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CHANGES TO THE 2023 GAR CONTRACT FORMS

A new year is upon us, which means it's time to learn about the changes our GAR Forms Committee made in the 2023 GAR Forms. Let's dive right in and get up to speed on the changes!

1. Purchase and Sale Agreement (GAR Form F201)

a) Disclosure of FIRPTA Affidavit Requirement Added

FIRPTA or the Foreign Investment in Real Property Tax Act is a federal tax law passed in 1980 that imposes U.S. income tax on foreign persons selling U.S. real estate. At closing, sellers are required to sign a FIRPTA affidavit certifying under oath that they are not a foreign citizen. If the seller is a foreign citizen, taxes may have to be withheld at closing from the seller's proceeds (with certain exceptions) in an amount that varies depending on the purchase price and the buyer's occupancy of the home. For 2023, the GAR Forms Committee decided to add language to the Purchase and Sale Agreement explaining that a FIRPTA Affidavit will need to be signed so that foreign sellers are not surprised by the withholding requirement.

b) Fees Paid by Seller and Buyer at Closing Clarified

For 2023, the seller agrees to pay the following in addition to any seller's contribution:

"costs of the closing attorney (1) to prepare and record title curative documents, (2) for Seller not attending the closing in person; and (3) payoff and proceeds handling and delivery."

The third item, the costs of the closing attorney handling and delivering payoffs and proceeds was added because this is a real cost that would otherwise come out of the seller's pocket.

On the buyer side, the buyer pays:

"(1) Georgia property transfer tax; (2) the cost to search title and tax records and prepare the limited warranty deed; (3) all other costs, fees and charges to close this transaction, except as otherwise provided herein; and (4) all other title fees and post-closing fees."

For 2023, the last category of buyer payments for “all other title fees and post-closing fees” was added for 2023. In other words, the seller pays for a limited number of specifically referenced items at closing and the buyer pays for everything else.

c) Added Language to Clarify the Duties of the Closing Attorney in an All-Cash Transaction Where the Attorney is Representing the Buyer.

Language was added to this section clarifying the duties of the closing attorney in a transaction where the attorney is representing the buyer. The new language is as follows:

“In transactions where the Buyer does not obtain mortgage financing, the closing attorney shall represent the Buyer in preparing the Closing documents, attempting to clear title of the Property to the satisfaction of the tile insurance company, conducting the Closing, disbursing funds according to the settlement statement signed by the parties and closing attorney, timely recording deeds and issuing an owner’s title insurance policy. Other than those services specifically listed above, nothing herein shall obligate the closing attorney to perform other legal services including, but not limited to, certifying, or warranting title of the Property, for the Buyer, except pursuant to a separate engagement agreement signed by the closing attorney and the Buyer.”

This new language clearly states that the closing attorney is performing limited closing services on behalf of the buyer and is not advising the buyer generally on all of the issues that might arise pertaining to the purchase and sale of the property unless the parties enter into a separate written agreement to that effect.

d) Inspection and Due Diligence Section Revised

i) The buyer’s obligation to hold the seller harmless from damage resulting from the inspection was modified. This section previously provided that:

“Buyer agrees to hold Seller and all Brokers harmless from all claims, injuries and damages relating to the exercise of these rights and shall promptly restore any portion of the Property damaged or disturbed from testing or other evaluations to a condition equal to or better than the condition it was in prior to such testing or evaluation.”

For 2023, the section was revised so that the buyer, rather than actually restoring the property damaged in an inspection, agrees to pay to seller the actual cost to restore the damage. This change was made so that the seller could control the repairs being made to the seller’s property. In addition, the entire section was added in a boldface font so that the buyer’s indemnification obligations are now very prominent. By doing this, it will also make it harder for buyers to argue that they did not see this section and should therefore, not be bound by it.

e) Inspection Section Revised

This section was completely rewritten to make it more organized and easier to understand. Among other things, the language that the buyer has a right to inspect the property and the

neighborhood even in a transaction where there is no due diligence period was placed in a more prominent location.

The sub-title in this section labeled “Buyer’s Duty to Inspect Neighborhood” was also changed to “Buyer’s Right to Inspect Neighborhood” since it is an inspection right rather than a duty to inspect.

f) Agency Section Tweaked

The agency section of the GAR Purchase and Sale Agreement was tweaked to add a disclosure that if the same brokerage firm is representing one party as a client and another party as a customer, all of the agents in the transaction are technically representing the party with whom the brokerage firm has a client relationship. This is because agency relationships are determined by who the broker is representing, rather than who the agent is working with.

g) Right to Extend Closing Date for Eight (8) Days Modified

The right of a party to extend the closing date for eight (8) days was revised to clarify that this includes situations where the buyer’s mortgage lender is not ready to close even in situations where the financing contingency has expired. While this has always been the intent of the form, the Committee decided that the additional language would eliminate some disputes that had arisen over the interpretation of this section.

h) Section on What Survives Closing Expanded

The section on what survives the closing was expanded for 2023 to include the buyer’s obligation to indemnify the seller for damage done to the property by the buyer or the buyer’s representatives.

