



FORMalized Updates

A Summary of Changes to the 2020 GAR Contract Forms Package

The GAR Forms Committee worked diligently throughout 2019 in order to bring a revised forms package forward in time for GAR's 100-year anniversary. Our forms package is a standard-bearer in the real estate industry, and dedicated committee members work hard each year to ensure that they are as up-to-date and accurate as possible. Let's take a closer look at the major changes that have been made for 2020.

I. CHANGES TO THE PURCHASE AND SALE AGREEMENT (GAR FORM F201)

A. Warranty of Title Section Clarified.

The seller warranty of title section has always included certain exceptions to which buyers agree not to object. So, for example, buyers agree not to raise as a title defect declarations of covenants and declarations of condominium. They also agree not to object to general utility, sewer and drainage easements upon which the improvements do not encroach. The GAR Forms Committee clarified this sentence to provide "upon which the improvements (other than any driveway or walkway do not encroach). The thought is that if there is general utility easement running across a property, the buyer should not be able to use this to try to get out of a contract merely because it runs under a driveway. However, if it runs underneath the house, a garage or a swimming pool, the buyer should be able to object to it because it could result in the destruction of the improvement in order for the easement area to be accessed.

B. Disclaimer Section Expanded

BRRETA protects a real estate licensee from liability when he or she answers questions incorrectly so long as the licensee did not know the answer was incorrect and the licensee discloses from whom he or she got the incorrect information. Based on this part of the law, smart REALTORS®, when answering questions, should always disclose the source of the information to any questions they are answering.

Better yet, REALTORS® should confirm in writing their answers and the source of their answers. In most cases, the source of the information to a question asked by the buyer will be the seller of the property. To help protect REALTORS® when they forget to disclose the source of their answers to questions from buyers, the GAR Forms Committee added language stating that when the licensee is answering a question for a buyer, the answer to the question came from the seller unless the REALTOR® makes a written disclosure to the contrary. This should help protect

REALTORS® from claims of misrepresentation because it identifies the seller as the source of their answers to all questions. However, it now requires REALTORS® to disclose in writing the source of any answer to a question whenever the source is not the seller. GAR Form F325 can be used for this purpose. Hopefully, this change will get REALTORS® into the habit of disclosing the source of all questions they answer since doing so gives REALTORS® protection against claims.

C. Default Section Broadened to Further Protect REALTORS®

The default language in the purchase and sale agreement was broadened to provide that a defaulting party will pay the brokers the commission they would have received had the transaction closed. The previous language limited this remedy only to parties with whom the broker did not have a written commission agreement.

If there was a commission agreement then that agreement controlled. So, for example, let's say the broker is working with both the buyer and the seller in a designated agency capacity. The listing broker has a written agreement where the broker will earn a three percent (3%) commission if the seller defaults but the buyer broker does not fill in a commission amount in the event of a buyer default. Under the old language the broker would likely be limited to the default commission of three percent (3%) since the broker is limited to the written agreements which only provide for this amount to be paid in the event of a default. Under the new language, the broker could seek a larger amount if the total commission the broker would have received was six percent (6%).

D. Agreement to Terminate Purchase and Sale Agreement Must be in Writing

We had an unusual appellate court decision earlier in the year where the court ruled that an agreement to terminate a purchase and sale contract was a separate agreement from the contract itself and did not need to be in writing. While that decision was effectively overturned legislatively, language was added to the contract stating that any agreement to terminate the purchase and sale agreement and any other subsequent agreement of the parties must be in writing.

E. Effort Made to Limit Statute of Limitations

There have recently been two appellate cases dealing with the question of whether parties to a contract can use the contract to limit the statute of limitations for legal claims. While this remains an open issue, it does appear that to do so, the language shortening the statute of limitations must clearly spell out the nature of the claims that the parties are trying to limit. Based on these two cases, the GAR Forms Committee is attempting to limit the statute of limitations to two (2) years. At present, the statute of limitations is six (6) years for breach of contract claims, and four (4) years for negligence and fraud claims. The four (4) year statute of limitations can be increased depending on when the fraud is discovered. If this provision is upheld, it will give much greater legal protection to REALTORS® by preventing lawsuits from being brought years after the events occurred.

