditions; or (c) terminate this Option, and if the Optionee shall elect to terminate, the amount paid as consideration for this Option shall immediately be refunded to Optionee. If the title to the Property is, or after curing by Optionor is rendered to be, without objectionable defects and good and marketable (as above specified), and Optionee fails to close this transaction in accordance with the terms of this Option, then this Option shall terminate, the amount paid as consideration for the Option and all extensions thereof shall be forfeited to the Optionor as liquidated damages, and all obligations of this Option as to all parties shall terminate.

Ad Valorem Taxes. Upon closing, taxes for the year in which the transaction is closed shall be prorated between Optionor and Optionee as of the date of closing.

Condition of Property. Should Optionee exercise this Option, Optionor shall deliver to Optionee at closing possession of the Property in substantially the same condition as on the date of the execution of this Option. In the event all or a material portion of the buildings or structures on the Property or standing trees shall be substantially damaged, destroyed, or a portion of the Property condemned after the date hereof but prior to closing, Optionee, after notification of such, may elect to: (a) reduce the purchase price in the amount of the condemnation award or the decrease in value (as determined by a qualified appraiser, but subject to arbitration) caused by the damage or destruction of the Property; or (b) receive such insurance proceeds or condemnation award as may be paid or payable with respect to such damage, destruction or taking, if the purchase herein provided should be consummated. Closing periods specified herein may be extended by the period of time required to determine amount or values under this provision.

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