



## **New Year, Improved Contracts**

### **Updates to the 2021 GAR Contract Forms**

The GAR Forms Committee worked throughout 2020 trying to improve our GAR Contract Forms for the benefit of REALTORS® and their clients and customers. The 2021 GAR Forms were available as of January 1, 2021. Since the mid-year changes to our GAR Forms were discussed in the Legal Ease column in the Fall 2020 issue of *Georgia REALTOR*®, this article discusses the changes approved by our Forms Committee in the latter part of the year, which were then implemented for the 2021 GAR Forms.

#### **1. THE PURCHASE AND SALE AGREEMENT (FORM F201)**

a. Brokers Now Referred to by New Names. The names of brokers in all of the GAR Forms changes for 2021 to “Seller’s Broker” from “Listing Broker” and to “Buyer’s Broker” from “Selling Broker”. This change was largely made because of consumer confusion over our old names. Specifically, some consumers mistakenly thought that the “Selling Broker” represented or worked with the seller and did not know which broker in the transaction was the “Listing Broker”. Hopefully, no one will get confused over our new, far more intuitive names, “Seller’s Broker” and “Buyer’s Broker” and who those brokers are working with or representing.

b. ACH Earnest Money Sent Allowed. ACH (or Automated Clearing House), which is essentially an electronic check, was added as a permissible way for buyers to pay earnest money. ACH is becoming increasingly common as a means of sending money and allowing earnest money to be paid in this fashion should make it easier for consumers to send earnest money to the holder. Of course, if the holder is the closing attorney, then earnest money must be wired to the closing attorney unless the closing attorney permits the earnest money to be paid through a different means.

c. Prorations Section Clarified. The prorations of ad valorem property taxes section was clarified to state that the buyer is: 1) assuming the responsibility for paying the taxes in the year of the closing; and 2) agreeing to indemnify the seller against taxes not being paid. Technically, the seller may have some responsibility if ad valorem property taxes are not paid. Therefore, this section was added to minimize that potential liability.

d. Due Diligence Section Clarified. The Due Diligence Period section was revised to more clearly state that the right to inspect the property is a continuing right under the contract that runs through the closing. While this has always been the case in our GAR Purchase and Sale Agreement, some sellers and seller’s agents misinterpreted this provision to conclude that the right to inspect ended with the end of the Due Diligence Period. Hopefully, with the clarification in the language, this issue will be resolved.

e. Disclaimer Section Revised. The Disclaimer section was revised to add “flood zone certification” and “propensity of the Property to flood” to the list of things that Brokers have no duty to inspect or give advice on to the Buyer or Seller. This change should be particularly welcome in our coastal areas where a lot of property is located in flood hazard zones.

f. Disclaimer Regarding the Use of the GAR Forms (Revised). The section regarding the GAR Forms was revised to clarify that GAR does not guarantee that its forms will always be enforced by our courts or enforced in the way the Forms Committee intended. This is really doing nothing more than stating what is obvious to any attorney - that how courts interpret contracts is subject to change and differing judicial opinions. While GAR works hard to create enforceable contracts, it cannot guarantee that its forms will forever withstand judicial scrutiny. The law is ever changing as courts confront new real estate disputes. This requires the GAR Forms Committee to constantly review judicial trends and decisions and try to improve and revise its forms in response to ever changing circumstances.

g. What Survives the Closing (Revised). Under a legal doctrine known as the doctrine of merger, the Purchase and Sale Agreement merges into the deed at closing and does not survive. Only those things survive that are specifically referenced as surviving in the contract. The section of the Purchase and Sale Agreement dealing with what survives the closing was revised for the 2021 forms package. Specifically, the obligations of the parties regarding ad valorem real property taxes was added to the list of what survives the closing. In addition, the general section stating that all representations regarding the Property survive the closing was changed to all written representations regarding the Property or neighborhood.

h. New Language Added Above Signature Line. A general acknowledgement was added above the signature lines stating that the buyer and seller acknowledge that they have each read and understood the Agreement and agree to its terms. While courts presume this when parties sign contracts, stating it in the contract reinforces the point and makes it harder for parties to later claim that they did not understand what they were signing.