F. Cyber Fraud Warning Rewritten

Cyber fraud continues to be an issue of great concern to buyers, sellers, REALTORS® and everyone else involved in real estate transactions. Fortunately,

REALTORS® have had some success reducing the incidence of cyber fraud by educating consumers as to the nature of the risks in this area.

In keeping with this approach, cyber fraud warnings now appear in every GAR form brokerage engagement and contract. In addition, the cyber fraud warning has been rewritten to more clearly explain how cyber fraud occurs and how to protect against it. REALTORS® are encouraged to ask buyers and sellers to read this disclaimer and answer any questions they may have about cyber fraud.

G. Limit of Liability for Cyber Fraud Added

A limit of liability of \$100 was added to the GAR Forms for 2020 for claims brought against REALTORS® involving cyber fraud. In other words, the maximum liability REALTORS® should have for an incident where they are sued as a result of buyer or seller losing money from cyber fraud is \$100. Limitations against liability have generally been enforced by our courts. However, recent court decisions have held that to be enforceable, the limitation must be spelled out conspicuously within the contract. This is why the limitation against liability is in boldface type and all capital letters within the contract.

II. REVISIONS TO THE GAR EXCLUSIVE SELLER LISTING AGREEMENT (GAR FORM F101)

A. Listing Period Automatically Extended Through Closing When Property Under Contract

The Exclusive and Non-Exclusive Seller Listing Agreements were revised so that if the property is under contract during the listing period but the listing period expires prior to the closing, then the listing period is automatically extended through the closing of the contract. The previous language in the contract provided that if the property was under contract, the listing was automatically extended until the closing. This small change was made to help ensure that the broker's commission was better protected.

B. Seller's Ability to Market Limited

The Exclusive Seller Listing Agreement was modified to limit the ability of the seller to market and show the property without the prior written consent of the broker. While most sellers are well meaning and simply want the property sold as quickly as possible, their efforts are sometimes counter-productive. This provision intends to strike a balance by encouraging sellers to communicate the availability of the property to friends and acquaintances, but to leave the actual marketing to the broker.

III. REVISIONS TO THE GAR EXCLUSIVE BUYER BROKERAGE AGREEMENT (GAR FORM F110)

A. Extension of Listing Section Revised

For many years, the GAR Buyer Brokerage Agreement provided that if the property was under contract during the term of the listing and the contract did not close, the listing term was automatically extended by the length of time the property was under contract. The problem with this provision was that many REALTORS® were unaware that their listings had been automatically extended leading to disputes

over who was entitled to the commission when the property was later sold during what was technically the listing term of both the old and new broker.

The revised language requires that the broker can only extend the listing (if the property had been under contract during the term of the listing) by sending written notice of the extension to the buyer prior to the original ending date of the listing. If the notice is not sent, the listing expires even though the property had been under contract for a portion of the original listing term. This should help prevent disputes over whether and when the listing terminates.

IV. **CHANGES TO THE CONVENTIONAL FINANCING CONTINGENCY (GAR FORM F404)**

A. Buyer Seeking Conventional Loan Cannot Switch to FHA / VA Loan

In the GAR Forms, the GAR Conventional Loan Contingency Exhibit was modified so that while the buyer seeking a specific conventional loan can seek a different conventional loan, the buyer cannot seek either a FHA or VA loan without the prior written permission of the seller. The rationale for this change is that since the seller will have certain additional costs when the buyer seeks a FHA or VA loan, the seller should have the right to reject a buyer going from a conventional loan to a FHA / VA loan.

B. Appraisal Section Revised

The appraisal section now addresses the scenario where the property appraises low, the buyer asks for a price reduction in an amendment and the seller neither accepts nor rejects the request. In this situation, if the seller does not respond to an amendment to reduce sales price within three (3) days of the date it is delivered to seller, then the buyer will have three (3) additional days to terminate the contract but not later than one (1) day prior to closing. If the buyer does not terminate within this timeframe, then the buyer waives his or her right to terminate and agrees to buy the property for the purchase price in the contract.

