



## Basic Contract Law and Real Estate Purchase Agreements

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General contract principals apply to all real estate purchase agreements. As discussed in a previous article published on NVAR.org entitled “Contract Essentials” the basic contract elements consist of mutual assent (which is offer and acceptance), consideration, legal capacity, and legal subject matter. Offer and acceptance has been discussed previously in the “Contract Essentials” article. This article will deal with the element of consideration.

A valid contract must contain good and valuable consideration. Good and valuable consideration is defined as a bargained-for change in the legal position between a buyer and a seller. This means a buyer promises to do something he is not legally obligated to do such as pay money and a seller promises to do something he is not legally obligated to do such as convey title to real estate.

Consideration can be in many forms, including cash or a binding promise to perform. In the context of a real estate purchase agreement, consideration is often in the form of bilateral promises to perform as stated in the contract. For example, the buyer promises to pay a purchase price and the seller promises to convey marketable title.

Gifts and pre-existing duties are not usually sufficient consideration. For example, a promise to give property without the other party giving or promising something in return is not consideration and would not be enforceable. Also a promise to do something that you already had a legal obligation to do is not consideration and the contract would not be enforceable.

Examples:

1) An uncle promised to give his house to his nephew when the nephew reaches the age of 21. When the nephew turned 21 and demanded his uncle’s house, the uncle refused. The nephew sued to enforce the promise. **RESULT:** The uncle wins because the nephew did not promise or pay consideration. The promise from the uncle was a promise of a gift and not an enforceable contract.

2) An uncle promised his nephew, “If you pay me \$100,000, I will give you my house when you turn 21. When the nephew turned 21 he paid \$100,000 to his uncle and demanded his uncle’s house, the uncle refused. The nephew sued to enforce the promise. **RESULT:** The nephew wins because the nephew promised to pay and did pay good and valuable consideration of \$100,000 to make the contract enforceable.



3) The nephew becomes the legal guardian of his uncle when the uncle becomes ill. The nephew is ordered by a court of law to care for his uncle and manage his uncle's affairs. During the guardianship the uncle promises he will give his nephew his house if the nephew will take care of him until he recovers from his illness. Nephew agrees. When the uncle got well, the nephew demanded his uncle's house. The uncle refused. The nephew sued to enforce the promise. RESULT. The uncle wins because the nephew had a pre-existing duty to care for his uncle because of the court ordered guardianship and did not promise to do something he did not already have a duty to do.

Most of the residential real estate transaction our members deal with involve consideration in the form of the buyer's promise to pay and the seller's promise to convey legal title.

Take note that earnest money has not been mentioned. Earnest money is not required to satisfy the element of consideration. Of course, if the agreement (which was based on consideration of a promise for a promise) requires earnest money as a condition of the contract, failure to pay it may give the seller a basis to terminate the contract. But don't confuse this with consideration.

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