## **2. NEW REQUEST FOR CONFIRMATION OF PRESENTATION OF OFFER OR COUNTEROFFER (FORM F289)**

The NAR Code of Ethics Article 1, Standard of Practice 1-7, now states [in part] that: “Upon the written request of a cooperating broker who submits an offer to the listing broker, the listing broker shall provide, as soon as practical, a written affirmation to the cooperating broker stating that the offer has been submitted to the seller / landlord, or a written notification that the seller / landlord has waived the obligation to have the offer presented.

As such, the GAR Forms Committee created a new form to request confirmation of an offer or counteroffer. The form not only allows buyer brokers to ask for confirmation that the seller’s agent has presented an offer, it also provides a place in the form for the seller’s agent to provide this confirmation.

One of the biggest sources of anxiety for buyers is not knowing whether their offers have been presented. Oftentimes, buyers think that their offers have not been presented by a seller’s agent when in fact it has been presented but the seller either does not respond to it or does not respond quickly. This new form should help address the concerns of buyers in this area.

It should be noted that this new form is for use between REALTORS® who are subject to NAR’s Code of Ethics. It is not a form that the seller is being asked to sign since there is nothing obligating the seller to do so.

## **3. NEW AGREEMENT TO REINSTATE CONTRACT CREATED (FORM 290)**

A new Agreement to Reinstate Contract form was created for 2021. This form allows the parties by mutual agreement to reinstate a contract that has been terminated. It should be emphasized that once a contract is unilaterally terminated, it cannot be unilaterally reinstated. It can only be reinstated if both parties agree to do so.

This form should particularly help buyers in situations where the buyer unilaterally terminates the contract during the Due Diligence Period where the buyer then has a change of heart after terminating and seeks to reinstate the contract. Starting over with a brand new contract in this situation may cause delays in the buyer obtaining mortgage financing. However, if the original contract can be reinstated there are usually no delays in the mortgage lending process.

Under the new form, when a contract is reinstated, the terms and time frames in the original contract remain the same unless the parties specifically agree to make changes. There is a place in the form where changes to the original contract can be made.

#### **4. NEW SELLER'S DISCLOSURE OF LATENT DEFECTS AND FIXTURES CHECKLIST CREATED (FORM 302)**

A new Seller's Disclosure of Latent Defects and Fixtures Checklist form was also created for 2021. This abbreviated disclosure form is intended as an alternative when sellers refuse to fill out the longer Seller's Property Disclosure Statement exhibit.

The use of the shorter form will hopefully only be used by sellers who are unfamiliar with the condition of the properties they are selling. The new, shorter form meets the legal obligation of sellers of residential properties to disclose latent or hidden defects in the properties they are selling that could not be discovered by the buyer thereof upon a reasonably careful inspection. However, the new form provides no other information about the property including historical information and information about past problems with the property that have been repaired.

Both disclosure forms include a fixtures checklist since the use of this checklist avoids so many disputes about what is to remain with the property. Having sellers make some disclosures about their properties is better than having sellers make no disclosures whatsoever. However, the more buyers know about the properties they are buying, the fewer the disputes there are after closing when buyers eventually learn all there is to know about the properties they purchased. Therefore, it is strongly recommended that REALTORS® continue to encourage sellers to fill out the longer Seller's Property Disclosure Statement and that buyers continue to ask sellers to make a full disclosure of the condition of the properties they are buying using the longer Seller's Property Disclosure Statement.

#### **5. LEAD-BASED PAINT EXHIBIT REVISED (FORM F316 AND FORM F918)**

The Lead-Based Paint Exhibit was revised to create one exhibit for sales transactions and one exhibit for lease transactions. As such, the new exhibits track more closely the federal forms prepared by the Environmental Protection Agency. Both forms now include boldface disclosures explaining that prior to the contract becoming a binding agreement, the lead-based paint exhibit needs to be filled out by the buyer and seller on all homes built prior to 1978 and the buyer needs to receive a lead-based paint brochure.