V. **REVISIONS TO FHA AND VA LOAN CONTINGENCIES (GAR FORMS F407 AND F410, RESPECTIVELY)**

A. FHA Loan Contingency

1. **When Repairs Exceed Agreed Upon Amount.** One of the more frustrating issues in the FHA Loan Contingency is when the seller agrees to pay for certain required repairs up to a certain amount and the repairs then exceed that amount. In that situation, the contract terminates because a contingency protecting the seller was exceeded.

In an effort to try to save some of these transactions, the GAR Forms Committee included a process for the parties to try to come to some agreement when repairs exceed the amount the seller has agreed to pay. In such an event, the seller will provide the buyer with an itemized list of the repairs required in the FHA commitment from third party contractors selected by the seller. Either party has the option to agree to pay the excess amount upon notice to the other party. If they cannot come to some

agreement within three (3) days of the seller providing a written estimate, then the contract terminates.

B. VA Loan Contingency

1. **VA Rules Section to Address Termites.** The VA Addendum was revised to clarify that the seller is obligated to obtain a termite letter at the seller's expense as part of a VA real estate loan transaction dated within 90 days of the closing. If the property is not free from infestation from termites, the seller is obligated to treat or re-treat the property, as the case may be, until it is free from termite infestation.

If the property has damage from termites, the property may not meet VA's minimum property requirements. In such an event, the seller agrees to obtain a written estimate from a contractor of the cost of the repairs and provide the same to the buyer. If the buyer and seller cannot then come to a written agreement as to who will pay for the repairs within three (3) days of the buyer receiving the estimate, then the contract automatically terminates.

VI. **COMMUNITY ASSOCIATION DISCLOSURE ("CAD", GAR FORM F322)**

A. Type and Number of Community Association Section Clarified

The CAD discloses to buyers the number and type of community associations in which the buyer will be a member. This section was revised so that sellers can also disclose if the community association, rather than the buyer will be a member of a master association since this could have financial ramifications for the buyer. In many mixed-use developments, the community association itself is often a member of one or more community associations each of which has its own budget which members pay for either directly or indirectly.

B. Seller Still Pays for Clearance Letter

The seller still pays to obtain the clearance letter from the association confirming that no assessments are owing to the association. If the clearance letter can only be paid as part of a package of documents or fees, the seller agrees to pay for all fees necessary to obtain the clearance letter.

C. Buyer Fees Lumped Into One Category Called Transfer, Initiation and Administrative Fees

Rather than trying to itemize all of the different one-time fees that will be paid by the buyer to the community association, the new CAD exhibit simply lumps them altogether in one category called "Transfer, Initiation and Administrative Fees". These fees include ". . . any initiation fee, capital contribution, new member fee, transfer fee, new account set-up fee, fees similar to the above but which are referenced by a different name, one-time fees associated with the closing of the transaction and fees to transfer keys, gate openers, fobs and other similar equipment. Advance assessments due at Closing for a period of time after Closing, shall not be Transfer, Initiation and Administrative Fees and shall be paid by Buyer."

D. Buyer Pays All Transfer, Initiation and Administrative Fees Up to Agreed Upon Amount

Since the buyer is relying on the seller to provide the buyer with the dollar amount of transfer, initiation and administrative fees he or she must pay, the form now provides a maximum dollar amount that the buyer will pay. The seller then simply has to fill in the dollar amount on the form. Any transfer, initiation and administrative fees that are above this amount must then be paid by the seller. This would include if the community association increases a fee after the seller provides in the contract a maximum amount the buyer will pay. The benefit of this approach is two-fold. First, the seller no longer has to worry about itemizing what are often multiple fees. Second, the seller no longer has to worry about identifying the right fee but putting it in the wrong category or box. The buyer has certainty from the beginning of the transaction as to the maximum amount he or she will have to pay for transfer, initiation and administrative fees. Note that if the association requires the buyer to prepay an amount for regular assessments, this amount is not included in the definition of Transfer, Initiation and Administrative Fees. As a result, the amount of any prepaid assessments is not counted towards, and is in addition to, the agreed upon maximum amount of buyer fees.