2. Temporary Occupancy Agreement After Closing Revised (GAR Form 219)

A number of changes were made to this form to strengthen the rights of the buyer purchasing the property and to include in the form more provisions that are typically found in leases. First, the seller’s duty to give the buyer keys was expanded to also include door openers, access codes, security system codes, and other similar equipment and / or codes to access the Property.

Second, the seller now remains obligated to perform all routine maintenance during seller’s temporary occupancy of the Property including but not limited to cutting the grass and maintaining pool chemicals. This also includes a duty on the part of a seller to report any obvious needs for maintenance or repairs.

Third, a boldface disclaimer was added advising the buyer and seller to consult with their respective insurance agents to confirm that their real and personal property is insured during the temporary occupancy period. This is largely because if the seller no longer owns the property, the seller’s personal property in the home may no longer be insured. Moreover, if someone is injured in the property while it is being occupied by the seller, it is unclear whether the buyer’s or seller’s insurance will cover the claim. In this instance, the buyer may need to get a policy covering the buyer in its role as a landlord and the seller may need to get a renter’s policy to be

covered. Rather than giving advice in this area, REALTORS® should advise their clients that this is beyond the REALTOR®'s expertise and they should get expert advice.

Finally, the purpose of the holdover rent section was clarified to state that:

“The holdover rent is intended to partially compensate Buyer for losses, damages and expenses, including delaying Buyer’s possession, and the additional costs to move associated with the delay or ability to secure a replacement tenant or causing a sales transaction to be terminated or postponed. If Buyer incurs additional costs due to the delay or losses of a prospective tenant or sales transaction because Seller fails to vacate the Property upon the expiration of the Temporary Occupancy Agreement, Seller will be liable for such damages as Buyer can prove it was because of Seller’s wrongful failure to vacate.”

This language explains that a seller holding over can have adverse consequences to the buyer and makes the seller legally liable for the seller’s damages.

3. Conventional Loan Contingency Exhibit (GAR Form 404)

The Conventional Loan Contingency Exhibit was revised in two (2) important ways. First, the section where the interest rate on the loan is to be filled in was modified so that it is an interest rate of “not greater than” the rate filled in. In other words, if the buyer were to fill in an interest rate of 7%, the buyer would be obligated to accept a loan with an interest rate of 7% or lower. This was always implied in the form, but the Forms Committee decided to make the language specific.

Additionally, all of the blanks in the Conventional Loan Contingency Exhibit are now on the first page of the form. This should help avoid mistakes where blanks on the form were previously missed and not filled in.

4. Seller’s Property Disclosure Statement (GAR Form F301)

This form was modified for 2023 to clarify that once the property is under contract, the fixtures checklist cannot be re-written to change what items remain with the property or goes with the seller without the prior written consent of the buyer. Sellers are required to update the Seller’s Property Disclosure Statement to reflect changes in the condition of the property. So, if the property has never flooded but then floods after the parties have signed a contract, the seller would need to unilaterally update the Seller’s Property Disclosure Statement to reflect the same. However, this obligation to unilaterally update the Seller’s Property Disclosure Statement to update defects in the property does not extend to changing the fixtures and personal items that remain with the property.

5. Exclusive Seller Brokerage Engagement Agreement (GAR Form F101)

a) New Lead-Based Paint Disclosure added.

A new lead-based paint exhibit section was added to the brokerage engagement agreement for 2023. The new language gives the seller a place to disclose whether the dwelling

or any portion thereof was built prior to 1978. It also alerts the seller that federal law requires the disclosure of lead-based paint in homes constructed prior to 1978.

b) Language Added Regarding Brokers Who are Not Members of an MLS.
Language was also added to the brokerage engagement that:

“Seller’s broker shall have no obligation to pay any cooperating broker who is not a participant of the Multiple Listing Service(s) in which the Property is listed a commission unless cooperating broker has negotiated and executed with the seller’s broker a Co-op Commission Agreement.”

