



## **ReFORMulated for 2019**

### **A Closer Look at the Latest Revisions to the GAR Contract Forms**

It's that time of year again when GAR releases the revisions to the GAR Forms. There are many changes (and hopefully improvements) to the 2019 GAR Forms. While the annual release of revised GAR Forms is typical, what is increasingly atypical is how changes are made to our GAR Forms. More and more, changes are being driven by members from all over Georgia who write in with requests for the Forms Committee to consider particular changes. It is not uncommon for thirty to fifty of these requests to be considered at any meeting of the GAR Forms Committee. Let's take a look at some of the more significant changes that were approved for 2019.

#### **1. CHANGE IN THE NUMBERING SYSTEM FOR OUR GAR FORMS**

Possibly the most controversial change to our GAR Forms - at least for those who have committed the numbers of more commonly used Forms to memory - is that the numbering system has been completely revised. The GAR Forms Committee has been so busy over these last several years that it had run out of new numbers to assign to Forms. Our Forms will now have three digit numbers with the Purchase and Sale Agreement being form F201. Hopefully, this will be a once a generation change and REALTORS® will quickly commit the new Forms numbers to memory.

#### **2. CHANGES TO THE PURCHASE AND SALE AGREEMENT (GAR FORM F201)**

A. Language was added in paragraph B(6) of the Purchase and Sale Agreement that when an individual lawyer is selected as the closing attorney, it is referencing the closing attorney's law firm and not the individual lawyer. This change was made to accurately reflect that it is the law firm that is being hired, and which owes the duties to ensure that the closing is conducted properly. Similarly, if earnest money is to be held in the closing attorney's escrow account, it is intended to mean that the earnest money is being held in the law firm's escrow account and not the closing attorney's escrow account since such accounts are normally those of the law firm.

B. A definition of "material relationship" was added to the Brokerage Relationship paragraph B(10)(a)(3) of the Purchase and Sale Agreement. This definition comes right from the Brokerage Relationships in Real Estate Transactions Act and is as follows:

*"A material relationship shall mean any actually known personal, familial, social, or business relationship between the broker or the broker's affiliated licensees and any other party to this transaction which could impair the ability of the broker or affiliated licensees to exercise fair and independent judgment relative to their client."*

As the definition makes clear, the duty to disclose a material relationship only exists where the nature of the relationship could impair the ability of the REALTOR® to exercise fair and independent judgment on behalf of a client. Therefore, for example, a REALTOR® who is the listing agent and the seller's sister does not need to disclose this relationship to the buyer because the buyer should expect that regardless of the familial relationship, the listing agent will be acting in the best interests of the seller. However, let's switch the facts and make the buyer the sister of the listing agent. This relationship would need to be disclosed to the seller since the nature of that relationship could impair the judgment of the listing agent in representing the seller.

C. The section addressing the condition of the property at the time of closing in paragraph C(3) of the Purchase and Sale Agreement was also revised. The section will now read, "At time of possession, Seller shall deliver Property clean and free of trash, debris, and personal property of Seller not identified as remaining with the Property". The underlined language was added to try to prevent sellers from "gifting" buyers with unwanted household items, such as that old scratched pool table or the stained and ripped sleeper sofa that would take at least four people to move. These unwelcomed "gifts" often leave a bad taste in buyers' mouths and a dent in their pocketbooks when they have to hire people to dispose of them. The new section makes clear that it is the responsibility of the seller to remove all of their possessions (and junk) from the property when they move.

D. The Disclaimer section in paragraph B(10)(c) of the Purchase and Sale Agreement was revised in three important ways. First, language was added to state that the Brokers have no duty to inspect the property. Second, the section was revised to state that brokers have no duty to monitor, supervise or inspect any construction or repairs to the property. Third, those areas in which brokers specifically disclaim expertise has been broadened to include tests for radon, asbestos, mold and methamphetamine, moisture tests of synthetic stucco, well water tests, a septic system inspection, a utility bill review, the zoning of the property and whether any condemnation action is pending or has been filed.

These changes were made in an effort to reduce claims against REALTORS® by plaintiff's lawyers arguing that REALTORS® have greater legal duties and expertise than they really do. The job of REALTORS® is to try to help buyers find suitable properties to purchase and help sellers sell their properties. REALTORS® do not assume responsibilities for matters requiring specialized expertise and in fact the contract recommends that when such expertise is needed, buyers and sellers should hire such experts.

E. A new definitions section was added in paragraph C(5) of the Purchase and Sale Agreement. Most of these definitions appeared in other places in the GAR Forms. The Forms Committee thought it would be helpful to locate all of the definitions in one place to make the definitions easier to find. Clarity was also given to the definition of a "banking day" and a "business day" by providing that neither definition included weekends or federal holidays.

F. Paragraph C(17) was revised to allow REALTORS® to download as an exhibit the EPA Home Buyer's and Seller's Guide to Radon Pamphlet. While the brochure is lengthy, it was felt that this brochure could help buyers and sellers better understand this topic.