E. Special Assessments and the Revised CAD

1. **Disclosing Special Assessments That Have Been Passed or Are Under Consideration.** Sellers not disclosing pending special assessments has been a problem in the real estate industry. This often occurs when a large special assessment is pending and the seller tries to quickly move to avoid paying it. The Forms Committee has been looking for ways to insure full disclosure of special assessments that have been passed or are under consideration. The first way it decided to do this was to define the term "Under Consideration" to mean that "notice of a meeting at which the special assessment has been voted upon has been sent to the members of the Association. If a special assessment(s) has been voted upon and rejected by the members of the association, it shall not be deemed to be Under Consideration by the Association. The goal in defining the term "Under Consideration" is to try to have a commonly used definition of what it means for a special assessment to be "under consideration".
2. **Where Seller Accurately Discloses Special Assessments Approved or Under Consideration.** If the seller accurately discloses in the GAR Community Association Disclosure Exhibit that a special assessment has passed or is under consideration, then the special assessment is paid for by the party who owns the property at the time the special assessment is due. In other words, if the special assessment is due prior to closing, the special assessment is paid by the seller. If the special assessment is due after closing, the special assessment is paid by the buyer. If a portion of the special assessment is due before and after closing, the buyer and seller would each pay their respective portions of the special assessment that was due while they owned the property.
3. **Where Seller Does Not Accurately Disclose a Special Assessment That Has Been Passed or is Under Consideration.** If the seller does not accurately disclose that a special assessment has been passed or is under consideration, then the seller is liable for and shall reimburse buyer for that

portion of the special assessment that was either not disclosed or disclosed inaccurately. So, for example, let's say that a special assessment has been passed for \$3,000 that is due on a date that is three weeks after closing. If the seller does not disclose the special assessment, the seller is responsible for what was not disclosed or was disclosed inaccurately. In this example, the seller would be responsible to reimburse the buyer the full \$3,000 after closing. Had the seller timely disclosed the special assessment in the example above, the buyer would have been obligated to pay the special assessment. Therefore, the failure to disclose results in a significant penalty to the seller.

4. **Surprise Special Assessments Arising After the Binding Agreement Date.** In some cases, notice of a large special assessment is often sent and in some cases approved subsequent to the Binding Agreement Date but prior to closing. What is the fair way to decide who should pay for a special assessment or potential special assessment arising after this date? Sellers are suddenly and potentially faced with a significant loss of revenue. For buyers, they are suddenly faced with a large expenditure that may prevent them from completing the purchase.

The GAR Forms Committee decided to address this issue by creating a procedure in the Community Association Disclosure Exhibit where the parties pre-agree to a special assessment amount arising after the Binding Agreement Date that, if proposed, will give the buyer the right to terminate the contract. For example, let's say that there is a new proposed special assessment under consideration that arises right after the due diligence period but prior to closing in the amount of \$10,000 per residence. The buyer and seller have pre-agreed in the Community Association Disclosure Exhibit that the buyer can terminate the contract if there is such a surprise special assessment under consideration after the Binding Agreement Date for more than \$2,500. Since the actual special assessment under consideration is for 4 times this amount, the buyer would have the right to terminate the contract upon notice to the Seller.

In this situation, the Community Association Disclosure Exhibit provides that the buyer has 5 days to terminate the contract from the date that the buyer receives notice from the seller of the large potential special assessment. If the buyer does not terminate the contract within the five day timeframe, the buyer's rights to terminate for this reason are waived. This five day time period was intended by GAR to create a window of opportunity during which the parties can try to salvage the transaction through some negotiation.