#### **6. CHANGES TO THE BROKERAGE ENGAGEMENT AGREEMENTS**

a. Listing Period Revised in the Exclusive Seller Brokerage Engagement Agreement. The listing period in the Exclusive Seller Brokerage Engagement Agreement was revised so that it now has both a starting date and a marketing commencement date when the property will be made available to the public. This should be a good change that reflects the

changing world of real estate where there is often a delay between the date the agreement becomes effective and the date that marketing begins.

b. Commission Adjustment to Cooperating Broker Revised in the Exclusive Seller Brokerage Engagement Agreement. As REALTORS®, we are required to disclose to our seller clients the commission we are paying to a cooperating broker. However, what commission the seller's broker is offering the buyer's broker has grown increasingly complex as seller's brokers offer any number of variable commissions. This new section of the form gives listing brokers more room to make a full disclosure to sellers of all the circumstances where the buyer's broker may receive less than a full commission.

c. New Vendor Section. A new vendor section was added to the brokerage engagements agreements stating that while the broker may provide buyers and sellers with the names of vendors, the ultimate decision on whether to hire any particular vendor rests solely with the buyer or seller, as the case may be.

d. New Attorneys' Fees Section. A new attorneys' fees section was added to the brokerage engagement agreements stating that the prevailing party in any litigation between the parties can recover its attorneys' fees. This change should make it easier for brokers to pursue commission claims since the cost of litigation can often make the pursuit of litigation economically infeasible. Additionally since a client who refuses to pay a commission may now be pursued for both the commission amount plus attorneys' fees, it will, hopefully, encourage clients who owe a commission to pay it without forcing the broker to file a lawsuit.

e. Survival. The survival section of the brokerage engagement agreements was modified to clarify that the broker's limitation of liability, the obligation of the parties to arbitrate certain disputes and other similar provisions that by their terms are meant to protect the broker all survive the termination of the agreement. This provision should help protect REALTORS®.

## **7. REVISIONS TO THE SALE OR LEASE OF BUYER'S PROPERTY CONTINGENCY (FORM F601)**

The GAR Forms Committee continued to revise this form during the second half of 2020. The first addition was to require a buyer with property to sell to keep the property listed with a real estate broker at a sales price not to exceed \$ \_\_\_\_\_ (unless the property is already under a binding purchase and sale contract).

Second, the form now provides that if an existing pending, contract on the buyer's property is terminated, the buyer shall immediately notify the seller of the same and the buyer can (but is not obligated to) terminate the purchase and sale agreement. If the buyer does not terminate the agreement, then the seller shall have the right (but not the obligation) to request that the buyer deliver an amendment removing all contingencies and the Due Diligence Period from the Agreement. If the seller does not exercise this right within three (3) days of receiving buyer's notice, then the seller's right to request the removal of contingencies and the Due Diligence Period shall be waived. If the seller requests the removal of the contingencies above and the buyer does not deliver an amendment within three (3) days, agreeing to do so, then the seller shall have the right to terminate the Purchase and Sale Agreement.

This procedure was added because many sellers will only give the buyer the right to sell other property if they know that it is already under a binding contract and want the right to either terminate the purchase and sale agreement or eliminate all contingencies and the Due Diligence Period if that existing pending contract goes away.

## **8. COMMUNITY ASSOCIATION DISCLOSURE (FORM 322)**

New language was added to the Community Association Disclosure requiring the seller to pay for the closing letter as instructed by the closing firm within two days of receiving notice from the closing firm. The provision also explains that if the seller fails to do this, it may delay the closing and / or result in additional fees being charged to the seller. This provision was added to help ensure that closing attorneys get paid or reimbursed for clearance letters that are needed at the closing.

## **CONCLUSION**

This article provides REALTORS® with an overview of the most important changes to the GAR Forms made during the second half of the year. As always, the GAR Forms Committee will continue to do its work in 2021 to ensure that our GAR Forms remain the best available in the marketplace.

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