G. A question that regularly gets asked is whether the brokers in the transaction have the authority to fill in the binding agreement date. There was certainly a legitimate basis for this concern since the Purchase and Sale Agreement provided that the brokers did not have the authority to bind their clients in any way. This question was addressed by adding the following language to Section C(4)(i) of the contract:

“Additionally, any Broker or real estate licensee involved in this transaction may perform the ministerial act of filling in the Binding Agreement Date. In the event of a dispute over the Binding Agreement Date, it may only be resolved by the written agreement of the Buyer and Seller.”

This should clarify that either broker may fill in the correct binding agreement date in the contract.

**3. REVISION TO THE “PROTECT YOURSELF WHEN SELLING A HOUSE” BROCHURE (GAR FORM CB10).** This brochure was revised to include a cyber fraud warning to sellers as well as buyers. Most of these scams involve false emails telling parties to wire money to someplace other than where it should go. The Forms Committee decided that receiving this warning was equally protective and thus valuable to both sellers and buyers.

**4. CHANGES TO THE EXCLUSIVE SELLER LISTING AGREEMENT (GAR FORM F101).**

A. Two major changes were made to the term of the listing agreement. The first change provides that if the property is under contract, the term of the listing agreement is automatically extended until the closing.

The second change relates the extension of the listing agreement when the property is under contract for a period of time, but the contract then does not close. The GAR Exclusive Listing Agreement long provided that the listing period was automatically extended for the period of time the property was under contract. The problem was that listing agents sometimes did not realize or forgot that the listing period was automatically extended by the length of time the property was under contract. As result, listing agents sometimes took their signs down and treated the listing as having expired when in fact it had not. Sellers who thought the listing had expired sometimes hired other listing agents. This lead to confusion and disputes over who was entitled to the commission if the property sold while it was technically subject to two listing agreements.

The GAR Forms Committee decided to address this issue by providing that the listing period is only extended by the time period the property is under contract if the listing broker notifies the seller of the extension prior to the end of the original listing period. If such notice is not given, then the listing period expires when it originally would have expired.

**5. CHANGES TO THE SELLER’S PROPERTY DISCLOSURE STATEMENT (GAR FORM F301).**

A. The GAR Forms Committee spent time trying to fix the problem of sellers removing expensive items from a property and replacing them with the same item but of much lower cost and quality. They did this by adding the following language to the Disclosure Statement:

“Items identified as remaining with the Property shall mean those specific items as they existed in the Property as of the Binding Agreement Date. No such item shall be removed from the Property unless it is broken or destroyed. In such an event, it shall be replaced with a substantially identical item, if reasonably available. If not reasonably available, it shall be replaced with a substantially similar item of equal quality and value, or better. The same or newer model of the item being replaced in the same color and size and with the same functions or better shall be considered substantially identical”.

Hopefully, this will encourage sellers to leave items existing in the property on the binding agreement date.

B. Every year additions are made to the Fixtures Checklist to try to prevent disputes over what items remain with the property. This year was no different and the items that were added to the list included the following:

- Window Blinds (and Hardware)
- Window Shutters (and Hardware)
- Window Draperies (and Hardware)
- Generator
- Solar Panel

**6. SMALL REVISION TO THE COUNTEROFFER FORM (GAR FORM F249).** The Counteroffer Form was revised to add the abbreviation "N/C" which means "No change" to replace "N/A" which meant "Not applicable." The "N/C" abbreviation is to be used in filling in the blank spaces on the first page of the Form where no change is intended. The Forms Committee felt that this was a clearer term to use to fill in blanks that were not changing.

**7. CLARIFICATION MADE IN THE COMMUNITY ASSOCIATION FEES, DISCLOSURES AND RELATED ISSUES FORM (GAR FORM F322).** While a number of small changes were made to this Form, the most significant is in the directions for filling out paragraph 4(A) of the Form. This is the section in which the seller discloses various fees to be paid by the buyer. The directions have been revised to state "If a fee is not accurately disclosed below or is left blank, the Seller shall pay the difference between what was disclosed and the actual fee owing". This added direction to the form hopefully clarifies that if a seller leaves a blank for a type of fee to be paid, the seller is responsible for the entire fee if in fact it is a fee charged by the association.

**8. SMALL CHANGE MADE REGARDING WHAT MAY BE THE BASIS OF A LOAN DENIAL LETTER IN THE CONVENTIONAL LOAN CONTINGENCY (GAR FORM F404).** Two small but significant changes were made to what may be the basis for a loan denial letter. The first was to add the word "solely" to the second paragraph so that the new section now reads:

"Notwithstanding any provision to the contrary contained herein, the Loan Denial Letter may not be based solely upon any of the following: (a) Buyer lacking sufficient funds other than the amount of the Loan(s) to close; (b) Buyer not having leased or sold other real property (unless such a contingency is expressly provided for in this Agreement); (c) Buyer not having provided the lender(s) in a timely fashion with all information required by lender, including but not limited to, loan documentation, Official Wood Infestation Reports, structural letters, well tests, septic system certifications, flood plain certifications and any other similar information required by lender (hereinafter collectively "Required Information"); or (d) Buyer making purchases that adversely affect Buyer's debt to income ratio."