VII. SALE OR LEASE OF BUYER'S PROPERTY CONTINGENCY EXHIBIT REVISED (GAR FORM F601)

One of the most commonly used forms is the contingency making the buyer's purchase of a property contingent on the sale of other property owned by the buyer. This section has long had a kick-out clause giving the seller special rights in the event that during this contingency period a better offer comes along. In that instance, the seller can give the buyer notice that the seller has received a better offer and give the buyer a short, pre-agreed period of time for the buyer to remove all contingencies from the contract making

the contract an all cash, no contingency contract. If the buyer does not agree to remove all contingencies, then the seller may terminate (or kick-out) the contract and enter into a contract with the second buyer.

This kick-out provision remains in the new form so that the initial buyer and seller can still pre-agree through negotiation to remove all contingencies from the contract if the kick-out provisions is exercised. However, a new option has been added where the parties can pre-agree to remove some but not all contingencies. So, for example, the buyer and seller may agree that if the seller exercises the kick-out option, the buyer must agree to remove the due diligence period, but not the buyer's financing contingency.

Whether sellers will agree to a limited kick-out is unclear. However, the changes to the form gives the parties a lot more room to negotiate.

VIII. TEMPORARY OCCUPANCY AGREEMENT FOR BUYER PRIOR TO CLOSING EXHIBIT REVISED (GAR FORM F222)

The temporary occupancy period before closing was modified to include, in addition to a date for the transfer of occupancy, a specific time. This should help ensure a smooth transition in occupancy from the seller to the buyer. In addition, a daily holdover rate was added in the event the closing does not occur and the buyer does not surrender the property back to the seller. This rate should be sufficiently high to encourage the buyer to move out quickly without being so outrageously high that a court will not enforce it. For example, a court will likely enforce a holdover rate of \$500-\$1,000 per day. A court will not likely enforce a holdover rate of \$25,000 per day.

IX. CLEAN COPY OF SECTION OF COUNTEROFFER FORM TWEAKED (GAR FORM 249)

The Counteroffer form was tweaked to make it clear that if either party asks for a "clean" copy of the Agreement to be signed, that includes signing or initialing, as the case may be, all exhibits.

X. REVISIONS TO THE SELLER'S PROPERTY DISCLOSURE STATEMENT (GAR FORM F301)

A. New Question Added about Systems and Components.

A new question was added about whether any systems or components are subject to a lease or rental plan? This would include things like a security system, appliances, solar systems and in some cases, even an HVAC system. This should help avoid unwelcome surprises where buyers mistakenly think that a system comes with the house only to discover that it is actually rented.

B. Seller Liable for Not Removing Fixture

The seller loses the right to remove a fixture if it is not removed by the closing. However, in some cases, the seller fails to take things that no one wants like heavy broken furniture or a hot tub that the buyer then has to pay someone to haul away. The Seller's Property Disclosure Statement now provides that the seller shall remain liable for the cost of the buyer having to dispose of such items provided that such items are disposed of within 30 days after closing. The goal of this provision is to get sellers to remove their junk and not attempt to "gift" it to the buyer.

C. New Items Added to the Fixtures Checklist

“Car Charging Stations” were added this year to the fixtures checklist. It should be noted that this is not referring to a battery charger but instead to the type of charging station used with electric car chargers.

In addition, the term “Pool” was modified to “Above Ground Pool” since it should be presumed that an in-ground pool will remain with the property.

XI. REVISION TO ACKNOWLEDGEMENT OF PERSON CONTRIBUTING EARNEST MONEY ON BEHALF OF BUYER (GAR FORM F525)

This form was revised to make it clear that if earnest money contributed by someone other than the buyer is to be returned, it will be paid to buyer and not to the party who paid the earnest money. This acknowledgement is underused and REALTORS® should always get it signed by a third party giving the buyers earnest money or other cash to close.

As you can see, 2019 was a particularly active year for forms changes. Hopefully, the changes will help prevent problems in real estate transactions and protect REALTORS® in this year and for years to come.

Seth G. Weissman is GAR’s general counsel, a partner at Weissman P.C., and a Professor of the Practice of City Planning in the College of Architecture at the Georgia Institute of Technology.