Offers of compensation set forth in a multiple listing service have always been limited to other members of the Multiple Listing Service. However, this new language was added since many REALTORS® are unaware of the fact. In order to be protected, non-participants of a multiple listing service should negotiate their commission with the seller’s broker prior to showing the property.

c) Seller’s Property Disclosure Statement Section of Brokerage Engagement Agreement Revised

This section of the brokerage engagement agreement explains to sellers that they have a duty to disclose latent defects. For 2023, clarifying language was added that the disclosure obligation only requires the disclosure of “known” latent defects. The clarifying language was added to both the exclusive and non-exclusive forms.

6. Exclusive Leasing / Management Agreement (GAR Form F128)

The Exclusive Leasing / Management Agreement was rewritten to solve a problem where the tenant terminates early. Prior to 2023, the manager did not receive any portion of the early termination fee. This section was revised so that the manager can now negotiate upfront to receive a percentage of any early termination fee that is collected.

7. All Cash Exhibit (GAR Form F401)

The All Cash Exhibit was renamed to “No Financing Contingency Exhibit” to avoid confusion in this area since so many buyers who used this form were still getting a mortgage. The form has always allowed a buyer to get a mortgage if that box on the form was checked. It simply did not make getting a loan a contingency under the contract.

8. FHA Loan Contingency Exhibit (GAR Form F407)

Several revisions were made to this exhibit for 2023. First, the Amendatory Clause was revised in both the FHA and VA Exhibits slightly to expressly state that if the property did not appraise and the seller reduced the sales price to the appraised price, the parties agreed to close at the lower price. This change was made to try to address the commonly asked question about the Amendatory Clause. It is, frankly, unclear whether FHA and VA will interpret the Amendatory Clause in the same way that the GAR Forms Committee has by requiring the buyer to buy the property if the seller reduces the sales price to the appraised price. While it certainly appears to be consistent with a policy intended to protect consumers against being forced to buy property that does not appraise, the answer to that question remains an open one. However, the language

should be enforceable between the buyers and sellers. If FHA or VA clarifies their policies differently than how the Amendatory Clause has been rewritten, GAR will revise its FHA and VA Exhibits accordingly.

In addition, in the section dealing with repairs required by FHA, language was added that if the parties cannot agree on who pays for repairs exceeding the agreed upon amount, then the contract will automatically terminate without penalty to the buyer. This language was added to make it clear that the buyer gets back their earnest money in this situation.

Most importantly, language also added to the Financing Contingency of the FHA Loan Contingency to provide that the buyer's rights under the Amendatory Clause shall exist after the Financing Contingency has expired. This, again, has been a commonly asked question and the source of several disputes and the GAR Forms Committee thought it was best to clarify the language.

9. Community Association Disclosure Exhibit (GAR Form F322)

The type of community association in which the buyer will be purchasing was clarified in the 2023 forms. Specifically, a new category of community association was added consisting of a "voluntary transitioning to mandatory" association. There is then a box to select whether the buyer will be a voluntary or mandatory member. While there are not a huge number of such associations, many voluntary homeowners' associations have tried to become mandatory membership associations and often go through a transition period where voluntary members eventually become mandatory members.

10. Condominium Seller's Property Disclosure Exhibit (GAR Form F304)

This exhibit was modified slightly to try to disclose to buyers the age of condominium units. Two new questions are asked as follows:

- "a) What year was the building in which the Unit is located originally built?" and
- "b) What year was the Declaration of Condominium recorded?"

With many condominium conversions, the original building may have been built long ago. That is what question (a) above is trying to address. The question regarding when the Declaration of Condominium was recorded tries to identify the approximate age of the condominium since the Declaration must be filed prior to the creation of the condominium.

11. Lease for Residential Property (GAR Form F913)

A new radon disclaimer was added to the lease for 2023. The disclaimer provides as follows:

"Radon Disclaimer: Radon is a naturally occurring radioactive gas that, when accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal and state guidelines have been found in buildings in Georgia. Additional information regarding radon and radon testing may be obtained from your county health

department. Landlord and Manager make no representation to Tenant about the level of radon gas, if any, in Premises.”

Additionally, a new section was added referencing the Georgia Landlord Tenant Handbook. That section is as follows:

“Georgia Landlord Tenant Handbook: Tenants are encouraged to obtain and review the Georgia Landlord Tenant Handbook which is available at www.dca.ga.gov.”

The GAR Forms Committee is always trying to improve its forms. Most of the changes it makes are now the result of concerns brought to the committee by REALTORS®. In this regard, questions asked by REALTORS® on the GAR Legal Helpline have helped identify areas where modifying our forms could help reduce disputes in the marketplace. Under the excellent leadership of the 2022 Forms Committee Chair, Angela Taylor, much progress was made in improving our forms. This will certainly continue under the guidance of the 2023 Chair, Tony White.

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