The problem that the GAR Forms Committee was trying to deal with is the situation where the loan denial is based on one legitimate and one illegitimate reason. In such a case, should the buyer be entitled to a return of the buyer's earnest money? The Forms Committee decided that so long as there was at least one legitimate reason for the loan to be denied in the loan denial letter, the buyer should not lose his or her earnest money even if there was also an illegitimate reason to deny the loan cited in the letter. The Committee decided that the buyer

should lose his or her earnest money only in situations where there was no legitimate reason for the loan to be denied.

The second change made in this section was to add language stating that the loan denial letter may not be based on one additional reason. Specifically, a loan denial may not now be based on the buyer making purchases that adversely affect the buyer's "debt to income ratio". So, for example, if a buyer is denied a loan solely because the buyer had just purchased a new SUV, this would not be a legitimate basis for the loan denial, and the buyer would lose his or her earnest money. REALTORS® should remind their buyer clients of this change so that buyers who qualify for a loan, but just marginally, do not go out and make a large purchase that could leave them in default of the financing contingency.

**9. CHANGES TO THE CLOSING ATTORNEY ACTING AS HOLDER OF EARNEST MONEY EXHIBIT.** Several small changes were made to this form. The first was to clarify that the buyer must deliver the entire contract to the closing attorney within two days from the binding agreement date and that all amendments to the contract must also be delivered within two days from the date they are entered into. This clarification is intended to make clear that the closing attorney cannot perform his or her duties without having the entire contract.

The second change is to require the alternate holder of the earnest money to be a broker in the transaction. The thought was that if the closing attorney declined to serve as the holder, there needs to be an alternative holder immediately available who is familiar with the transaction. The Forms Committee felt this person should be one of the brokers already in the transaction.

The third change is to provide that if the closing attorney is holding the earnest money, the earnest money must be wired to the closing attorney. Closing attorneys requested this change because of the time involved in communicating with buyers who have written bad checks. If the earnest money is wired, the closing attorney knows that he or she has good funds. There was some discussion of requiring earnest money to be wired regardless of whether it is going to a broker or the closing attorney. While the Forms Committee decided that such a change was premature, requiring all earnest money to be wired would similarly save time for brokers.

**10. CHANGES TO THE NOTICE TO UNILATERALLY TERMINATE BROKERAGE ENGAGEMENT AGREEMENT (GAR FORM F155).** The Form was modified to add the following sentence to the "Termination by Client" section as follows: "Unilateral termination of this Agreement by Client does not eliminate the Client's obligation to Broker for commission and/or fees due to Broker as specified in the Agreement". This change was made to clarify that terminating a brokerage engagement agreement does not relieve the client of his or her obligation to pay the broker a commission.

**11. CHANGE TO AMENDMENT TO ADDRESS CONCERNS WITH PROPERTY (GAR FORM F704).** An issue had arisen with this Form where some buyers misinterpreted it to mean that if the box "shall not terminate" was selected, the due diligence period lasted through the date of closing. This was obviously not what was intended. This issue was addressed by clarifying the sentence to read ". . . all parties agree that if this Amendment is signed by Buyer and Seller and delivered to both parties, the remainder of Buyer's Due Diligence Period  shall OR  shall not terminate". Hopefully, no one will misinterpret the new language.

**12. CHANGES TO LEASE FOR RESIDENTIAL PROPERTY (GAR FORM F913).** A number of changes were made to the Lease for Residential Property.

First, the total amount of rent due over the term of the Lease was eliminated. The Forms Committee felt that with the total rent often being a large number, it created a marketing obstacle to leasing the property.

Second, the Active Military section of the Lease was revised to reference the soldier's rights under both federal and now Georgia law. Georgia law actually affords soldier's greater rights than they have under federal law, and the Forms Committee wanted to make sure our soldiers were fully protected.

Third, the term "guest" was defined "as anyone who visits the Property for no longer than fourteen (14) consecutive days or twenty-eight (28) non-consecutive days in any twelve (12) month period". This was done to try to prevent the tenant from falsely claiming that they are a guest when in fact they have actually moved into the apartment.

**13. NEW REQUIRED RENTER'S INSURANCE EXHIBIT (GAR FORM F920).** A new exhibit requiring renters to have renter's insurance was added to the GAR Forms. The exhibit gives the landlord the right to require tenants to obtain both property insurance on the tenant's possessions and liability insurance. Minimum coverage amounts of at least \$30,000 in property coverage and \$100,000 in liability insurance are recommended. The exhibit also requires the tenant to name the landlord and property manager as an additional insured on the liability insurance coverage.

This form has numerous benefits for landlords and tenants alike. In the event of a fire or other similar casualty, the tenant will have insurance to replace any damaged or destroyed personal belongings. Moreover, with the landlord and manager being additional insureds on the liability insurance, there is an additional source of insurance to potentially pay claims where damage is done as a result of the tenant's negligence.

The GAR Forms Committee is always looking to improve its forms for the benefit of Georgia REALTORS®. If you have a suggestion on how to improve the GAR Forms for 2020, please send it in.